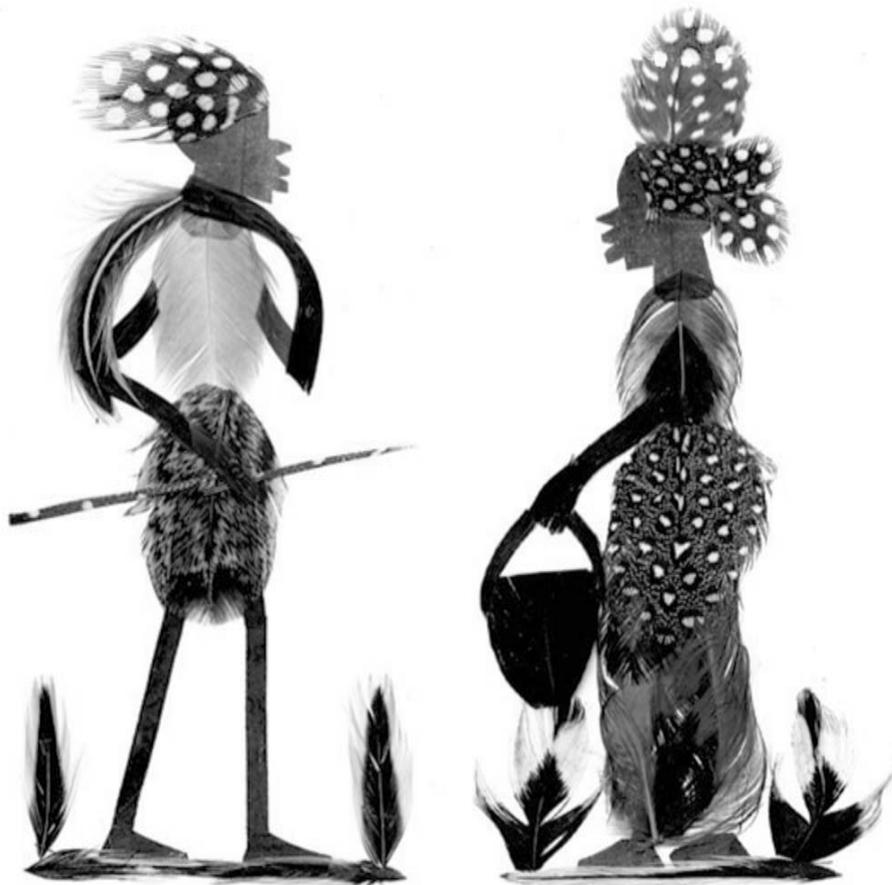


# MARITAL PROPERTY IN CIVIL AND CUSTOMARY MARRIAGES

PROPOSALS FOR LAW REFORM



Gender Research & Advocacy Project  
LEGAL ASSISTANCE CENTRE  
2005

# ACKNOWLEDGEMENTS

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The information in this research report was collected and compiled by Dianne Hubbard, Beth Terry, Sarah Field, Elizabeth Cassidy, Evelyn Zimba-Naris, Susan Taylor, Heather Sherdahl, Melinda Maasdorp, Leigh-Anne Agnew and Mercedes Ovis. The final report was drafted by Dianne Hubbard and Beth Terry (Chapter 5), and edited by Dianne Hubbard.

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The project was carried out in close consultation with the Gender Training and Research Programme of the Multi-Disciplinary Research and Consultancy Centre at the University of Namibia (UNAM). The LAC participated in the shaping of questionnaires used as the basis for the UNAM report, *Women's Property and Inheritance Rights in Namibia*, and data collected by means of those questionnaires has been drawn on by means of independent analysis for this report. These two reports are intended to complement each other and should ideally be read together. The result is, we hope, a rich and multi-faceted look at social and legal aspects of women's property ownership in different contexts.

This report overlaps to some extent with a previous LAC report, *Proposals for Law Reform on the Recognition of Customary Marriages* (1999). However, this report is informed by subsequent field research in Namibia, by more recent developments in the region, and by proposals put forward by government in the intervening period.

There is also some overlap with portions of another previous LAC report, *Proposals for Divorce Law Reform in Namibia* (2000). Once again, however, this report attempts to take the issues discussed in that report one step further by incorporating more recent developments.

A third related LAC report is *Customary Laws on Inheritance in Namibia: Issues and questions for consideration in developing new legislation* (2005).

Our goal in this study is to give greater clarity to property issues in civil and customary marriage by considering them together.

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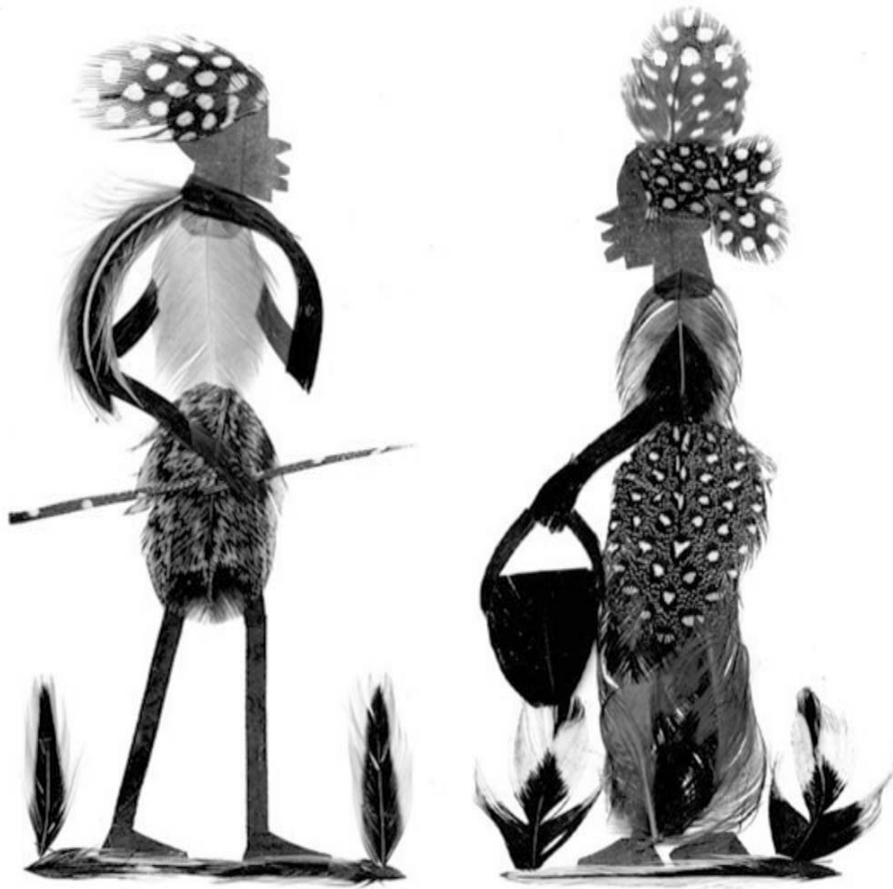
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The LAC is unable to credit the artist whose 'feather figures' grace the cover of this report. We scanned them from 'gift cards' purchased by a staff member from a street trader in Windhoek. We only know that the artist's initials are B.M. As we have not been able to find the artist, we have taken the liberty of using these images without permission. We hope that B.M. will somehow benefit from this 'publicity', and we hope to hear from him or her.

# Chapter 1

## INTRODUCTION

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*This chapter gives an overview of the report and explains the terminology used.*

### 1. OVERVIEW

**1.1** Thirteen years after independence, Namibian law on marital property is still marred by both race and sex discrimination. Furthermore, many aspects of the law on marital property are in need of reform because they are inadequate or outdated.

**1.2** This report examines specific issues relating to marital property in respect of both civil and customary marriage and discusses proposals for law reform in this area, in light of the current situation and the concerns and preferences of persons interviewed in a range of regions.

**1.2.1** The report attempts to discuss marital property separately from related family law issues, such as divorce, inheritance and general issues relating to the recognition of customary marriages. However, this is not always possible, as family law topics are unavoidably intertwined.

**1.3** The Legal Assistance Centre has conducted separate research on aspects of inheritance, published in separate reports.<sup>1</sup> However, as others have wisely observed, “inheritance rights pre-date death”.<sup>2</sup>

**1.3.1** Inheritance and marital property regimes are very closely linked, because the marital property system which applies will affect the contents of the “estate” of the deceased which is distributed amongst the heirs. If laws on marital property provide for a certain division of the couple’s assets upon dissolution of the marriage, the assets which rightfully belong to the surviving spouse will not form part of the deceased’s estate.

**1.3.2** This is in technical terms a separate question from the inheritance rights of the surviving spouse, but the two issues are not always kept separate in public discourse. The average person is understandably more focused on the practical question of what the surviving spouse “gets”, regardless of the legal mechanism involved.

**1.3.3** Because the two issues (division of marital property upon death of a spouse and inheritance by the surviving spouse) overlap, they will be discussed together in some places in this report.

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<sup>1</sup> See Legal Assistance Centre, *Customary Laws on Inheritance in Namibia: Issues and questions for consideration in developing new legislation* (June 2005) and Legal Assistance Centre, *The Meanings of Inheritance: Perspectives on Namibian inheritance practices* (September 2005).

<sup>2</sup> Centre on Housing Rights and Evictions, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women, A Survey of Law and Practice in Southern Africa*, 2004 at 32.

**1.4** Another related issue is maintenance of the surviving spouse and dependants, which is taken out of the estate of the deceased before distribution to the heirs. This topic is not a focus of this report, although it is mentioned in discussions of marital property as part of the whole picture.<sup>3</sup>

**1.5** The Legal Assistance Centre is planning to publish a report on property issues and other matters relating to cohabitation in 2006.

**1.6** The report does not attempt a socio-economic analysis of the relative positions of women and men in marriage or in Namibian society. A more general examination of women's property rights is contained in the report *Women's Property and Inheritance Rights in Namibia*, published by the Gender Training and Research Programme of the Multi-Disciplinary Research and Consultancy Centre at the University of Namibia in 2004. The two reports were prepared in close consultation, and should be read as companion pieces.

## **2. TERMINOLOGY**

**2.1** This paper uses the term "marital property" to refer to the property arrangements which apply to couples who marry, by reference to different "marital property regimes". The term "marital property" when used in this way is not intended to indicate joint ownership – it refers more broadly to the systems for sharing or keeping separate the property of married persons.

**2.1.1** This report will use the term "marital property" because it covers a broad range of issues relating to marriage and property arrangements.

**2.2** Another term which is sometimes used in this context is "matrimonial property". For example, South Africa has a piece of legislation entitled the "Matrimonial Property Act". However, South African family law expert June Sinclair asserts that "matrimonial property" is a new term in South African law, pointing out that it can be understood to refer only to the property acquired during the marriage by the joint efforts or contributions of the parties.<sup>4</sup>

**2.2.1** The Namibian Law Reform and Development Commission refers to "matrimonial property consequences of common law marriages" and "matrimonial property systems" in its recent report on the repeal of section 17(6) of the Native Administration Proclamation 15 of 1928.<sup>5</sup>

**2.3** The terms "in community of property", "out of community of property" and "accrual system" appear in quotes throughout the report. This is simply for the purpose of showing that the words in the phrase should be read together, to make it easier for the reader when the phrase appears in a sentence.

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<sup>3</sup> Proposals for maintenance of dependants of deceased persons are contained in Legal Assistance Centre, *Customary Laws on Inheritance in Namibia: Issues and questions for consideration in developing new legislation* (June 2005).

<sup>4</sup> June Sinclair, *The Law of Marriage, Vol. I* (Juta, 1996) at 373, note 36.

<sup>5</sup> Law Reform & Development Commission, *Report on Uniform Default Matrimonial Consequences of Common Law Marriages (Repeal of section 17(6) of Native Administration Proclamation, 1928 (Proclamation 15 of 1928))*, LRDC 11, Project 6, July 2003.

# Chapter 2

## THE NAMIBIAN CONSTITUTIONAL AND POLICY FRAMEWORK

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As Namibia's Supreme Law, the Namibian Constitution must be the starting point of any discussion on law reform. This chapter looks at the interpretation and application of the sections of the Namibian Constitution which pertain to marital property. It also discusses relevant portions of Namibia's National Gender Policy.

### 1. THE CONSTITUTIONAL FRAMEWORK

**1.1** The Namibian Constitution forbids race and sex discrimination in Article 10 and provides explicitly for equality in all aspects of marriage in Article 14. All other laws in Namibia – statute law, common law and customary law – are subordinate to the fundamental rights in the Constitution, including the rights contained in Articles 10 and 14.<sup>1</sup>

#### **Namibian Constitution**

##### **Article 10 Equality and Freedom from Discrimination**

- (1) *All persons shall be equal before the law.*
- (2) *No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.*

##### **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.*

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<sup>1</sup> A brief explanation of the different kinds of law may be helpful for readers without legal backgrounds.

**Statutes** are the laws that have been made by Parliament since independence, as well as laws that were made by other officials or bodies that had legislative powers over Namibia at various stages prior to independence (such as the South African Parliament and the South West African Administrator-General).

**Common law** is the law that is made by courts when they make decisions on specific cases. In these circumstances, the magistrate or judge must look back in history to see what courts have said in similar cases. The applicable legal principles can be deduced from the chain of judicial decisions that have been made in the past. Parliament can change the common law by passing a statute which overrules it.

**Customary law** means the customs that have developed over the years in different communities in Namibia. Customary law is not usually written down. One key feature of customary law is its dynamic nature; it changes over time as people change their ways of doing things. As in the case of common law, Parliament can change customary law by passing a statute that applies to all communities in Namibia. Customary law is often spoken of in contrast to civil law, which is the general law of Namibia (including both statute and common law) that applies to everyone in Namibia.

- (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.*

**1.2** Article 66 states that common law and customary law in force at the date of independence remain valid *to the extent to which they do not conflict with the Constitution*. In this way the fundamental rights and freedoms in the Constitution clearly take precedence over all subordinate laws. According to Article 25, Parliament has no power to make “any law” which conflicts with the fundamental rights and freedoms contained in Chapter 3 of the Constitution (which includes the provisions on equality and marriage). In terms of Article 140 of the Constitution, “all laws” in force at the time of independence can be declared unconstitutional by a competent court. The *Myburgh* case, discussed below, went even farther by holding that some kinds of laws which conflict with the Constitution became automatically invalid at independence.

## **Namibian Constitution**

### **Article 25 Enforcement of Fundamental Rights and Freedoms**

- (1) *Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid ...*

### **Article 66 Customary and Common Law**

- (1) *Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.*
- (2) *Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.*

### **Article 140 The Law in Force at the Date of Independence**

- (1) *Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court ...*

## 2. THE MYBURGH CASE

**2.1** The Supreme Court case of *Myburgh v Commercial Bank of Namibia* (2000) examined the operation of these constitutional provisions in more detail.<sup>2</sup> This case concerned the common law principle in force at the time of independence, in terms of which a woman married “in community of property” under civil law had limited contractual capacity and was subject to the legal authority of her husband – a rule which was found to be in conflict with both Article 10 on equality and Article 14 on equal rights with respect to marriage. This discriminatory principle was altered by a post-independence statute, the Married Persons Equality Act 1 of 1996. However, the Supreme Court held that, even before the passage of this statute, the unconstitutional common law rule “*was swept away by the Constitution at independence*”, by virtue of the provisions of Article 66.

### Excerpts from the Myburgh case

*The language of the Article [Article 66] means what it says, namely that the customary law and common law in force on the date of Independence only survive in so far as they are not in conflict with the Constitution.*

*Article 66(1), as previously pointed out, renders invalid any part of the common law to the extent to which it is in conflict with the Constitution. As also pointed out, this occurred when the Constitution took effect. The Article does not require a competent Court to declare the common law unconstitutional ...*

*Seen in this context it follows that the words “any law” in Article 25(1)(b) and “all laws” in Article 140(1) can refer only to statutory enactments and not also the common law because in the first instance such laws which were in force immediately before Independence remain in force until amended, repealed or declared unconstitutional by a competent Court. The Constitution therefore set up different schemes in regard to the validity or invalidity of the common law which is in conflict with its provisions and the statutory law. In the latter instance the statutory law immediately in force on Independence remains in force until amended, repealed or declared unconstitutional.*

**2.2** The result of this judgement is that unconstitutional common laws are *automatically invalid* as from the date of independence, whilst statute law remains valid until such time that it is *repealed or amended by Parliament or declared unconstitutional by a competent court*.

**2.3** The Namibian courts have not yet specifically addressed the effect of the *Myburgh* ruling on customary law, although the case seems to indicate that aspects of customary law which violate Article 10 or Article 14 of the Constitution became invalid

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<sup>2</sup> *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC).

upon independence – a principle which could have sweeping effects on customary law, particularly in the area of family law.

**2.4** The “automatic unconstitutionality” of common law found in the *Myburgh* case makes the impact of the situation different from that where a statute is declared unconstitutional. In the case of a statute, the finding of unconstitutionality generally does not operate retroactively.<sup>3</sup> However, since *Myburgh* holds that the portions of common law which are unconstitutional automatically became invalid at independence, without the need for a pronouncement of a court on their constitutionality, the effective date in respect of the question of retroactivity would appear to be 21 March 1990. The same would presumably apply to customary law.<sup>4</sup>

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<sup>3</sup> For example, in the case of *Tsotetsi v Mutual and Federal Insurance Co Ltd*, the South African court stated that the general principle of non-retroactivity could be ignored only in exceptional circumstances, explaining: “Such a case could only arise, first, if it is clear that the challenged provisions or conduct was a gross violation of the provisions of the Bill of Rights, and, secondly, if there were special and peculiar reasons which would suggest that an order with retroactive effect should be made in a particular case.” 1997 (1) SA 585 (CC) at paragraph 8.

See also *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at 866, paragraph 19 (per Kentridge AJ): “... What is clear is that there is no warrant in the Constitution for depriving a person of property which he lawfully held before the Constitution came into force by invoking against him a right which did not exist at the time when the right to property vested in him.”

<sup>4</sup> There has not yet been a decided case on such retroactivity in respect of customary law (as opposed to common law) in Namibia. However, in the *Bhe* case in South Africa, the Constitutional Court examined at some length the question of retrospectivity of the holding that the customary law rule of primogeniture is invalid:

[126] Section 172(1) of the Constitution empowers this Court, upon a declaration of invalidity, to make any order that is just and equitable, including an order to limit the retrospective effect of that invalidity. The statutory provisions and customary law rules that have been found to be inconsistent with the Constitution are so egregious that an order that renders the declaration fully prospective cannot be justified. On the other hand, it seems to me that unqualified retrospectivity would be unfair because it could result in all transfers of ownership that have taken place over a considerably long time being reconsidered. However, an order which exempts all completed transfers from the provisions of the Constitution would also not accord with justice or equity. It would make it impossible to re-open a transaction even where the heir who received transfer knew at the time that the provisions which purport to benefit him or her were to be challenged in a court. That was the position in the *Shibi* case [one of the cases dealt with in the court’s consolidated opinion].

[127] To limit the order of retrospectivity to cases in which transfer of ownership has not yet been completed would enable an heir to avoid the consequences of any declaration of invalidity by going ahead with transfer as speedily as possible. What will accordingly be just and equitable is to limit the retrospectivity of the order so that the declaration of invalidity does not apply to any completed transfer to an heir who is *bona fide* in the sense of not being aware that the constitutional validity of the provision in question was being challenged. It is fair and just that all transfers of ownership obtained by an heir who was on notice ought not to be exempted.

[128] The next issue to be decided is whether it is just and equitable that the order of invalidity should date back to 4 February 1997 when the Constitution became operative. The question is relevant because the deceased in *Shibi* died during 1995, while the interim Constitution was in force. The impugned provisions in this case became inconsistent with the interim Constitution in 1994 when it came into force. It would accordingly be neither just nor equitable for affected women and extra-marital children to benefit from a declaration of invalidity only if the deceased had died after 4 February 1997, but not if the deceased had died after the interim Constitution had come into force but before the final Constitution was operative. I am accordingly of the view that the declaration of invalidity must be retrospective to 27 April 1994 in order to avoid patent injustice.

**2.5** The potential retroactive effect of the *Myburgh* ruling on the past application of unconstitutional common law and customary law would be limited to a certain extent by prescription – the principle that legal challenges relating to transactions or events must be brought within a specified time period. According to the Prescription Act 68 of 1969, a civil case will prescribe three years from the date on which the cause of action arose.<sup>5</sup> It would appear in light of the *Myburgh* case that any Namibian affected by unconstitutional common law and customary law could bring a claim for causes of action that arose since the date of independence (21 March 1990), provided that the cause of action still lies within the three-year prescription period (or is covered by exceptions to the application of the prescription period).

### 3. THE RIGHT TO CULTURE IN ARTICLE 19

**3.1** The Constitution protects the right to culture in Article 19, but this right is clearly made subordinate to the other rights protected by the Constitution. The constitutional provision which protects the right to culture states that this right is “*subject to the terms of this Constitution*” and “*further subject to the condition that the rights protected by this article do not impinge upon the rights of others or the national interest*”. In this way, the other rights protected by the Constitution are given primacy.

#### **Article 19 Culture**

*Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this article do not impinge upon the rights of others or the national interest.*

**3.2** South African customary law expert Tom Bennett argues on the contrary that the approach to constitutional interpretation depends on whether the “right to culture” in Article 19 is interpreted as a right or a freedom. According to his analysis, if customary law is seen as a component of the fundamental “right to culture”, then any conflicts with the other fundamental rights will have to be resolved by a balancing of the conflicting rights.<sup>6</sup> However, this interpretation does not seem tenable when tested against the plain language of the various constitutional provisions.

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[129] To sum up, the declaration of invalidity must be made retrospective to 27 April 1994. It must however not apply to any completed transfer of ownership to an heir who had no notice of a challenge to the legal validity of the statutory provisions and the customary law rule in question.

*Bhe & Others v Magistrate, Khayelitsha & Others*, Constitutional Court, 15 October 2004 (Case CCT 49/03) at paras 126-29 (Langa DCJ, writing for a majority of the Court).

<sup>5</sup> Section 3(c). Prescription is postponed in cases where the person against whom the prescription is running is a minor, insane or a person under curatorship, or where the person in favour of whom the prescription is running is outside the country.

<sup>6</sup> TW Bennett, *Customary law and the Constitution: A Background and Discussion Paper*, LRDC 3, October 1996 at 31-32.

**3.3** The internal limitation which is placed upon the right to culture differs significantly from the limitations placed on other fundamental rights and freedoms. There are several instances in Chapter 3 of the Constitution, which contains all of the fundamental rights and freedoms, where restrictions can be placed on a fundamental right or freedom. In most of these cases, the right is first stated and then the conditions under which that right may be limited by law or by judicial authorities are explained.<sup>7</sup> Only in Article 19 is the right itself *automatically* limited by other considerations. The right to culture is by its own terms subject to the rest of the Constitution and to the condition that its exercise does not impinge on the rights of others or the national interest. No law or judicial decision is needed to impose these limitations (although it may still be necessary for the courts to *interpret* when a right to culture does in fact impinge upon the constitutional rights of others or the national interest).

**3.4** If the intent of the Constitution had been to require a balancing between the right to culture and the right to equality (or more specifically, to equality within marriage), then surely these provisions, like the provision on the right to culture, would have contained some reference to the fact that they were subject to the right to culture or to customary law in force at the date of independence. But rightly or wrongly, our Constitution appears to have made a different choice.

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<sup>7</sup> The only explicit limitation connected to Article 10 is the caveat in Article 23(2) stating that affirmative action *by law* for previously disadvantaged persons will not be considered as a violation of the prohibition on equality before the law or the principle of non-discrimination.

Article 11(5) allows for interference with the right of persons detained as illegal immigrants to consult a legal practitioner *in accordance with law* where this is necessary “in the interest of national security or for public safety”.

Article 12(1)(a) guarantees the right to public trials and hearings, but provides that *a court or tribunal* may exclude the press and public “for reasons of morals, the public order or national security”.

The requirement in Article 12(1)(c) that judgements in criminal cases shall be given in public can be overruled “where the interests of juvenile persons or morals otherwise require”.

Article 13 authorises interference with privacy *in accordance with law* if this is in the interests of “national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others”.

There is no reference to any explicit basis for limitation of Article 14 on equal rights during marriage.

Article 16 on the right to own property allows Parliament to pass *legislation* prohibiting or restricting the right of non-citizens to acquire property.

The right to participate in public affairs in Article 17(1) is subject to “qualifications *prescribed by law* as are necessary in a democratic society”, and the right to vote or to hold public office in Article 17(2) may be similarly restricted *by law* “on such grounds of infirmity or on such grounds of public interest or morality as are necessary in a democratic society” (Article 17(3)).

The list of fundamental freedoms contained in Article 21(1) are subject to “reasonable restrictions” imposed *by law* which are “necessary in a democratic society and are required in the interests of sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or morality” (Article 21(2)).

Derogations from certain of the fundamental rights and freedoms contained in Chapter 3 are allowed in a state of emergency, but not from (amongst others) Article 10 (equality and non-discrimination), Article 14 (equality in respect of marriage) or Article 19 (culture).

Things to avoid: Allowing tradition to limit opportunities for women.

**Vision 2030:** Policy Framework for Long-term National Development, Main Document, 2004 at 110.

**3.5** A sharp contrast can be found in the Constitution of Zimbabwe, which forbids discrimination without specifically mentioning sex discrimination, and furthermore explicitly states that the principle on non-discrimination *does not apply to matters relating to marriage, divorce and inheritance and the application of customary law*. The Constitutions of Kenya and Zambia contain similar limitations.<sup>8</sup>

**3.6** South Africa seems to have taken an approach similar to that in the Namibian Constitution. Article 211 of the South African Constitution, which deals with the recognition of customary law and traditional leadership, states that *“The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”* Article 39 of the South African Constitution states that *“The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill”*, and directs that courts, when *“developing the common law or customary law”*, must *“promote the spirit, purport and objects of the Bill of Rights”*. The right to culture and religion are limited, with Article 31 stating that these rights *“may not be exercised in a manner inconsistent with any provision of the Bill of Rights”*. Article 15 specifically states that freedom of religion, belief and opinion shall not prevent the state from enacting legislation recognising *“marriages concluded under any tradition, or a system of religious, personal or family law”* or *“systems of personal and family law under any tradition, or adhered to by persons professing a particular religion”* – but requires that such recognition *“must be consistent with this section and the other provisions of the Constitution”*.

**3.6.1** The South African Law Commission recently summed up the constitutional position in South Africa as follows:

*Although the state is obliged to treat all cultures equally, a group’s right to practise its culture may not be used as a reason for depriving an individual of his or her fundamental rights. Hence, both sections 30 and 31 expressly provide that the right to culture may be exercised only in a manner consistent with the Bill of Rights. It follows that any right to have customary law applied to a case is subordinate to the right to equal treatment.*<sup>9</sup>

**3.6.2** The South African courts have clearly ruled that customary law must be consistent with the South African Constitution. For example, the constitutional Court made the following statement in the 2003 *Alexkor* case:

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<sup>8</sup> Constitution of Zimbabwe, Article 23; Constitution of Kenya, Article 82; Constitution of Zambia, Article 23.

<sup>9</sup> South African Law Commission, *Discussion Paper 93 on Customary Law*, 2000 at paragraph 2.1.8.

*While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution.*<sup>10</sup>

**3.6.3** This point of view was elaborated in the 2004 *Bhe* case which found the customary law rule of primogeniture to be unconstitutional:

*The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as ubuntu. These valuable aspects of customary law more than justify its protection by the Constitution.*

*It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.*<sup>11</sup>

**3.7** Since the Namibian and South African constitutional approaches seem similar, in contradistinction to the constitutional framework in other countries in the region, this report will give particular emphasis to South African examples as a point of comparison.

## **4. THE ROLE OF NAMIBIAN TRADITIONS AND VALUES IN THE APPLICATION OF ARTICLE 10**

**4.1** The cases involving the application of Article 10 of Namibia's Constitution have produced some interesting statements on the role of Namibian traditions and values in the application of the Constitution.

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<sup>10</sup> *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) at para 51 (footnotes omitted).

<sup>11</sup> *Bhe* (n 4) at paras 45-46 (Langa DCJ, writing for a majority of the court; footnotes omitted). The Court concluded that:

*The primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. As the centrepiece of the customary law system of succession, the rule violates the equality rights of women and is an affront to their dignity. In denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom ...*

*In conclusion, the official system of customary law of succession is incompatible with the Bill of Rights. It cannot, in its present form, survive constitutional scrutiny.* (paras 95-97)

**4.2** The basic approach to be used by the court in the application of Article 10 has been determined in the *Mwellie* and *Müller* cases.<sup>12</sup> The framework for analysis is helpfully summarised by the Supreme Court in *Müller*:

(a) **ARTICLE 10(1)**

*The questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose ...*

(b) **ARTICLE 10(2)**

*The steps to be taken in regard to this sub-article are to determine –*

- (i) *whether there exists a differentiation between people or categories of people;*
- (ii) *whether such differentiation is based on one of the enumerated grounds set out in the sub-article;*
- (iii) *whether such differentiation amounts to discrimination against such people or categories of people [by which the Court later explains that it means “unfair discrimination”]; and*
- (iv) *once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of article 23 of the Constitution [on affirmative action].*<sup>13</sup>

**4.3** The Supreme Court went on to explain that the discrimination in question under Article 10(2) must be *unfair* discrimination – the “pejorative meaning of discrimination” – and gave a detailed explanation of how courts should approach this determination:

*In these cases<sup>14</sup> various factors play a role, the cumulative effect of which must be examined in the determination of whether the discrimination was unfair. In this regard, the Court must not only look at the disadvantaged group but also the nature of the power causing the discrimination as well as the interests which have been affected. The enquiry focuses primarily on the “victim” of the discrimination and the impact thereof on him or her. To determine the effect of such impact consideration should be given to the complainant’s position in society, whether he or she suffered from patterns of disadvantage in the past and whether the discrimination is based on a specified ground or not. Furthermore, consideration should be given to the provision or power and the purpose sought to be achieved by it and with due regard to all such factors, the extent to which the discrimination has affected the rights and interest of the complainant and whether it has led to an impairment of his or her fundamental human dignity. It was made further clear that these factors do not constitute a closed list but that other factors may emerge as the equality jurisprudence*

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<sup>12</sup> *Mwellie v Minister of Works, Transport and Communication & Another* 1995 (9) BCLR 1118; *Müller v President of Namibia and Another* 1999 NR 190 (SC).

<sup>13</sup> At 200A-D.

<sup>14</sup> Here the court refers to the South African cases of *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) and *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) from which it draws its approach.

continues to develop. This latter remark would most certainly also be true of the development of this jurisprudence in Namibia.<sup>15</sup>

**4.4** In the *Müller* case, the Court did not find unfair discrimination in the more onerous legal procedure required for a husband to adopt his wife's surname as compared to the automatic mechanism by which a wife can adopt her husband's surname. Key factors were the findings that the complainant, a white male, was not a member of a prior disadvantaged group;<sup>16</sup> that the legislature has a clear interest in the regulation of surnames; and that the impact of the differentiation on the interests of the applicant was considered to be minimal. Particularly relevant to the discussion at hand is the Court's reference to the fact the provision of the Aliens Act which was challenged "gave effect to a tradition of long standing in the Namibian community that the wife normally assumes the surname of the husband".<sup>17</sup> The Court found that there was uncontested evidence that the government was unaware of any other husband in Namibia who wanted to assume the surname of his wife. However, no right to "culture" was raised in this regard. The Court did not give any indication of which factors were most persuasive to the finding that the challenged provision serves the purpose of the Aliens Act "without discriminating against the appellant in the context of our Constitution".

**4.5** Other cases have also indicated that constitutional interpretation must be carried out in the context of Namibian values. For example, Berker CJ, in a concurring judgement in the case of *Ex Parte Attorney General, Namibia: In re: Corporal Punishment by Organs of State*, stated that "the one major and basic consideration in arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards, aspiration and a host of other established beliefs of the people of Namibia".<sup>18</sup>

**4.6** Writing for the majority in the subsequent *Frank* case,<sup>19</sup> O'Linn JA elaborated on this principle by stating that the significance of the wording of a constitutional provision must be "anchored in the provisions of the Namibian Constitution, the language of its provisions, the reality of its legal history, and the traditions, usages, norms, values and ideals of the Namibian people", regardless of whether these factors are "liberal" or "conservative". This must be accompanied by a "value judgement" based on "the current values of the Namibian people". In making this value judgement, the Court must have regard

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<sup>15</sup> *Müller* at 203A-B. After providing this summary of the South African approach, the Namibian Supreme Court concludes that "those guidelines laid down by the Constitutional Court of South Africa as well as any other factors which may be relevant to a particular situation are useful also in the determination of discrimination in Article 10(2) of our Constitution". At 203F-G.

<sup>16</sup> The outcome might have been different if the argument had raised the corresponding discrimination on the wife of the applicant. See E Bonthys, "Deny Thy Father and Refuse Thy Name: Namibian Equality Jurisprudence and Married Women's Surnames", 117 SALJ 464 (2000).

In contrast, see *President of the Republic of South Africa and Another v Hugo*, 1997 (4) SA 1 (CC), where it is stated that "the fact that the individuals who were discriminated against by a particular action ... were not individuals who belonged to a class who had historically been disadvantaged does not necessarily mean that the discrimination is fair ...". At 22F.

<sup>17</sup> At 204B.

<sup>18</sup> *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State* 1991 NR 178 (SC) at 197H-J.

<sup>19</sup> *Frank and Another v Chairperson of the Immigration Selection Board* 2001 NR 107 (SC).

to the “‘contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people as expressed in their national institutions and Constitution’, as well as the consensus of values or ‘emerging consensus of values’ in the ‘civilised international community’”.<sup>20</sup>

**4.6.1** This value judgement must be based on the Namibian Constitution itself, as well as on “Namibian institutions” which could include “the Namibian Parliament, courts, tribal authorities, common law, statute law and tribal law, political parties, news media, trade unions, established Namibian churches and other relevant community-based organizations” – further noting that “‘Parliament, being the chosen representatives of the people of Namibia, is one of the most important institutions to express the current day values of the people’”.<sup>21</sup>

**4.6.2** The relevant sources which the court might draw on to locate prevailing norms include “debates in Parliament and in regional statutory bodies and legislation passed by Parliament; judicial or other commissions; public opinion as established in properly conducted opinion polls; evidence placed before Courts of law and judgements of Court; referenda; publications by experts”.<sup>22</sup>

**4.7** However, the Court in the *Frank* case also expressed the need to exercise caution when considering the value of public opinion in constitutional interpretation:

... the value of public opinion will differ from case to case, from fundamental right to fundamental right and from issue to issue. In some cases public opinion should receive very little weight, in others it should receive considerable weight. It is not a question of substituting public opinion for that of the Court. It is the Courts that will always evaluate the public opinion. The Court will decide whether the purported public opinion is an informed opinion based on reason and true facts; whether it is artificially induced or instigated by agitators seeking a political power base; whether it constitutes a mere ‘amorphous ebb and flow of public opinion’ or whether it points to a permanent trend, a change in the structure and culture of society ... The Court therefore is not deprived of its role to take the final decision whether or not public opinion, as in the case of other sources, constitutes objective evidence of community values ...<sup>23</sup>

**4.7.1** As an example, in its discussion of whether Article 10 protects against discrimination on the basis of sexual orientation, the Court found that Namibian trends, contemporary opinions, norms and values do not show a tendency towards recognising or encouraging homosexual relationships.<sup>24</sup> However, the Court went on to emphasise that nothing in its judgement justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of

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<sup>20</sup> *Frank* at 135G-H, 135J-136A, 136J-137A, quoting in part *Namunjepo and Others v Commanding Officer, Windhoek Prison & Another* 1999 NR 271 (SC).

<sup>21</sup> *Frank* at 137H-J, quoting *Namunjepo and Others v Commanding Officer, Windhoek Prison & Another*, 1999 NR 271 (SC).

<sup>22</sup> *Frank* at 138C-E.

<sup>23</sup> *Frank* at 138F-H, quoting *S v Vries* 1998 NR 244 (HC), 1996 (2) SACR 638 (Nm) at 658.

<sup>24</sup> *Frank* at 150D-G.

the Namibian Constitution, but holds only that the Constitution does not require that homosexual partners be placed on the same footing as spouses.<sup>25</sup>

**4.8** It should also be noted that the *Frank* judgement asserts that some constitutional provisions are “absolute” and do not require a value judgement, citing the portion of Article 6 which prohibits the death penalty as an example.<sup>26</sup>

**4.9** Significantly, Strydom CJ in the *Myburgh* case finds that common law provisions on marital power constitute unconstitutional sex discrimination in terms of Articles 10(2) and 14(1), without finding it necessary to make any “value judgement” in this regard. The Court offered the following analysis on the question of whether the common law principle of marital power was unconstitutional:

*In the present instance there can be no doubt that a differentiation exists between men married in community of property and women married in community of property. It can in my opinion also not be denied that this differentiation is based on one of the enumerated grounds, namely sex. Only women are, on marriage in community of property, subjected to the disabilities occasioned by such marriage.*

*In determining whether the differentiation amounts to discrimination the Court, in the Müller case ... came to the conclusion that discrimination as used in article 10(2) refers to the pejorative meaning of the word. Various guidelines were laid down to determine in a particular instance whether a differentiation based on one of the enumerated grounds is discriminatory. Following those guidelines it must be concluded that women can claim to have been part of a prior disadvantaged group. This is acknowledged by the Constitution itself. (See Article 23(3).) Where such differentiation is based on stereotyping which does not take cognisance of the equal worth of women but reduces them, in the eyes of the law, to minors who cannot act independently, but need the assistance of their husbands, there can also be no doubt that such disabilities to which such women are subjected, impair the dignity of women as a class or individually, The differentiation takes no cognisance of the fact that in many marriages in community of property the intelligence, training, qualifications or natural ability or aptitude of the woman may render her a far better administrator of the common estate than the husband. The impact of these common law rules on women is that as far as the common estate is concerned they remain minors for as long as the marriage subsists. Even where the husband becomes insane the wife does not acquire contractual capacity and must either allow her husband's curator to administer the joint estate or apply to Court for authorization to administer her own property as though her husband were an absent person ... In my opinion such disability brought about by a marriage in community of property, which renders the wife subject to the marital power of the husband, is discriminatory and offends against Article 10(2) of the Constitution. That is also the case in regard to Article 14(1) which guarantees to the husband and wife equal rights during the marriage. Where a wife is during the marriage, in these respects, subject to “guardianship” of the husband, the parties do not have equal rights.<sup>27</sup>*

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<sup>25</sup> *Frank* at 156H-I.

<sup>26</sup> *Frank* at 137E.

<sup>27</sup> *Myburgh* at 266B-I.

The Court then noted:

*This is also **not an instance where meaning and content must still be given to the provisions of the Constitution**, as was the case with Article 8 where the Court had to determine the content and meaning of words such as degrading treatment or punishment. In order to determine whether the rules of the common law, which subjected women married in community of property to the marital power of the husband, are discriminatory **no value judgement is necessary**.*<sup>28</sup>

It seems that the Court found the discrimination here so bald and serious that there was no need to look further.

**4.10** It is reasonable to suppose that similarly discriminatory provisions in the existing *customary* law on marriage might be treated in similar fashion by the Namibian courts.

**4.11** Even if a court interrogating the constitutionality of customary law provisions should find it necessary to make a value judgement, it would be necessary to take great care in considering *whose* values should be taken as a guide. Since both customary law and common law have developed in patriarchal systems, neither adequately reflects the values of the female half of the Namibian population. Similarly, institutions such as the Namibian Parliament, courts, tribal authorities, political parties, news media, trade unions, churches and many other organisations are still dominated by men and male points of view. As one Parliamentarian commented in the course of the debate around the Married Persons Equality Act:

*Sometimes people adhere to outdated notions even though the real lives they live have changed. Some people also call in the aid of customary law when it suits them, well aware that such laws are flexible, unwritten and can be manipulated by those who have the power and authority ... I am afraid that culture and religion are conveniently used as instruments by those who want to subject women to all forms of inequality ...*<sup>29</sup>

## 5. THE MEANING OF ‘MARRIAGE’ IN ARTICLE 14

**5.1** Some of the cases discussed above also deal with Article 14, but without addressing the interpretation of the term “marriage” in that provision (except to find that it contemplates only relationships between people of the opposite sex).<sup>30</sup> It might be asserted that the term “marriage” as used in the Constitution includes only civil marriages and not customary marriages which still do not have full legal recognition as marriages in terms of Namibia’s statute law (although full recognition has been proposed by the Law Reform and Development Commission).<sup>31</sup>

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<sup>28</sup> Myburgh at 268D-E, citation omitted.

<sup>29</sup> As reported in Legal Assistance Centre, *Guide to the Married Persons Equality Act*, 2000.

<sup>30</sup> Frank at 144.

<sup>31</sup> Law Reform & Development Commission, *Report on Customary Law Marriages*, LRDC 12, Project 7, October 2004.

**5.2** The only other reference to marriage in the Constitution is in Article 4(3), which deals with the acquisition of citizenship by marriage. Here the term is explicitly defined to include “a marriage by customary law”. In contrast, Article 14 is silent on what is included in its use of the term marriage. However, Article 4(3) seems to indicate that the specific inclusion of customary marriage in its terms should not be considered to affect other provisions of the Constitution one way or the other, by adding the caveat that the definition of marriage for its purposes should not derogate from “any effect that it may have for any other purposes”.<sup>32</sup>

**5.3** Despite the silence of Article 14 on what forms of marriage the term “marriage” encompasses, the context of the Article makes it inconceivable that customary marriages would be excluded. Article 14(3) speaks of the “family” as the natural and fundamental group unit of society” which is “entitled to protection by society and the State”. In light of this statement, it would make no sense for the corresponding term “marriage” to be interpreted in a way which would exclude traditional family structures.

**5.4** The *Frank* case supports this interpretation in the course of the discussion leading to its finding that the terms “marriage”, “family” and “spouses” in Article 14 do not include homosexual relationships. It compares the meaning of the same terms in Article 4(3) for guidance, commenting that:

*The word ‘spouses’ is clearly used in the same sense and context as in 4(3)(a)(bb) of the Constitution [which includes customary marriage].*<sup>33</sup>

The *Frank* Court also looked to the African Charter on Human and People’s Rights as a guide, noting its reference to the family as “the custodian of morals and traditional values recognised by the community” (Article 18(2)).

**5.5** Thus, it is almost certain that our courts will interpret Article 14’s promises of equality as to marriage, during marriage and at its dissolution as encompassing equality in customary marriage as well as civil marriage.

## 6. HORIZONTAL VERSUS VERTICAL APPLICATION OF THE CONSTITUTION

**6.1** One possible way in which the applicability of Article 10 and Article 14 to customary family law might be limited is by means of the question of horizontal versus vertical applicability. “Vertical” application refers to relations between individuals and the state. Some rights, such as the right to a fair trial, only make sense at this level. “Horizontal” application refers to application to relations between private individuals.

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<sup>32</sup> The relevant provision reads as follows in its entirety (emphasis added):

(b) for the purposes of this Sub-Article (and **without derogating from any effect that it may have for any other purposes**) a marriage by customary law shall be deemed to be a marriage: provided that nothing in this Constitution shall preclude Parliament from enacting legislation which defines the requirements which need to be satisfied for a marriage by customary law to be recognised as such for the purposes of this Sub-Article.

<sup>33</sup> *Frank* at 144G.

**6.2** Article 5 of the Namibian Constitution indicates that its fundamental rights and freedoms are applicable horizontally, although the wording of this statement is somewhat circular:

*The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, **where applicable to them, by all natural and legal persons in Namibia**, and shall be enforceable by the Courts in the manner hereinafter prescribed.*<sup>34</sup>

**6.3** In contrast, such rights apply in terms of the South African Constitution to "all legislative and executive organs of state at all levels of government". The key South African case of *Du Plessis* cited the Namibian Constitution as proof that the comparable South African provision was **not** intended by the drafters to give the South African Constitution direct horizontal application.<sup>35</sup> Implicit in this is the understanding that the Namibian Constitution is indeed applicable horizontally.<sup>36</sup>

**6.4** The *Du Plessis* case in South Africa made reference to fears that horizontal applicability would mean that the courts would effectively usurp the legislature, by performing a legislative function instead of simply scrutinising the acts of the legislature. In this case, Justice Sachs said that in essence "the issue is not about our commitment to the values expressed by the Constitution but about which institutions the Constitution envisages as being primarily responsible for giving effect to those values."<sup>37</sup> Despite the clear horizontal applicability of the Namibian Constitution, these issues may also be of concern in the Namibian courts.

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<sup>34</sup> Article 5, emphasis added.

<sup>35</sup> *Du Plessis & Others v De Klerk & Others* 1996 (3) SA 850 (CC) at para 45 (Kentridge AJ). The *Du Plessis* judgement ruled that the fundamental rights provisions in the South African Constitution were in general of vertical application only.

However, South African courts in other cases have cited Section 35(3) of the South African Constitution (which states that "in the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of Chapter 3") as a rationale for providing a route for a "constitutionally adapted common law" (and presumably customary law as well). This has become known by some as the indirect horizontal application of the fundamental rights. See *Du Plessis* (opinion of Sachs, J, concurring) and Christa Rautenbach, "The Right of Women to Inherit: A Constitutional Analysis of the Applicability of the Bill of Rights", available online at [www.kas.org.za/Publications/SeminarReports/Constitution %20and%20Law%20ii/RAUTEN~1.pdf](http://www.kas.org.za/Publications/SeminarReports/Constitution%20and%20Law%20ii/RAUTEN~1.pdf).

<sup>36</sup> The South African case of *Ryland v Edros* (1997 (2) SA 690 (C) at 705) cited another Namibian case, *S v Acheson* 1991 (2) SA 805 (NmHC), as support for the proposition that fundamental rights in a Constitution have a radiating effect on common law and interpretations of public policy. The *Acheson* decision was concerned with whether the trial of an Irish Citizen charged with the murder of a SWAPO member could be adjourned without infringing his right to a fair trial. Although this right is clearly of vertical application, Mohamed AJ in dictum described the Constitution as a "mirror reflecting the national soul" and went on to say that "the spirit and the tenor of the constitution must preside and permeate the processes of judicial interpretation and judicial discretion". *S v Acheson* 1991 (2) SA 805 at 813A-B.

<sup>37</sup> *Du Plessis*, 1996 (3) SA 850 (CC) at para 127.

## 7. THE PROCESS OF CHANGE

**7.1** Both common law and customary law are complex, dynamic systems which are constantly evolving in response to a wide variety of internal needs and external influences. Both have historically been transformed by community and judicial responses to internal and external influences. This process is still underway, and will continue regardless of whether or not it is influenced by legislation. Customary law in particular is a living, changing law, and any notion of it as a static system which must be “preserved” reflects a misunderstanding of its basic nature.

**7.1.1** For example, Hinz notes that “the laws of the Ondonga have been amended periodically since time immemorial in order to meet the demands of the time”.<sup>38</sup>

Culture is not static and thus changes are both necessary and inevitable.

**Vision 2030:** Policy Framework for Long-term National Development, Main Document, 2004 at 122.

**7.2** Legislative reform of common law seems to be more acceptable to many people than similar reform of customary law, even though both systems govern many areas of private and family life and both are expressions of a certain culture.

**7.3** South African customary law expert Tom Bennett asserts that “because customary law is pervaded by the principle of patriarchy”, full-scale application of the fundamental rights in the Namibian Constitution to customary law would have the result of “abolishing the personal law of the majority of the population”. Thus, he advocates a qualified application of human rights norms to private law:

*... [E]xperience elsewhere has shown that constitutional rights have a ‘natural’ scope of operation. Application is limited by balancing social, economic and political consideration against human rights. The Constitution of the United States is a good example: although it contains no express limitation on the application of its bill of rights, these rights are far from being absolute. They may be validly infringed, provided that a potentially offending law complies with certain standards laid down by the Supreme Court.*<sup>39</sup>

**7.4** In contrast, the South African Law Reform Commission takes the view that the wording of the right to culture in South Africa (which is similar to the approach taken in the Namibian Constitution) precludes this type of balancing approach:

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<sup>38</sup> MO Hinz, 1997, “Law Reform from Within: Improving the Legal Status of Women in Northern Namibia” in *Journal of Legal Pluralism* 39 at 76.

<sup>39</sup> Prof TW Bennett, “Customary law in Constitutional and International Perspective” in Law Reform and Development Commission, *The Ascertainment of Customary Law and the Methodological Aspects of Research into Customary Law: Proceedings of a Workshop, February/March 1995* at 50.

Customary law might still escape the full rigour of the Bill of Rights if it could be argued that the right to equal treatment should be limited by the customary rules of succession .... In essence, a case of limitation requires a balancing of interests. In order to determine whether the limiting law is acceptable in an open and democratic society, one right (equal treatment) is weighted against another right (culture) and the limiting law (the customary system of succession). The particular working of the right to culture, however, suggests that it may not limit the right to equality. An individual may claim the freedom to pursue a culturally defined legal regime, but only to the extent that that regime does not interfere with someone else's right to equal treatment.

... The Constitution makes certain principles clear. First, although legislation must continue to respect the African legal heritage, a right to culture and thus customary law is subordinate to the right to equal treatment. Secondly, discrimination on any one of the prescribed grounds ... – age, sex, gender or birth – is prohibited, even if the discrimination occurs within the family and is permitted by private law. Hence, to the extent that rules of customary law conform to the principle of equal treatment, they can be supported, but wherever customary law discriminates unfairly it must be amended.<sup>40</sup>

**7.5** The *Bhe* case in South Africa stressed the fact that customary law has become distorted “in a manner that emphasises its patriarchal features and minimises its communitarian ones”. The South African Constitutional Court illustrated this point with a statement from Professor Thandabantu Nhlapo of the University of Cape Town, a well-known customary law analyst:

*Although African law and custom has always had [a] patriarchal bias, the colonial period saw it exaggerated and entrenched through a distortion of custom and practice which, in many cases, had been either relatively egalitarian or mitigated by checks and balances in favour of women and the young ... Enthroning the male head of the household as the only true person in law, sole holder of family property and civic status, rendered wives, children and unmarried sons and daughters invisible in a social and legal sense ...*

*The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the household head was a minor (including unmarried sons and even married sons who had not yet established a separate residence), had a profound and deleterious effect on the lives of African women. They were deprived of the opportunity to manipulate the rules to their advantage through the subtle interplay of social norms, and, at the same time, denied the protections of the formal legal order. Women became ‘outlaws’.*<sup>41</sup>

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<sup>40</sup> South African Law Commission, *Discussion Paper 93 on Customary Law*, 2000 at paragraphs 2.2.4-2.2.5, 2.2.9.

<sup>41</sup> RT Nhlapo, “African customary law in the interim Constitution” in Liebenberg (ed), *The Constitution of South Africa from a Gender Perspective* (Community Law Centre, University of the Western Cape in association with David Philip, Cape Town 1995) at 162, quoted in *Bhe* (n 4) at para 89.

Nhlapo concludes that protecting people from patriarchal distortions masquerading as custom is imperative.

**7.6** “Culture” is sometimes used in practice as an excuse for the retention of power by individuals or groups. As Becker and Hinz point out: “*An approach to a gender perspective on customary law must first ... look at how culture, including its customs, norms, traditions and law, is defined and by whom. It should also be asked who stands to gain from preserving a cultural tradition.*”<sup>42</sup>

**7.7** South African writer, Victoria Bronstein, points out that it is wrong to conceptualise disputes about sexual equality under customary law as a contest between “equality” and “culture”. A woman who approaches a court with a dispute about her status does not dislodge herself from her culture, but rather seeks assistance with a dispute that is taking place *within* the culture. The contest is between two interest groups within the culture who seek to retain or change existing power relations (which are in any event constantly evolving).<sup>43</sup>

**7.8** Both common law and customary law must adapt. For example, in the South African case of *S v Makwanyane*, Sachs J stated that “the ... progressive development of our legal system demands that it draw the best from all the streams of justice in our country ...”, but added the following caveat:

*We do not automatically invoke each and every aspect of traditional law ... just as we do not rely on all features of the common law. Thus we reject ... common law traditions which are inconsistent with freedom and equality .... [Similarly], there are many aspects and values of traditional African law which will also have to be discarded or developed ... to ensure compatibility with the principles of the new constitutional order.*<sup>44</sup>

**7.9** Namibia has already in several statutes altered both common law and customary law to give effect to the constitutional value of sexual equality.

**7.9.1** The *Married Persons Equality Act 1 of 1996* overrules certain aspects of both common law and customary law in favour of gender equality.<sup>45</sup>

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<sup>42</sup> Heike Becker and Manfred Hinz, *Namibia Papers No 30: Marriage and Customary Law in Namibia* (1995) at 82.

<sup>43</sup> See V Bronstein, “Reconceptualising the Customary Law Debate in South Africa” 14 *South African Journal on Human Rights* 3 (1998); Sharita Samuel, “Women married in customary law: no longer minors”, 40 *Agenda* 23 (1999) at 23-24.

<sup>44</sup> 1995 (3) SA 391 (CC), at 518F, paragraph 383.

<sup>45</sup> *The Married Persons Equality Act 1 of 1996* repeals the common law principle of “marital power” and replaces it with a new regime of mutual consultation (section 2). It also changes both common law and customary law by giving wives a domicile independent of their husbands (as well as giving children a domicile independent of their parents), and by making husband and wife equal guardians of their children. (See sections 12-14 and 16.)

**7.9.2** The *Communal Land Reform Act 5 of 2002* clearly chooses sexual equality over patriarchal custom, by providing that both widows and widowers will have the right to remain on their land after the death of their spouses. This right to occupation will continue to be held by surviving spouses of both sexes even if they subsequently remarry.<sup>46</sup>

**7.9.3** The *Maintenance Act 9 of 2003* sets principles about liability for maintenance which supersede any common law and customary law principles to the contrary, for the equal protection of all spouses and children.<sup>47</sup>

**7.10** Future legislation could easily make similar choices, whilst still respecting the right to culture in its non-discriminatory aspects.

*Since our Constitution provides a clear and unambiguous position on the status of women, Government is committed to eradicating the injustices of the past that have been perpetrated against women. In this regard, our aim is to reconcile existing customary laws and practices with the provisions of the Constitution regarding equality of women and men, and to ensure that the Constitution prevails where there is conflict with such customary laws and practices.*

**President Sam Nujoma**, 28 September 1996

## **8. NAMIBIA'S GENDER POLICY AND PLAN OF ACTION**

**8.1** Both Namibia's Gender Policy and the National Gender Plan of Action (1998-2003) repeatedly emphasise the need for change in customary law and practices relating to marriage and inheritance. There is no indication of an intention to qualify the principle of gender equality in these areas – the Gender Policy speaks of “equal rights” and “equal access” with reference to inheritance as well as in respect of land and other economic resources.

**8.2** The National Gender Policy also recognises that “culture” is used to oppress women in Namibian communities:

*The cultural differences, which are the basis for the women's image, are the strongest source of gender bias. These biases need to be rectified. Under the cover of culture all sex discrimination is based on the concept of stereotype roles and activities. Socialization is an extension of the cultural expectations and aspirations expected of the different sexes. (paragraph 1.7)*

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<sup>46</sup> Section 26, *Communal Land Reform Act 5 of 2002*.

<sup>47</sup> The *Maintenance Act 9 of 2003* overrules both customary law and common law in some respects, substituting a clear set of principles to guide maintenance issues. See sections 3-4.

**8.3** The National Gender Policy offers the following analysis of the situation:

*The economic, cultural and social status ascribed to men and women are culturally and socially constructed and prescribed on the different sexes. These status [sic] can be changed. It is only through the implementation of strategies proposed in this National Gender Policy that the status quo can change.*

*However, the conditions of men and women in Namibia can best be described under sociological, economical and cultural concepts.*

*It is important to recognize that Namibia has been and continues to be a stratified society, and that inequality between cultural groups, and regional groups, as well as urban and rural, continues to be observable. This situation has directly and indirectly affected the position of men and women in the country in a negative way. The situation becomes worse in the case of women and the girl-child.*

*The social structures, and stratification, including the culture and legal systems show clear and visible specific interests of those who dominate decision-making and political power, in this case, 'the males'.*

*Due to these social and cultural structures, positive changes in policy, laws and developmental programmes have had, if any, only limited success. So, the disadvantaged groups, in particular women and children have remained in the periphery of politics, economic development, cultural, and social changes. (paragraphs 1.7-1.13)*

**8.4** Thus, the National Gender Policy does not view traditional practices as inviolable tenets which must be preserved at all costs, but strongly urges changes to aspects of culture which have the effect of discriminating against women. Whilst noting the importance of cultural constructs as a fundamental part of the social context, the policy also emphasises the fact that current manifestations of culture have entrenched male power and privilege. The policy notes the interplay of race discrimination and sex discrimination for women and girls, and commits itself unequivocally to the removal of all such discrimination.

**8.5** The linkage between equality in family law and the elimination of poverty is clearly acknowledged. For example, the Policy states that “*the gender disparities in economic power-sharing between the different cultural groups have also contributed to the poverty of women*” (paragraph 3.1).

**8.6** In its discussion of strategies to promote equal economic rights and independence, the policy commits the government to enact legislation to ensure “*equal rights to inheritance and to ownership of land and other properties, credit, natural resources and appropriate technologies*” (paragraph 7.5.1).

**8.7** More generally, the chapter of the policy on gender and legal affairs notes that “*it is critical that all the discriminatory laws including customary law*” as well as legal practices in the areas of family, civil, labour and commercial law are “*reviewed, amended and/or removed ...*” (paragraph 12.5).

**8.8** As an accompaniment to these policy statements, the National Gender Plan of Action 1998-2003 includes commitments to “*review laws and traditional practices*

*which create barriers for women to ensure equal rights and access to economic resources”<sup>48</sup> and to ensure that law reform takes place in a number of areas, including “customary law on marriages and inheritance”.<sup>49</sup>*

**8.9** The time period covered by these documents (1998-2003) has now passed, but they have not yet been superseded by updated versions and so are still relevant to discussion of marital property.

*With independence, the new democratically-elected government committed itself to changing not only the shape and form, but also the content of our inherited institutions and relationships. This transformation is an ongoing process that has to be mindful of our complex reality and based on social consensus, which we have to sensibly and consciously build and strengthen.*

**Hon. Marlene Mungunda**, Minister of Gender Equality and Child Welfare  
Forward to “Between Yesterday and Tomorrow: Writings by Namibian Women”.

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<sup>48</sup> At 6.

<sup>49</sup> At 35-36.

# Chapter 3

## NAMIBIA'S INTERNATIONAL OBLIGATIONS

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Namibia is a party to a number of international and regional documents which buttress the constitutional right to equality and prohibit sex discrimination – including the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and People's Rights. More specifically, Namibia is also a party, without reservations, to the Convention on the Elimination of All Forms of Discrimination against Women which gives detailed guidance on issues which are relevant to a consideration of marital property. An African statement of principles on this issue can be found in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

### 1. CEDAW

**1.1 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)** was adopted in 1979 by the UN General Assembly. It is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports at least every four years on measures they have taken to comply with their treaty obligations.

**1.2** The key article of CEDAW relating to marital property is Article 16, which obligates States Parties to “*take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations*”. More specifically, men and women must have on a basis of equality the same right to enter into marriage and the “*same rights and responsibilities during marriage and at its dissolution*”. They must also have the same rights “*in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration*”.<sup>1</sup>

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<sup>1</sup> Article 16 of CEDAW in its entirety reads as follows (emphasis added):

1. States Parties shall take **all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations** and in particular shall ensure, on a basis of equality of men and women:
  - (a) The same right to enter into marriage;
  - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
  - (c) The **same rights and responsibilities during marriage and at its dissolution;**
  - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

**1.3** Article 15, which affords women “*equality with men before the law*”, states that women must have in civil matters, a legal capacity identical to that of men, including “*equal rights to conclude contracts and to administer property*” and equal treatment “*in all stages of procedure in courts and tribunals*”.

**1.4** Cultural considerations are no defence to inequality in terms of CEDAW. In terms of Article 5(a), States Parties are obligated “*to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women*”.

**1.5** The special needs of rural women are highlighted in Article 14, which obligates States Parties (amongst other things) to take “*all appropriate measures to eliminate discrimination against women in rural areas*” and states that rural women must have “*equal treatment in land and agrarian reform as well as in land resettlement schemes*”.

**1.6** From time to time the Committee on the Elimination of Discrimination Against Women issues **General Recommendations** intended to serve as guides to the interpretation of CEDAW. The General Recommendations indicate how some of the articles of CEDAW have been amplified, what practical measures should be taken to implement them, and what information state reports should include on specific articles. Several of these comments are pertinent to the discussion at hand.

**1.7** For example, the General Recommendations note that, whilst many countries report that their national constitution and laws are in compliance with CEDAW, “*custom, tradition and failure to enforce these laws in reality contravene the Convention*”.<sup>2</sup> The same recommendation continues as follows:

17. *An examination of States Parties’ reports discloses that many countries in their legal systems provide for the rights and responsibilities of married partners by relying on the application of common law principles, religious or customary law, rather than by complying with the principles contained in the Convention. These variations in law and practice relating to marriage have wide-ranging consequences for women, invariably restricting their rights to equal status and responsi-*

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- (e) *The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;*
  - (f) *The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;*
  - (g) *The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;*
  - (h) ***The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.***

2. *The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.*

<sup>2</sup> Paragraph 15, General Recommendation No 21 (13<sup>th</sup> session, 1994).

bility within marriage. Such limitations often result in the husband being accorded the status of head of household and primary decision maker and therefore contravene the provisions of the Convention.

**1.8** The monitoring committee elaborated on this point when considering Namibia's first report under the Convention, with some committee members noting that "despite new legislation, women still faced discrimination arising from deep-seated traditional customary laws which impeded full implementation of the Convention" – a problem which the committee acknowledged as being common to many African countries.<sup>3</sup> The committee identified religious beliefs, cultural practices and remaining inequities under general and customary laws as "factors that continued to allow men to dominate women in the family context" in Namibia.<sup>4</sup> Traditional and customary laws were singled out as specific sources of "persistent discrimination against women", and the committee recommended research to identify "the customary laws that contravene the letter and spirit of the Convention, followed by attempts to replace those laws".<sup>5</sup>

**1.9** CEDAW takes the position that polygamy is a form of discrimination against women:

14. States Parties' reports also disclose that polygamy is practised in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States Parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention. (General Recommendation No 21 (13<sup>th</sup> session, 1994)

In its report on Namibia, the committee expressed concern about "the prevalence of polygamous marriages and that customary marriages were not registered" and urged the government to address this issue with "an intensive programme to discourage polygamy".<sup>6</sup> What was envisaged is revealed by the remark of one committee member during Namibia's presentation, to the effect that there should be legal education to encourage Namibian women to choose civil marriage over customary marriage because customary marriage is "detrimental to them".<sup>7</sup>

**1.10** There is a specific discussion of marital property in General Recommendation 21 (1994) (reproduced in the box below), which emphasises the right of women to an equal share in, and equal control over, property in a marriage.

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<sup>3</sup> UN press release WOM/97, 8 July 1997.

<sup>4</sup> CEDAW/C/1997/II/L.1/Add.2, 14 July 1997, paragraph 7.

<sup>5</sup> CEDAW/C/1997/II/L.1/Add.2, 14 July 1997, paragraphs 15 and 50.

<sup>6</sup> CEDAW/C/1997/II/L.1/Add.2, 14 July 1997, paragraphs 43 and 56.

<sup>7</sup> UN press release WOM/97, 8 July 1997.

## Marital property

30. *There are countries that do not acknowledge that right of women to own an equal share of the property with the husband during a marriage or de facto relationship and when that marriage or relationship ends. Many countries recognize that right, but the practical ability of women to exercise it may be limited by legal precedent or custom.*
31. *Even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce may be managed by a man. In many States, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold or otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it.*
32. *In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight.*
33. *In many countries, property accumulated during a de facto relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner. Property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged.*

**1.11** On this point, whilst the monitoring committee praised Namibia's enactment of the Married Persons Equality Act, it also stated that this law "*did not sufficiently address discrimination in the family*" and needed amendment.<sup>8</sup> Committee members expressed particular concern that the law had little impact on customary marriage or polygamy.<sup>9</sup>

**1.12** The General Recommendations suggest the registration of all marriages, including those contracted according to custom or religion, as a way to ensure compliance with the Convention in the form of equality between partners and the prohibition of polygamy.<sup>10</sup> In line with this recommendation, the monitoring committee suggested

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<sup>8</sup> CEDAW/C/1997/II/L.1/Add.2, 14 July 1997, paragraphs 37 and 59.

<sup>9</sup> UN press release WOM/97, 8 July 1997.

<sup>10</sup> Paragraph 39, General Recommendation No 21 (13<sup>th</sup> session, 1994).

that Namibia should ensure, as soon as feasible, “the registration of all customary marriages”.<sup>11</sup>

**1.13** On the issue of land ownership (which is one key aspect of marital property), the committee recommended “legal change with regard to land ownership by women, especially in rural areas”.<sup>12</sup> This has already taken place in the form of the *Communal Land Reform Act* (discussed below in Chapter 4), although this Act will not be sufficient on its own to redress women’s inequality.

**1.14** CEDAW itself does not mention inheritance specifically, but General Recommendation 21 requests States Parties to include information on inheritance, including inheritance under customary laws, in their report. The committee notes that a resolution of the Economic and Social Council has already recommended that “States ensure that men and women in the same degree of relationship to a deceased are entitled to equal shares in the estate and to equal rank in the order of succession” – whilst also noting that this recommendation “has not been generally implemented”.<sup>13</sup> The CEDAW committee goes on to make the following recommendation:

35. **There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women.** As a result of this uneven treatment, women may receive a smaller share of the husband’s or father’s property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased’s property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. **Such provisions contravene the Convention and should be abolished.**<sup>14</sup>

**1.15** Thus, CEDAW does not shy away from the fact that there are many attributes of family law, particularly in terms of customary law, which discriminate against women in violation of CEDAW and should be abolished.

**1.16** The provisions of CEDAW on women’s property rights have been reinforced by a recent **Resolution of the United Nations High Commission on Human Rights on “Women’s equal ownership, access to and control over land and the equal rights to own property and to adequate housing”**.<sup>15</sup> This Resolution –

*Affirms that discrimination in law against women with respect to having access to, acquiring and securing land, property and housing, as well as financing for land, property and housing, constitutes a violation of women’s human right to protection against discrimination (para 3).*

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<sup>11</sup> CEDAW/C/1997/II/L.1/Add.2, 14 July 1997, paragraph 57.

<sup>12</sup> CEDAW/C/1997/II/L.1/Add.2, 14 July 1997, paragraph 55.

<sup>13</sup> Paragraph 34, General Recommendation No 21 (13<sup>th</sup> session, 1994), referring to Economic and Social Council Resolution 884 (XXXIV).

<sup>14</sup> General Recommendation No 21 (13<sup>th</sup> session, 1994).

<sup>15</sup> Commission on Human Rights Resolution 2003/22 (22 April 2003).

It also –

*Encourages Governments to support the transformation of customs and traditions that discriminate against women and deny women security of tenure and equal ownership of, access to and control over land and equal rights to own property and to adequate housing, to ensure the right of women to equal treatment in land and agrarian reform as well as in land resettlement schemes and in ownership of property and in adequate housing, and to take other measures to increase access to land and housing for women living in poverty, particularly female heads of household (para 5).*

## 2. AFRICAN PROTOCOL ON THE RIGHTS OF WOMEN

**2.1** Some argue that CEDAW and other international conventions are dominated by Western values. However, moving closer to home, there is a growing consensus in Africa – at least in high levels of official debate – about the need to change laws and customs which discriminate against women.

**2.2** The African Union adopted the final text of a **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa** on 11 July 2003. This Protocol is intended to supplement the African Charter on Human and People's Rights by elaborating on the rights of women. The Protocol will become binding on individual states 30 days after the 15<sup>th</sup> ratification. As of June 2005, only 11 out of 53 countries in the African Union had ratified the Protocol, although it had been signed by 37 countries as of that date.<sup>16</sup> Namibia ratified the Protocol on 26 August 2004, with the exclusion of the provisions of Article 6(d) until such time as Namibia has enacted legislation regarding the recording and registration of customary marriages.

**2.3** States Parties to the Protocol are generally required to “*combat all forms of discrimination against women*” and to “*prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards*”.<sup>17</sup>

**2.4** There is a lengthy and detailed discussion of marriage in Article 6 of the Protocol (reproduced in full in the box below) which emphasises the fact that men and women should be afforded the position of “*equal partners in marriage*”.<sup>18</sup>

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<sup>16</sup> Information from the official website of the African Union, <http://www.africa-union.org/>, last visited on 21 July 2005.

<sup>17</sup> Articles 4 and 5. “Harmful practices” are defined as “**all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls**, such as their right to life, health, dignity, education and physical integrity.” Article 1(g), emphasis added.

<sup>18</sup> Article 6.

## Article 6 - Marriage

**States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.** They shall enact appropriate national legislative measures to guarantee that:

- a) no marriage shall take place without the free and full consent of both parties;
- b) the minimum age of marriage for women shall be 18 years;
- c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;**
- d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;
- e) the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;**
- f) a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;
- g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;
- h) a woman and a man shall have equal rights with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;
- i) a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;
- j) during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.**

**2.5** This article specifically states that husband and wife must choose their matrimonial regime by mutual agreement, and that a married woman “shall have the right to acquire her own property and to administer and manage it freely”.<sup>19</sup>

**2.6** Article 7 states that men and women are to have the same rights to seek divorce, and both the divorced spouses have the right to “an equitable sharing of the joint property deriving from the marriage”.<sup>20</sup> But it must be noted that “equitably” is not the

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<sup>19</sup> Article 6(j).

<sup>20</sup> Article 7.

same as “equally” – “equitably” refers rather to what is fair in light of all the circumstances.

**2.7** The Protocol also contains a specific section on widow’s rights. States Parties are expected to take legal measures to prohibit “*inhuman, humiliating or degrading treatment*” of widows. More specifically, a widow shall automatically become the guardian and custodian of her children after the death of her husband (unless this is for some reason contrary to the welfare and interests of the children), and a widow has the right to remarry the person of her choice.<sup>21</sup> The accompanying section on rights to inheritance says that a widow shall have the right to continue to live in the matrimonial home, although this right continues upon remarriage only if the house belongs to her or she has inherited it.<sup>22</sup>

**2.8** On inheritance generally, the Protocol states that “*women and men shall have the right to inherit, in equitable shares, their parents’ properties*”.<sup>23</sup>

**2.9** One overarching issue which is relevant to discussion of gender and customary law is the promise that “*women shall have the right to live in a positive cultural context and to participate in all levels in the determination of cultural policies*”.<sup>24</sup>

**2.10** As noted above, this Protocol is not yet legally binding, although it will probably become binding in the near future. It is already an indication of a degree of general acceptance in Africa that there is a need for transformation of family law and practice to protect the property rights of women.

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<sup>21</sup> Article 20.

<sup>22</sup> Article 21(1). An earlier draft of the Protocol gave widows a right to “an equitable share in the inheritance of the property of the husband”, but this provision does not appear in the final version of the Protocol.

<sup>23</sup> Article 21(2). It should be noted that all the references to women in the document are defined to include girls.

<sup>24</sup> Article 17.

# Chapter 4

## THE CURRENT LEGAL POSITION

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*This chapter will give a brief overview of the law currently in force on marital property. Subsequent chapters will provide a more detailed discussion of some of the areas of the current law which are in need of reform.*

### 1. TWO KINDS OF MARRIAGE

**1.1** There are two kinds of marriage in Namibia: civil marriage and customary marriage. Only about 30% of Namibia's population aged 15 and over is formally married under either system.<sup>1</sup>

**1.2 Civil marriage** takes place when a man and a woman are married by a marriage officer, which could be a magistrate or a church official. Civil marriages are registered, and a couple who marry in this way will receive a marriage certificate.<sup>2</sup>

**1.3 Customary marriage** takes place when a man and a woman are married according to the traditions of their community, but without a marriage officer. Customary marriages are not registered.

*The following statistics come from the 2001 census, with reference to the entire population of Namibia aged 15 and above:*

- 56.2% were never married
- 19.2% were married in civil marriages
- 9.4% were married in customary marriages
- 28.6% were therefore married in either civil or customary marriage
- 7.4% were living with a partner without being formally married
- 2.8% were divorced or separated
- 4% were widowed.

*2001 Population and Housing Census,  
National Report: Basic Analysis with Highlights at 4.*

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<sup>1</sup> Central Statistics Office, 1991 *Population and Housing Census: Basic Analysis with Highlights at 10*; Central Bureau of Statistics, 2001 *Population and Housing Census, National Report: Basic Analysis with Highlights at 4*.

<sup>2</sup> Gay and lesbian couples are not allowed to contract civil marriages in terms of Namibian law.

The Namibia Demographic and Health Survey 2000 reaches similar conclusions on marriage from a national sample, but records a higher level of informal cohabitation. The data for the 6755 women aged 15 to 49 and the 2954 men aged 15-59 interviewed in that survey were as follows:

- 55.9% were never married
- 22.7% were married
- 15% were living with a partner without being formally married
- 1% were divorced
- 4% were separated
- 1.3% were widowed.

The differences between this study and the 2001 census are probably attributable to the more limited age range of persons included in the Demographic and Health Survey, and to the intentional focus on women as the primary sample group (since the primary purpose of the survey was to collect information on fertility issues).

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A 2000 gender survey of 1862 households in all 13 regions found the following (with reference to both males and females, aged 18 or older, based on a sampling procedures designed to interview a range of household members):

- 35.5% were never married
- 10.5% were in civil marriages
- 5.8% of household members were in customary marriages, with 0.6% of these being polygamous
- 16.3% were in either civil or customary marriages
- 2.7% were informally cohabiting
- 0.9% were divorced and 0.6% were separated
- 3.1% were widowed.

Customary marriage was particularly prevalent in the Kavango and Caprivi regions, followed by Omaheke and Otijzondjupa. Polygamy was most common in Caprivi, Otijzondjupa, Kunene and Erongo regions. The distinctions between these findings and the other two sets of statistics presented here is probably attributable to the different age range and the different sampling technique used.

**EM Ipinge, FA Phiri and AF Njabali,**  
The National Gender Study, Volume I,  
University of Namibia, 2000 at 29-30.

**1.4** Customary marriages in most Namibian communities are potentially polygamous.<sup>3</sup>

**1.4.1** About one out of every eight married women (12.5%) in a national survey carried out in 1992 stated that their husbands currently had other wives.<sup>4</sup> About half of these women reported one co-wife, whilst the other half reported two or more co-wives. Polygamy was more common in rural areas than in urban areas, and was particularly prevalent in the northeast.

**1.4.2** The situation was virtually unchanged in 2000, when 12% of the married women in a follow-up survey reported that their husbands had other wives. Some two-thirds of these women reported one co-wife, with the other third of them reporting two or more co-wives. Women reported more polygamy in the Caprivi, Ohangwena, Kavango and Omusati Regions.<sup>5</sup>

**1.4.3** The 2002 report noted that more married women than men reported that they are partners in polygamous marriages, speculating that this “*could be due to differences in classifying girlfriends, ie a tendency for women to report their husbands’ girlfriends as wives, while the husbands do not*”.<sup>6</sup>

**1.4.4** According to Vision 2030, “*Polygamous marriages are declining in number, while informal relationships and adultery remain common, and are thought to be rising*”.<sup>7</sup> However it must also be noted that the number of couples who identified themselves in the censuses as being “married consensually” (considering themselves married without having formalised the union) *decreased* substantially between 1991 and 2001, from 12% to 7%.<sup>8</sup> It may be that some relationships are becoming so casual that they are not viewed as being analogous to marriage in any way.

**1.5** Both civil marriage and customary marriage are recognised as “marriages” for many purposes in Namibia. For example, the ability to gain Namibian citizenship by marriage applies to both types of marriage. Employees’ compensation paid to surviving spouses when an employee is killed in a work-related accident can be obtained by spouses in both types of marriage. On the other hand, some laws which talk about “marriage” and “spouses” cover only civil marriages. The term “customary

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<sup>3</sup> Polygamy in Namibia actually takes the form of polygyny, which refers to husbands taking multiple wives. Wives are not allowed to take multiple husbands (polyandry). It is possible that polygyny might be interpreted as a violation of the Constitutional right to equal rights “as to marriage”, but this issue has not yet been raised before the Namibian courts.

<sup>4</sup> Ministry of Health & Social Services, *Demographic and Health Survey* (1992) at 48-49.

<sup>5</sup> Ministry of Health & Social Services, *Demographic and Health Survey* (2000) at 80-82.

<sup>6</sup> *Ibid* at 80.

<sup>7</sup> Government of the Republic of Namibia, Office of the President, *Vision 2030: Policy Framework for Long-term National Development, Main Document*, 2004 at 133.

<sup>8</sup> According to the 2001 census, the number of persons over age 15 living together as husband and wife without being formally married (7%) was almost equal to that of persons married in customary marriage (9%). However, this is a decrease from the position in the 1991 census, where 12% of Namibians aged 15 and over were living together as husband and wife without any kind of formal marriage. The 1991 census questionnaire did not collect information on the distinction between civil and customary marriage.

union” has been used in some laws and other official contexts to differentiate unrecognised customary marriages from civil marriages.

**1.6** The Law Reform and Development Commission has put forward proposals for the recognition and registration of customary marriages, which will be discussed in relation to marital property in subsequent chapters.<sup>9</sup>

**1.7** The two forms of marriage are not always kept strictly separate. A couple may observe some of the customs of their community, such as the exchange of gifts or *lobola*, and they may follow some of the traditional ceremonies.<sup>10</sup> But they may also have a marriage ceremony in a church or in a magistrate’s court. This means that some couples may follow both sets of laws and rules in their marriage, depending on the situation at hand.<sup>11</sup>

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<sup>9</sup> Law Reform and Development Commission, *Report on Customary Law Marriages*, Project 7, LRDC 12, October 2004.

<sup>10</sup> See June Sinclair, *The Law of Marriage, Volume I* (Juta, 1996) at 235-36: “The contract of *lobolo*, that is the payment of bridewealth by the husband to the wife’s guardian, is a custom that has been incorporated into the civil marriages of Blacks. Payment of *lobolo* is clearly not a requirement for a valid civil marriage, yet many Blacks believe that it is indispensable to create the status of a married woman for the wife and to transfer her into the family of her husband. It ‘plays a social and psychological role in the marriage of a Black person’. It is ‘probably the most enduring institution of customary law and it is characteristic of its tenacity that it is nearly always an adjunct to civil/Christian marriages’. The contract of *lobolo* is regarded as ancillary to and separate from the civil marriage.” (footnotes omitted)

<sup>11</sup> For example, civil marriage has risen in popularity in Katutura, applying to almost half of the conjugal households in the early 1990s, while customary marriages are extremely rare. However, civil marriages in Katutura often incorporate customs usually associated with traditional marriage, such as bride-wealth, thus producing an intertwining of the two systems. Wade Pendleton, *Katutura: A Place Where We Stay* (1994) at 82, 90.

A similar pattern can be observed in some rural areas. For example, a 1992/93 study of three Ovambo communities found that only about 5% of respondents had been married solely in accordance with customary law, while 33% of the respondents had been married in church or a magistrate’s court. However, there were many cases in which traditions associated with marriage under customary law were observed in conjunction with the marriages solemnised according to civil law. What is particularly important to note is that in these study areas, “people did not choose between the general and customary legal systems; they tended to mix elements of both.” H Becker, “Experience with Field Research into Gender and Customary Law in Namibia” in Law Reform & Development Commission, *The Ascertainment of Customary Law and the Methodological Aspects of Research into Customary Law: Proceedings of a Workshop*, February/March 1995; at 95.

Similarly, a study of Herero communities in Omatjette conducted in the late 1980s found that most married couples in the area had married both in church (in a civil marriage) and in terms of customary law. HP Steyn, *Huwelikspatrone by die Herero van Omatjette, Namibie*, in 14 (3) *South African Journal of Ethnology* 79, quoted in Heike Becker and Manfred O Hinz, *Marriage and Customary Law in Namibia*, Centre for Applied Social Sciences, Working Document 30, 1995 at 78 (hereinafter “Becker/Hinz”). In all Herero communities, the transfer of *otjitunga* is usually an integral part of church marriages, which formalises them in terms of customary law as well as civil law. Becker/Hinz at 82.

Recent field research indicates that hybrid marriages continue to be common. Debie LeBeau, Eunice Ipinge & Michael Conteh, *Women’s Property Rights and Inheritance Rights in Namibia*, University of Namibia, 2004 at 35.

Vision 2030 states: “The majority of Namibians are married under customary law, although civil marriages are on the increase.” Government of the Republic of Namibia, Office of the President, *Vision 2030: Policy Framework for Long-term National Development, Main Document*, 2004 at 133. This statement is not consistent with the 2001 census figures, which put the number of civil marriages at over twice the number of customary marriages. *2001 Population and Housing Census, National Report: Basic Analysis with Highlights*

**1.7.1** Many commentators refer to the situation where the same two spouses conclude a marriage in terms of both civil and customary law as “dual marriage”. This paper uses the term “**hybrid marriage**” as being more accurately descriptive, because it would be misleading in many cases to conceive of two separate processes or events. In fact, the civil and customary formalities are sometimes carried out simultaneously, or intertwined. Furthermore, it is not accurate to imply that the spouses themselves consider that they have two separate forms of marriage. Couples who marry in terms of both civil and customary law may simply choose to conduct their marriages according to the norms which are familiar to them.<sup>12</sup> The term “hybrid marriage” also points to the difficulty of dealing with the inconsistent consequences of the differing forms of marriage, such as conflicting marital property regimes.

**1.7.2** Becker and Hinz note that, “*in some regions the majority of people marry the same partner in terms of both legal systems. Often civil and customary law stipulated contradictory rules with regard to marriage and its legal consequences which lead to conflict.*”<sup>13</sup>

## 2. MARITAL PROPERTY SYSTEMS

**2.1** In Namibia there are two basic marital property regimes that apply to civil marriage – “in community of property” or “out of community of property”. A few people use the “accrual system”. Property arrangements in customary marriage follow customary law and do not fit neatly into any of these three categories.

### A. MARRIAGES “IN COMMUNITY OF PROPERTY”

**2.2** In a marriage “in community of property”, all of the assets and liabilities of the husband and wife constitute one joint estate. This includes assets possessed at the time of marriage and those acquired during the marriage, as well as all profits and losses arising during the marriage. Each spouse owns an undivided half-share of the joint estate. Liabilities incurred by either spouse are paid out of the joint estate.

**2.3** Before the *Married Persons Equality Act* was passed in 1996, the common law concept of “marital power” gave the husband the right to control the joint estate. Even though half of everything belonged to the wife, the husband had the authority to administer the estate on behalf of the couple. The Married Person’s Equality Act changed this situation, providing that a husband and wife married in community of

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at 4, supported by similar findings in EM Ipinge, FA Phiri and AF Njabali, *The National Gender Study, Vol. I, University of Namibia*, 2000 at 29-30. “Hybrid marriages” may account for the apparent discrepancy.

<sup>12</sup> For example, in Owambo and Kavango communities, couples who have a civil marriage often continue to follow community customs when it comes to the organisation of their married lives. Research in three Owambo communities indicated that the marital property regime which officially applies to couples married under civil law has little impact on ownership and control of property during the marriage, or on the distribution of property upon death or divorce. In fact, people who were interviewed on this issue did not even understand the difference between “in community of property” and “out of community of property”. Becker/Hinz at 64.

<sup>13</sup> Becker/Hinz at 6.

property must theoretically agree when they sell, give away or borrow against important joint assets – such as the house, household furniture or livestock. They must also agree before taking out a loan which is secured by joint property.

**2.4** Unfortunately, the enforcement mechanisms intended to back up these rules are weak, meaning that a failure to comply will usually result in an appropriate adjustment to the division of the joint estate only at the time when the marriage comes to an end through divorce or death. (The operation of this act is discussed in greater detail below.)

**2.5** When a marriage in community of property ends, any liabilities are settled out of the joint estate. If the marriage ended in divorce, the remainder of the estate is normally divided equally between the spouses. If the marriage ended due to the death of one spouse, the surviving spouse keeps his or her own half-share and the deceased spouse's half-share is distributed in terms of the law of succession or intestacy.

## **B. MARRIAGES “OUT OF COMMUNITY OF PROPERTY”**

**2.6** A marriage “out of community of property” essentially means that the assets and debts of husband and wife remain separate. Ownership of property remains with the person who acquired it. If the marriage comes to an end, each spouse retains his or her own separate belongings.<sup>14</sup>

**2.7** The most common form of community of property arises from an ante-nuptial agreement which excludes both community of property *and* community of profit and loss. In this case, each spouse's assets and liabilities from before the marriage remain separate, as do the assets and liabilities acquired and the profits and losses arising during the marriage. In such a marriage the spouses are not liable for each other's debts or delicts (legal wrongs), and each spouse binds only him or herself in contracts.<sup>15</sup>

**2.8** A much less common arrangement occurs where an ante-nuptial agreement excludes community of property, but retains community of profit and loss. Here each spouse's premarital assets and debts remain separate. But all of the assets acquired and debts incurred during the marriage become a joint estate in which each spouse possesses an undivided half-share. In addition, all profits and losses arising from joint estate assets are jointly owned.

**2.9** The basic “out of community” regime can also be adjusted by means of provisions in the ante-nuptial contract which undertake to settle specific property on one of the spouses in certain circumstances (such as a promise that one spouse will settle property on the other, with a proviso that the property will revert to the first spouse if the second spouse dies first).<sup>16</sup>

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<sup>14</sup> Technically, this is a marriage where community of property and community of profit and loss have both been excluded. See Hahlo, *The South African Law of Husband and Wife* (4<sup>th</sup> edition, 1975) (hereinafter “Hahlo (4<sup>th</sup> edition)”) at 278.

<sup>15</sup> This is the case where the default regime is “out of community of property” because of the operation of section 17(6) of the Native Administration Proclamation 15 of 1928.

<sup>16</sup> Hahlo (4<sup>th</sup> edition) at 295.

**2.10** Before the advent of the *Married Persons Equality Act*, “marital power” gave the husband the right to control the wife’s separate property during the marriage, as well as his own property. Now, the *Married Person’s Equality Act* provides that a husband and wife married “out of community of property” will each control their own belongings. However, the *Married Persons Equality Act* also makes it clear that both husbands and wives in marriages “out of community of property” bear responsibility for making contributions to household necessities in proportion to their resources. Both spouses are jointly and severally liable to third parties for all debts incurred by either of them in respect of necessities for the joint household. A spouse who has contributed more than his or her fair share in respect of such necessities has a right of recourse against the other spouse.<sup>17</sup>

**2.11** The standard form of “out of community of property” can sometimes produce harsh results when the marriage comes to an end. However, where the spouses conducted a business together, to which both contributed money or labour, the courts may find that there was an implied partnership which would entitle both spouses to share in the assets of the enterprise. In this way, courts have ameliorated some of the unfair consequences of the “out of community of property” regime. However, this concept of “universal partnership” has limited application to cohabitation, as the existence of such a partnership requires the following factors:

- a) the aim of the partnership must have been to produce some material gain (which could be the accumulation of an appreciating joint estate);
- b) both parties must have contributed to the enterprise; and
- c) the partnership must operate to benefit both parties.<sup>18</sup>

## C. THE “ACCRUAL SYSTEM”

**2.12** Couples who have entered into ante-nuptial agreements sometimes apply a variation of “out of community of property” popularly known as the “accrual system”.

**2.13** Under the “accrual system”, the property owned by the husband and the wife before the marriage remains their separate property, and property acquired during the marriage is administered as separate property. But when the marriage comes to an end, husband and wife share equally in all of the property and assets that were added to the household during the marriage. There is no sharing of losses, only of profits.<sup>19</sup> The spouses can also state in the ante-nuptial agreement that particular property or classes of property will be excluded from the operation of the “accrual system”.<sup>20</sup>

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<sup>17</sup> *Married Persons Equality Act 1 of 1996*, section 15.

<sup>18</sup> See, for example, *Ally v Dinath* 1984 (2) SA 451 (T); *Muhlmann v Muhlmann* 1984 (1) SA 97 (A).

<sup>19</sup> The usual approach is sharing of assets on a 50-50 basis, but it is possible in theory for the ante-nuptial contract to specify other percentages. See JC Sonnekus, “Matrimonial Property” (Issue 34) in B Clark, ed, *Family Law Service* (October 2000) at 11-ff.

<sup>20</sup> *Id* at 15.

**2.14** The Law Reform and Development Commission mistakenly states in one of its reports that the “accrual system” is not available to Namibians.<sup>21</sup> While there is no statutory regime governing the “accrual system” in Namibia, as there is in South Africa for example, it is in fact possible at the present time for a couple to establish the “accrual system” by way of an ante-nuptial contract.

**2.15** Since the assistance of a lawyer is usually required for such a contract, it is certainly the case that the “accrual system” is rarely applied in practice in Namibia. A survey carried out by the Legal Assistance Centre which examined a random sample of 434 divorce cases heard by the High Court over the period 1990-1995 found that over 70% of the marriages in these cases were “in community of property, with most of the remainder being “out of community of property”. The “accrual system” applied to less than 1% of these marriages.<sup>22</sup>

## **D. PROPERTY ARRANGEMENTS IN CUSTOMARY MARRIAGE**

**2.16** The three marital property regimes described above are all normally associated with civil marriages. As noted above, none of them accurately describe the existing property arrangements in customary marriage.

**2.17** In contrast to civil marriages, which are primarily arrangements between the individual spouses confirmed by the authority of a marriage officer (a magistrate or a religious authority), customary marriages are an alliance between two families.<sup>23</sup>

**2.18** It is impossible to summarise the marital property system utilised in customary marriages in Namibia.

**2.18.1** There are, predictably, differences between the approaches of communities which follow different descent systems, such as matrilineal versus patrilineal descents.

**2.18.2** There are differences between the practices of different communities within the same ethnic groups.

**2.18.3** Different respondents and informants even within the same community give different accounts of what constitutes customary practice.

**2.18.4** Chapter 5 will attempt to organise some of the data collected during UNAM and LAC field research on this question, including an examination of the different approaches to the division of marital property upon divorce, or upon the death of one of the spouses.

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<sup>21</sup> Law Reform & Development Commission, *Report on Uniform Default Matrimonial Consequences of Common Law Marriages: Repeal of section 17(6) of Native Administration Proclamation, 1928 (Proclamation 15 of 1928)*, LRDC 11, Project 6, July 2003 (hereinafter “LRDC 11”) at para 4.5.

<sup>22</sup> See Legal Assistance Centre, *Proposals for Divorce Law Reform in Namibia* (2000) at 47-ff.

<sup>23</sup> TW Bennett, *Customary law and the Constitution: A Background and Discussion Paper*, LRDC 3, October 1996 at 98.

**2.19** The disposition of marital property upon the death of one of the spouses is influenced by the persistence of the customs of widow inheritance (levirate) and widower inheritance (soroate) in some communities (as detailed in Chapter 5).

**2.20** The existence of polygamy complicates property arrangements in customary marriage in some communities. As noted above, this affects some 12% of marriages in Namibia.<sup>24</sup>

**2.21** The payment of bridewealth or *lobola* can also affect the control of marital property and its division. This question is explored in detail in Chapter 11, but the following general points should be considered:

**2.21.1** *Lobola* is still used in many Namibian communities -- indeed, its use seem to be on the increase. For example, *lobola* has begun to replace traditional brideservice in some Kavango communities where it was not traditionally used.

**2.21.2** The payment of *lobola* in some communities is perceived as giving the husband and his extended family certain rights of control over the wife, such as rights of control over her domestic production, fertility and children. It is also used as a justification for the practice of widow inheritance.

**2.21.3** Because such payments are often culturally interpreted as giving the husband certain rights and powers over his wife, it could be argued that the practice constitutes an unconstitutional form of discrimination – although there has not yet been any such challenge to the use of *lobola* in Namibia.

**2.22** Most traditional communities in Namibia are patrilocal, meaning that the wife usually moves to the place where her husband lives. (In Kavango communities, this move traditionally took place after the groom performed a period of bride service, during which time the newly-married couple lived near or with the bride's parents.) This factor may be of even more influence on the treatment of marital property than the type of descent system followed by the community.

**2.22.1** For example, research on San families living on farms in the Omaheke Region found that “*relations between husbands and wives were somewhat more balanced where couples lived in extended kin groups and especially where the wife’s family was close by than where the husband and wife had gone to live at the husband’s workplace without relatives close by. Indeed the relatively strong position of women in hunter-gatherer San societies has been attributed in part to the temporary matrilocality residence patterns of young couples who lived with the wife’s family for the first few years of their marriage*”.<sup>25</sup>

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<sup>24</sup> See paragraph 1.4 above.

<sup>25</sup> Silke Felton and Heike Becker, “A Gender Perspective on the Status of the San in Southern Africa”, Windhoek: Legal Assistance Centre, 2001 at 21-22, citing R Sylvain, “‘We work to have life’: Ju/hoan women, work and survival in the Omaheke Region, Namibia”, unpublished PhD thesis, 1999 and R Lee, “Politics,

### 3. DEFAULT POSITIONS

**3.1** The default matrimonial property regime applicable under common law to most civil marriages in Namibia is “**in community of property**”. Spouses can however enter into an ante-nuptial contract, to adjust the default position. An ante-nuptial contract is a special written agreement which is concluded before the marriage and registered at the office of the Registrar of Deeds. In general, a couple who want to marry “out of community of property” must enter into a formal ante-nuptial contract if they want to change the default position.

**3.2** However, because of the influence of Namibia’s apartheid history, the default position on marital property is different for some blacks in Namibia. The *Native Administration Proclamation 15 of 1928*, which is still in force in post-independence Namibia, makes a different rule for all civil marriages between “natives” north of the old “Police Zone” (in the areas then known as Owamboland, Kavango and Caprivi) which take place on or after 1 August 1950.<sup>26</sup> These marriages are automatically “**out of community of property**”, unless a declaration establishing another property regime was made to the marriage officer one month before the marriage took place.<sup>27</sup>

**3.2.1** The theory behind the law seems to have been the protection of multiple wives in cases where one or more customary marriages took place before the civil marriage in question – the colonial authorities seem to have thought that an “out of community of property” regime would make it easier for these customary law wives to retain a share of the husband’s assets.

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sexual and non-sexual, in an egalitarian society” in E Leacock and E Lee, eds, *Politics and history in band societies*, at 37-59, Cambridge: Cambridge University Press, 1982.

<sup>26</sup> Section 17(6) of the Proclamation states:

*A marriage between blacks, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.*

See Government Notice 67 of 1954 of 1 April 1954 (Application of Certain Provisions in Chapter IV of Proclamation 15 of 1928 to the Area Outside the Police Zone). The section was applied only to marriages which took place on or after 1 August 1950.

It is not clear whether this rule applies to blacks who are domiciled in the area in question, or to marriages which take place in the area in which the provision is in force. Section 17(6) of the Proclamation simply states that it applies to marriages between “blacks”, while the Government Notice which brought it into force says only that it “shall apply in that portion of the Territory north of the Police Zone” and “shall be deemed to have come into operation in that area with effect from the 1<sup>st</sup> day of August, 1950.

The Police Zone is defined in the First Schedule to the Prohibited Areas Proclamation 26 of 1928. See also LRDC 11 at para 2.4.4.

<sup>27</sup> See *Ex parte Minister of Native Affairs In re Molefe v Molefe* 1946 AD 315. This case, based on a legislative provision in South Africa which is similar to the operative one in Namibia, indicates that the default position in a civil marriage where no declaration is made is “out of community of property”, and not the application of customary law rules to the civil marriage.

**3.2.2** The current law on marital property regimes discriminates on the basis of both race and place. The law is clearly in conflict with the guarantees of equality in Article 10 of the Namibian Constitution, but it remains in force to date in terms of Article 144(1) of the Constitution, which states that all statutes in force at the date of independence remain in place until repealed or amended by an Act of Parliament or declared unconstitutional by a competent court.<sup>28</sup> There have been several legal challenges to the law, but so far all of these cases have been resolved before the constitutional question on the law's general applicability has been reached.

**3.2.3** So as of 2005, the Native Administration Proclamation remains in place, meaning that civil marriages between blacks north of the old Police Zone have the opposite effect of marriages by everyone else when it comes to default marital property regimes. Marriages between white and coloured persons, as well as mixed marriages involving one black spouse and one white or coloured spouse, are not affected by the Native Administration Proclamation, regardless of where they take place.

**3.2.4** The Law Reform and Development Commission has recommended the repeal of section 17(6) of the *Native Administration Proclamation* as a matter of urgency.<sup>29</sup>

**3.3** There are a few **other exceptions** to the general default position of “in community of property”:<sup>30</sup>

**3.3.1** If a major (an adult aged 21 or older) has married a minor (someone below age 21) without the required parental consent, then the property regime will be whatever system operates to the greatest benefit of the minor.<sup>31</sup>

**3.3.2** If the husband is at the time of marriage domiciled in a country other than Namibia, then the marital property regime is governed by the law of that country.<sup>32</sup>

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<sup>28</sup> See the discussion of the *Myburgh* case in Chapter 2 above.

<sup>29</sup> LRDC 11. The details of this recommendation will be discussed below.

<sup>30</sup> Hahlo (4<sup>th</sup> edition) at 214.

<sup>31</sup> In South Africa, the *Matrimonial Property Act* has changed the common law position on this point. In terms of section 24, if a marriage involving a minor is not dissolved on the grounds of lack of consent, then the property consequences will be the same as if the minor were of age when the marriage took place. Any ante-nuptial agreement entered into by the minor which includes the “accrual system” will be viewed as being valid and enforceable.

It should be noted that some confusion has been created by the lack of clarity as to whether the South African law reform was intended to apply retrospectively to marriages of minors concluded before the commencement of the law in question. If Namibia enacts a similar reform, this question should be dealt with explicitly. See Sinclair (n 10) at 379-ff.

<sup>32</sup> The husband's domicile at the time of the marriage is the matrimonial domicile (*lex domicilii matrimonii*). The *Married Persons Equality Act* has given married women domicile independent of the domicile of their husbands, but this common law rule was not affected by the statute. See *Frankel's Estate and Another v The Master and Another* 1950 (1) SA 220 (A); *Esterhuizen* 1999 (1) SA 492 (C). A couple can,

**3.4** The provisions of the *Native Administration Proclamation* on marital property should clearly be repealed. However, a broader question which needs consideration is the question of what default regime should apply to civil marriages in Namibia. In other words, what marital property regime should apply automatically if a couple do not make any agreement between themselves about how to share property during their marriage? This question will be considered in Chapter 8 below.

## 4. ANTE-NUPTIAL CONTRACTS

**4.1** As noted above, ante-nuptial contracts are written agreements which are concluded before a civil marriage takes place.<sup>33</sup> A couple intending to marry will usually sign an ante-nuptial contract if they want to make special arrangements to regulate how their property will be dealt with during the subsistence of the marriage, and how it will be divided in the event of a divorce or on the death of one of the spouses.

**4.1.1** Couples whose marriages are regulated by the provisions of the *Native Administration Proclamation* may also register ante-nuptial agreements, even though all that is required to change their marital property regime is a written declaration made before a magistrate within one month prior to the marriage ceremony.<sup>34</sup>

**4.2** In order for these agreements to be binding in respect of third parties, they must be registered at the Office of the Registrar of Deeds in terms of sections 86 and 87 of the *Deeds Registries Act 47 of 1937* (a South African statute inherited at independence which is still in force in Namibia). The ante-nuptial contract must be signed before a notary, and registered within three months of the date on which it was made.<sup>35</sup>

**4.2.1** The recent Namibian case of *Mofuka v Mofuka* confirmed that couples may enter into an unregistered ante-nuptial agreement between themselves, either expressly or by implication, which will regulate the proprietary consequences of the marriage *between the two of them*. Such an unregistered ante-nuptial agreement does not have any force against third parties, although it would determine the relative property rights of the spouses upon dissolution of the marriage. Such an agreement can be made orally instead of in writing, and it could be an agreement

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however, make an ante-nuptial agreement which chooses a law other than that of the husband's domicile as the law governing the proprietary consequences of their marriage. The court commented in the *Esterhuizen* case that "the Legislature must decide whether it wishes the *lex domicilii matrimonii* principle to remain intact, even if it does produce anomalous results in some circumstances." At 504E. This issue is discussed further in Chapter 7 below.

<sup>33</sup> The historical development of the law on ante-nuptial contracts is summarised by Corbett JA in *Ex parte Spinazze and Another* NNO 1985 (3) 650 (A).

<sup>34</sup> *Mofuka v Mofuka* 2001 NR 318 (HC); 2003 NR 1 (SC). See also *Ex parte Minister of Native Affairs In re Molefe v Molefe* 1946 AD 315 at 320 and *Koza v Koza* 1982 (3) SA 462 (T) at 463E-G, which interpret a similar provision in a South African statute, section 22(6) of Act 38 of 1927.

<sup>35</sup> If the contract is executed outside of South Africa, it must be attested to by a notary or otherwise entered into in accordance with the law of the place of execution, and it must be registered in a deeds registry within six months of execution or such extended period as a court may allow.

made by implication in the course of agreeing to a marriage officer's explanation of the property consequences of the marriage.

**4.2.2** Although an informal ante-nuptial contract can be enforced between husband and wife, it would not stand up in court if a third party were involved. For example, suppose that a couple living in Karas Region were supposed to be married by default "in community of property", but declared to the marriage officer that they wanted to be married "out of community of property". Upon divorce they could agree to retain their own property from before the marriage and the property each acquired during the marriage and go their separate ways. However, if the husband, for example, took out a furniture loan, the furniture company could hold both the husband and wife responsible for the debt because their marriage default system was "in community of property" and they did not declare "out of community of property" in a registered ante-nuptial contract.

**4.2.3** The recent *Mofuka* case made it clear that this informal type of ante-nuptial agreement could be binding between parties to a marriage which is governed by the Native Administration Proclamation, even where they did not make the required declaration in front of a magistrate.<sup>36</sup> This ruling may provide some relief to couples who would otherwise be severely disadvantaged by the application of the Native Administration Proclamation, although couples who did not consider the property consequences of their marriage prior to the conclusion of the marriage ceremony will not be affected.

**4.3** The assistance of a lawyer is generally required for an ante-nuptial contract, and few couples register such contracts in Namibia. They are popular primarily with urban residents in the upper income brackets.

**4.4** A study of divorce cases which took place between 1990-1995 in Namibia showed that there were significant differences between different language groups regarding the use of ante-nuptial contracts, with German, Afrikaans and English speakers being more likely to utilise them than other language speakers. Ante-nuptial contracts are thus more prevalent amongst members of language groups likely to have easier access to legal advice, and a greater amount of property to be regulated.<sup>37</sup>

**4.5** The general common law rule on marital property regimes is as follows: "*Community once excluded cannot be introduced, and once introduced cannot be excluded, nor can an ante-nuptial contract be varied by a post-nuptial agreement between the spouses ...*"<sup>38</sup>

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<sup>36</sup> *Mofuka v Mofuka* 2001 NR 318 (HC), confirmed on this point by 2003 NR 1 (SC). See also *Lagesse v Lagesse* 1992 (1) SA 173 (DCLD).

<sup>37</sup> Legal Assistance Centre, *Proposals for Divorce Law Reform in Namibia* (2000) at 51. The situation is similar in South Africa. See Debbie Budlender, *In Whose Best Interests?: Two studies of divorce in the Cape Town Supreme Court*, University of Cape Town Law Race and Gender Research Unit, 1996 at 13.

<sup>38</sup> Hahlo (4<sup>th</sup> Edition) at 305; *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 224. See also, for example, *Honey v Honey* 1991 (3) SA 609 (WLD). The common-law prohibition on donations between spouses is often cited as the justification for this rule, but other reasons have also been cited, such as the need to protect creditors. See *Honey v Honey* at 613-614, which concludes that "the mere repeal of

**4.5.1** There are only limited grounds for changing an ante-nuptial contract in Namibia. It is clear that an ante-nuptial contract can be revoked or altered in certain cases, such as where the contract does not give effect to the actual agreement of the parties<sup>39</sup> – for example where the property which the contract intended to refer to was wrongly described,<sup>40</sup> or where the contract contained an error with respect to the property regime which the parties actually intended to adopt.<sup>41</sup>

**4.5.2** The court may also give leave for alteration of an ante-nuptial contract for “good cause”.<sup>42</sup> For example, this has been allowed where the terms of the original contract were impossible to comply with, or where some modification was justified by a change in the circumstances of the spouses. One instance of this approach was a case where a husband had undertaken to settle on his wife a half-share in a farm which he was in the process of purchasing. When he was unable to complete the purchase of that farm, the court allowed the substitution of another farm in the ante-nuptial contract.<sup>43</sup>

**4.5.3** The court’s power to authorise changes to an ante-nuptial contract on a showing of good cause has usually been applied to details of the contract, rather than to an alternation of the underlying marital property system. However, it is possible for the court to approve a change in the basic property regime. As stated (in dictum) in the leading South African case of *Edelstein v Edelstein*: “Our law is clear: once a particular proprietary matrimonial regime is established at the marriage it may not ... be altered except by an order of court in certain circumstances.”<sup>44</sup> For example, in a 1984 South African case, a young and inexperienced couple were allowed to cancel an ante-nuptial contract making their marriage “out of community of property” on the grounds that they had been pressured to conclude the contract by a parent (who threatened to exclude them from his home if they did not comply) and a church minister (who urged them to co-operate to preserve the family peace). This pressure did not rise to the level of undue influence, which would have invalidated the contract, but it did prevent the couple from concluding an agreement that reflected their true wishes. Therefore, the court

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*the prohibition against donations between spouses did not automatically abrogate the rule that parties may not postnuptially amend an ante-nuptial contract”.*

<sup>39</sup> *Ex Parte Venter* 1948 (2) SA 175 (O).

<sup>40</sup> See, for example, *Ex parte Kilroe* 1945 GWL 27.

<sup>41</sup> See, for example, *Ex parte Mouton* 1929 TPD 406; *Ex parte Dunn* 1989 (2) SA 429 (NC).

<sup>42</sup> *Ex Parte Smuts* 1914 CPD 1034. A narrower approach was put forward in *Ex Parte Venter* 1948 92) SA 175 (O), where the court held that a court’s power to revoke and alter an ante-nuptial contract was much narrower, being “strictly limited to those cases where the marriage has been dissolved or where the terms appearing in the ante-nuptial contract do not give effect to the true agreement between the parties”. However, it appears that the broader approach taken in the Smuts case has prevailed in most South African jurisdictions. See, for example, *Ex parte Orchison* 1952 (3) TPD 66 at 80H.

<sup>43</sup> *Ex parte Louw* (1907) 24 SC 350.

<sup>44</sup> 1952 (3) SA 1 (AD) at 15H. In this case, the circumstances were that the wife was a minor when she entered into the ante-nuptial contract, and she did not have the consent of her father as guardian. As a result, the court declared the ante-nuptial contract void.

found that good cause was shown for cancelling the contract to make the marriage “in community of property”.<sup>45</sup>

**4.5.4** Although alteration to ante-nuptial contracts is possible in some circumstances, the possibilities for change after marriage are narrow. There is no real possibility for couples to simply change their minds about what marital property regime is most appropriate after the marriage has taken place. The Legal Assistance Centre is aware of some marriage partners so desperate to make a change that they have even considered the possibility of divorcing and remarrying with a new ante-nuptial agreement.<sup>46</sup>

**4.6** It is possible in limited circumstances to register a post-nuptial agreement in terms of section 88 of the *Deeds Registries Act 47 of 1937*. The relevant portion of this section reads as follows:

*Notwithstanding the provisions of sections eighty-six and eighty-seven the court may, subject to such conditions as it may deem desirable, authorize postnuptial execution of a notarial contract having the effect of an antenuptial contract, if the terms thereof were agreed upon between the intended spouses before the marriage, and may order the registration, within a specified period, of any contract so executed.*

**4.6.1** There are three requirements that have to be met before the court will allow registration and execution of a post-nuptial contract. These requirements are:

- (1) The parties must have agreed on the terms of the contract before the marriage.
- (2) They must show good reason why they failed to execute the contract in the prescribed manner before the marriage.
- (3) The change must be requested within a reasonable time after the marriage takes place.<sup>47</sup>

**4.6.2** Section 88 does not technically permit post-nuptial contracts, but merely authorises the court to execute and register an ante-nuptial contract after marriage if the listed requirements are met. It has been held: “*The only contract which the court has power to authorise to be postnuptially executed is one the terms of which were agreed upon between the intended spouses before the marriage.*”<sup>48</sup> The question of whether or not the parties actually reached an express or implied agreement about the proprietary consequences of the marriage before the marriage took place is a factual determination.

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<sup>45</sup> *Ex parte Coetzee et Uxor* 1984 (2) SA 363 (WPA).

<sup>46</sup> It is reported that this was the situation in the case of *Le Roux* 1963 (4) SA 273 (C) where the divorce backfired from the wife’s point of view, when her ex-husband, instead of re-marrying her out of community of property as they had planned, married someone else instead. See *Sonnekus* (n 19) at 5, note 11.

<sup>47</sup> HR Hahlo, *The South African Law of Husband and Wife* (4<sup>th</sup> Edition) 1975 at 267.

<sup>48</sup> *Ex parte Winwood* (per Broome J), 1946 NPD 279 at 287.

**4.6.3** Most applications brought under section 88 are based on the fact that the parties were mistaken as to the proprietary consequences of their marriage. This usually occurs in circumstances where the parties are foreigners who get married in South Africa, and are under some mistaken belief that their marital property regime will be “out of community of property” due to the fact that this would be the case in their country of origin – although some South African courts have been stricter than others as to when this sort of mistake is sufficient to justify post-nuptial registration.<sup>49</sup> Another example of a situation in which some courts have approved post-nuptial registration is where the parties had agreed beforehand to exclude community but thought that they could complete a formal contract after the marriage.<sup>50</sup>

**4.6.4** One South African case offered the following description of what sort of evidence can be considered on the factual question of whether or not there was a pre-marital agreement:

*... Evidence is required of the station in life of the parties, economical and educational, and their standard of intelligence at the time of the alleged contract, evidence of their financial position both at the time of making the alleged agreement and at the time of moving the court, and all matters which might affect the mind of the court in deciding whether, on all the facts, it is satisfied that it is reasonable that the applicants should have made their agreement as and when alleged. The court is entitled to information as to what statements on this matter were made by the parties to the marriage officer at the time of the marriage ceremony, and to an explanation as to why such statements (if that be the case) did not disclose the ante-nuptial agreement. Any delay in making the application must be explained – the absence of any explanation throws some doubt on the genuineness of the parties’ allegation of a definite agreement.<sup>51</sup>*

**4.6.5** The second requirement in terms of section 88 of the *Deeds Registries Act* is that the parties must show good reason why they failed to execute the ante-nuptial contract in the correct manner before the marriage. The courts when interpreting this section have taken each case individually, and looked at the

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<sup>49</sup> For example, in *Ex parte Witz* 1941 WLD 74, both parties were born in England and were subsequently married in Johannesburg. The court granted an application for the postnuptial registration of an ante-nuptial contract because the husband, although domiciled in Johannesburg, was under the false impression that English law applied.

On the other hand, In *Ex parte Orford*, 1920 CPD 367 at 371, Juta JP said the following: “Where the parties think that they are being married out of community by virtue of some law other than the law of South Africa, it seems to me obvious that no such contract was made between the intending spouses. I do not see how consistently with the principles of our law, the court can allow an agreement to be executed after marriage which it is obvious was never entered into before marriage because the parties thought or believed that there was no need for it, but where they would have entered into one if they had known it was necessary.” Similarly, in the case of *Pollard v Registrar of Deeds* 1903 TS 353, the parties thought that they were being married according to English law. The court held that where there is no proof that the applicants had discussed an ante-nuptial contract before their marriage, the court cannot grant an application in terms of section 88 of the Deeds Registries Act.

<sup>50</sup> See *Ex parte Wells* 1905 TS 54; *Ex parte Erskine* 1910 TPD 644.

<sup>51</sup> *Ex parte Hersch*, 1946 TPD 548 at 554-5.

surrounding circumstances in each case. For example, in the case of *Ex parte Van der Merwe*, the applicants were both 'educated' persons and the court felt that their ignorance in executing and registering an ante-nuptial contract was inexcusable, and could not be condoned.<sup>52</sup> In *Ex parte Van Rensburg*, on the other hand, the court allowed an order in terms of section 88 as the parties were ignorant and illiterate.<sup>53</sup>

**4.6.6** The final requirement of section 88 is that the parties must bring the application to court with reasonable promptitude. This does not mean that a long period of time between the date of marriage and the application is a bar to granting the necessary relief under section 88. It does mean, however, that there must not be an unnecessary delay between the date when the parties became aware of the mistake or the true legal position, and the court application.<sup>54</sup>

**4.6.7** Once an order is granted in terms of section 88 the new matrimonial regime is binding upon third parties, as if it existed since the date of marriage.

## 5. INHERITANCE

**5.1** Although this report is concerned with issues relating to marital property rather than inheritance, the two topics are deeply intertwined. It is not possible to discuss marital property fully without at least touching on the issue of inheritance.

**5.2** The manner in which property is distributed upon the death of a person in Namibia depends largely on that person's race. Here, the division between civil marriage and customary marriage is blurred, with the determining factor being race. The rules of succession which apply depend on a complex interplay of race and (for a black person) on the part of Namibia where the person resides, on whether that person is or was a party to a civil or customary marriage, and on what marital property regime applied to the civil marriage.

**5.3** The topic is best understood by starting with the most general rules. All of the property which belonged to a person who dies – including cash, land and other things – is called the "estate". Any debts which the deceased owed must be paid out of the estate first, before any of the heirs get anything.

**5.4** If there was a civil marriage, the kind of property arrangement which applied to the marriage affects what is in the estate of the deceased. Suppose it is the husband who has died. The part of the household's property which belongs to the wife is NOT part of the husband's estate.

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<sup>52</sup> 1938 OPD 62.

<sup>53</sup> 1947(4) SA 435 (C).

<sup>54</sup> In the following cases the time difference was as follows: *Ex parte Karbe* 1939 WLD 351 (25 years); *Ex parte Goode* 1939 WLD 367 (36 years); *Ex parte Roche* 1947 (3) SA 687 (N) (27 years).

**5.4.1** If the marriage was “in community of property”, then half of all the household’s property belongs to the wife and half to the husband. The wife takes her half, and the other half is the husband’s estate. This division of property must take place before anyone can inherit anything.

**5.4.2** If the marriage was “out of community of property”, then the husband and the wife kept their property separate all along. The wife takes her property, and the husband’s property becomes his estate.

**5.4.3** If the marriage was under the “accrual system”, then only the additions to the household’s property during the marriage are shared. The wife takes whatever she owned before the marriage and half of everything that was added to the household during the marriage. The rest of the property is the husband’s estate.

## **Inheritance in terms of a will**

**5.5** If the deceased party left a will, then the estate which belongs to the deceased after any division of joint property has been made will be distributed according to the provisions of the will. A person who makes a will can leave property to anyone – a wife, a husband, a relative, a friend, a stranger or even an organisation. A spouse has no duty to leave any part of his or her estate to the surviving spouse or to the children of the marriage. Husbands and wives have equal rights to make wills.

**5.6** However, race- and gender-based restrictions on the power to make wills are imposed by the *Native Administration Proclamation 15 of 1928*. The patchwork of overlapping regulations issued in terms of that proclamation have the result that a black person in Kavango, Eastern Caprivi or Owambo has full power to bequeath his or her estate by will. But a black *man* in any other part of Namibia does not have full testamentary freedom. He does not have the legal power to leave by will (a) movable property allotted to or accruing under customary law to any woman with whom he lived in a customary union or (b) any movable property accruing under customary law to a particular “house”. Property which falls into these two categories must be distributed according to customary law.

## **Intestate succession**

**5.7** If there is no will (“intestate succession”), then inheritance takes place in terms of laws which determine who will inherit the property of the person who died – but again, the rules are dependent upon race.

**5.8** For all Namibians *other than black Namibians*, property will usually go to the deceased’s relatives by blood or by marriage, in an order of precedence determined by the *Intestate Succession Ordinance 12 of 1946*. In most cases, the estate is shared between the surviving spouse and the children of the deceased in proportions set forth by the statute.<sup>55</sup> In other cases, the basic rules are as follows:

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<sup>55</sup> The general idea is that the surviving spouse gets *everything up to N\$50 000*. If there is more money in the estate, it will be divided equally between the spouse and the children – as long as the spouse

- If there are no children, the surviving spouse will share the estate with other close relatives (such as parents, brothers or sisters); if there are no other close relatives, the spouse inherits everything.
- If there are children but no surviving spouse, the children inherit everything.
- If a child has already died, that child's share will be given to that child's children – who are the grandchildren of the deceased.
- If there is no spouse and no children, the estate will go to the deceased's parents, brothers and sisters, or closest blood relatives.
- If there are no relatives at all, the property will go to the state.

Any part of the deceased's estate which is inherited by minor children is held in trust by the state and given out for the children's needs as necessary.

**5.9** However, as in the case of marital property, the *Native Administration Proclamation 15 of 1928* makes some special rules for black men in certain parts of Namibia, because they might have wives under both customary law and civil law. Regulations on succession were promulgated in terms of this proclamation, but made applicable *only* to the area north of the Police Zone as from 1 August 1950.<sup>56</sup>

**5.9.1** These regulations make the type of marriage and the marital property regime the criteria for determining the rules of intestate succession which would apply to "blacks".

**5.9.2** If a black person *outside* of the old Police Zone dies leaving no valid will, his or her property is to be distributed as follows.

**5.9.2.1** If the deceased, at the time of his death, was (a) a partner in a civil marriage "in community of property" or under ante-nuptial contract; or (b) a widower, widow or divorcee of a civil marriage "in community of property" or under ante-nuptial contract *and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage*, then the property shall devolve as if he or she had been a "European" (in other words, as if he or she were white).

**5.9.2.2** But if the deceased does not fall into one of these categories, the property will be distributed according to "native law and custom".

**5.9.2.3** So, in other words, if the deceased was at any stage married in a civil marriage in the default position of "out of community of property" which applies to civil marriages between blacks in the north, then the estate is probably going to be distributed "according to native law and custom".

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gets a child's share or N\$50 000, whichever is greater. If the marriage was "in community of property", then the surviving spouse's half-share in the property which the couple owned jointly is counted towards the N\$50 000 total.

<sup>56</sup> Government Notice 70 of 1954.

**5.9.3** Inside the area covered by the old Police Zone, the estates of *all* black persons, regardless of the circumstances of any marriage they may have entered, are distributed according to “native law and custom”.

**5.9.3.1** Section 18(3) of the *Native Administration Proclamation 15 of 1928* states that “any dispute or question which may arise out of the administration and distribution of any estate in accordance with native law shall be determined by the native commissioner”, who has been replaced by magistrates. The law applicable to such disputes is the customary law of the area in which the marriage was concluded.

**5.10** The 2003 case of *Berendt v Stuurman* has changed this situation, by holding that several sections of the *Native Administration Proclamation 15 of 1928* are unconstitutional violations of the prohibition on racial discrimination in Article 10. Parliament has been given a deadline of 30 June 2005 (subsequently extended to 31 December 2005) to replace the offensive sections with a new regime.<sup>57</sup>

**5.11** The customary law rules on inheritance are different in different communities. The following are some general points pertaining to customary law systems of inheritance:

**5.11.1** The kinship system of the community will affect inheritance – for example, inheritance will work differently in matrilineal systems (where the children are part of the mother’s family) than in patrilineal systems (where the children are part of the father’s family).

**5.11.2** The customary law rules on inheritance often discriminate against women, younger sons and children born outside of marriage.

**5.11.3** A further problem is that magistrate’s courts may have difficulty accurately determining the relevant customary law rules, since they are not recorded in writing and may differ even within the same community or ethnic group.

**5.11.4** These issues will not be taken up in detail in this report, but are addressed in a separate study by the Legal Assistance Centre.<sup>58</sup>

## **Administrative procedures**

**5.12** It is not only the rules on inheritance which depend on race. Until recently, the administrative procedures relating to deceased estates also depend largely on the racial classification of the deceased.

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<sup>57</sup> Unreported Judgement Case No. (P) A 105/2003.

<sup>58</sup> Legal Assistance Centre, *Customary Laws on Inheritance in Namibia: Issues and questions for consideration in developing new legislation* (2005).

**5.12.1** The *Administration of Estates Act. 66 of 1965* was applicable to whites and coloured persons, meaning that their estates were administered by the Master of the High Court.<sup>59</sup>

**5.12.2** If the deceased was classified as a “Baster” then the estate would be administered by a magistrate under the *Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1947*.

**5.12.3** Black estates were administered by magistrates in terms of the *Native Administration Proclamation 5 of 1928*. This is one of the few remaining areas of law where Namibia’s apartheid heritage continued to operate.

**5.13** Namibia’s 1996 country report under the Convention on the Elimination of all Forms of Racial Discrimination conceded the problems in the country’s system of inheritance:

*The system applicable to whites and coloureds is clear and easy to understand. There are detailed provisions regulating the succession and administration of these estates. The estates are administered under the supervision of a specialist office, that of the Master of the High Court. The law regulating the estates of blacks who die without leaving a will (the vast majority of cases) is a mass of confusion. There is no proper system of administration, nor is the administration properly supervised. It is difficult to ascertain who the heirs are and this uncertainty is exploited by unscrupulous persons who enrich themselves at the expense of the deceased’s immediate family, particularly women and children.*

**5.14** The 2003 *Berendt* case struck down the legal provision which gives magistrates power to administer “black estates” while other estates go to the more specialised jurisdiction of the Master of the High Court. Parliament was directed to fix this problem by June 2005 (later extended to December 2005). In the meantime, as an interim measure, heirs of black estates can choose the magistrate or the Master as an administrator, as they prefer.<sup>60</sup>

**5.14.1** The *Berendt* case takes the same line as the recent *Moseneke* case in South Africa, where the court said: “*It is an affront to all of us that people are still treated as ‘blacks’ rather than as ordinary persons seeking to wind up a deceased estate, and it is in conflict with the establishment of a non-racial society where rights and duties are no longer determined by origin or skin colour.*”

**5.14.2** The separate system of estate administration for Basters was not affected by the *Berendt* case, but will probably be covered by the forthcoming law reform on administration of estates.

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<sup>59</sup> “Coloured people” is a race classification used by the apartheid regime in Namibia and South Africa to describe people of mixed race (between white and black).

<sup>60</sup> *Berendt* (n 57).

## 6. MARRIED PERSONS EQUALITY ACT

**6.1** The *Married Persons Equality Act 1 of 1996* eliminates the discriminatory Roman-Dutch law concept of marital power which previously applied to civil marriages. Husbands and wives married “in community of property” must now consult each other on all major transactions, and they are subject to identical powers and restraints. Husbands and wives married “out of community of property” now have the same rights to deal with their separate property independently.

### Impact on all civil marriages

**6.2** 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”.

**6.3** The Act repealed this legal rule. This means that families are now free to decide amongst themselves how they will handle family decision-making, but the law will not automatically support the opinion of the husband over the opinion of the wife. 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.

### Impact on marriages “in community of property”

**6.4** The Act summarises the equal powers of husband and wife in civil marriages “in community of property” by saying that husbands and wives have “equal capacity” –

- (a) to dispose of the assets of the joint estate;
- (b) to contract debts for which the joint estate is liable; and
- (c) to administer the joint estate.<sup>61</sup>

**6.5** A subsequent section of the Act lists the transactions affecting the joint estate which require the consent of the other spouse. This list covers all major financial transactions. Of particular interest to rural couples is the fact that transactions in livestock are mentioned explicitly as requiring the consent of both spouses where the marriage is “in community of property”.<sup>62</sup>

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<sup>61</sup> Section 5, *Equal powers of spouses married in community of property*.

<sup>62</sup> The consent of both spouses is required to

- sell, borrow against or otherwise enter into obligations affecting **land** which is part of the joint estate
- sell, give away or promise any **company shares, insurance policies** or other **investments** which are part of the joint estate
- sell or promise any **jewellery, coins, stamps, paintings, livestock or other property which is held mainly as an investment for the future**

**6.6** Spouses married “in community of property” generally need each other’s written consent to bring or defend a court case, with a few exceptions for cases which pertain only to the interests of one spouse.<sup>63</sup>

**6.7** The High Court (or a judge in chambers) or a magistrate’s court can give one spouse permission to proceed with a transaction or a court case without the required consent of the other spouse if the court finds that consent is being unreasonably withheld, or if there is some other good reason for dispensing with the requirement – such as a situation where a spouse cannot be located or is unconscious for a long period of time.<sup>64</sup>

**6.8** The primary weakness of the Act lies in its enforcement mechanisms.

**6.8.1** Oral consent suffices for all financial transactions other than those which involve deeds to land or any other documents which must be registered at a deeds office, and those in which one spouse wishes to bind himself or herself as surety for a loan.

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- sell, promise or borrow against any **furniture or other property which is used in the couple’s common household**
  - enter into a **hire-purchase agreement or a leasing agreement for any items**, such as furniture or a motor car
  - enter into a **contract for the purchase or sale of land**, where the purchase price is to be paid in more than two instalments which stretch out over a period of a year or more
  - make a **written guarantee to pay someone else’s debt** if they cannot pay it
  - receive any **salary, wages or other income due to the other spouse** from that other spouse’s employment or business
  - receive any **compensation for loss of income due to the other spouse** in connection with that other spouse’s employment or business
  - receive any **inheritance, donation, bursary or prize** due to the other spouse;
  - receive any **income from the separate property of the other spouse** (for example, rent paid on a piece of land belonging to the other spouse which is not part of the joint estate)
  - receive **dividends or interest on company shares or investments** which are in the name of the other spouse
  - receive the **proceeds of any insurance policy or annuity** which is supposed to go to the other spouse
  - **give away property which is part of the joint estate**, if the gift might have an effect on the other spouse’s interest in the joint property (meaning that small gifts such as birthday presents of a reasonable value will not require the other spouse’s consent).

There are **three exceptions** to the general rules listed above. The consent of the other spouse is not necessary if one spouse wants to:

- sell or trade **shares on a registered stock exchange**
- deal with **bank deposits or building society shares held in his or her own name**
- perform any of the listed transactions which are **part of his or her own normal profession or business**.

Section 7, *Acts requiring other spouse’s consent*.

<sup>63</sup> These exceptions cover cases which involve only a spouse’s separate property, cases for damages resulting from injury to one spouse or cases relating to the employment or business of one spouse. See section 9, *Litigation by or against spouses*.

<sup>64</sup> Section 10, Power of court to dispense with spouse’s consent with regard to specific juristic act, read together with definition of “court” in section 1.

**6.8.2** Furthermore, consent can be given within a reasonable time *after* the transaction has actually taken place – again with the only exceptions being transactions involving land or suretyship, where written consent must be obtained from the other spouse in advance.<sup>65</sup>

**6.9** The remedies for cases where one spouse acts without the other spouse's consent seem to have been designed with concerns about protection of the rights of third parties taking primacy.

**6.9.1** If the third party to the transaction (such as the bank, or a person who buys furniture from one of the spouses) does not know that there is no consent from the other spouse – and cannot reasonably be expected to know that there is no consent – then the transaction will be treated as though consent had been given. In other words, the transaction will not be reversed unless the third party knew or should have suspected that there was no consent from the other spouse.<sup>66</sup>

**6.10** If the spouse involved in the transaction should reasonably have known that the other spouse was *not* likely to give consent after the fact – and the joint estate suffers a loss because of this transaction – then the other spouse can ask for an adjustment of the joint estate. There are two ways to seek such an adjustment:<sup>67</sup>

**6.10.1** The wronged spouse can request an adjustment when the joint estate is divided, at the time when the marriage comes to an end because of divorce or death. This means that, instead of dividing the joint estate exactly in half, some amount will be deducted from the half-share of the spouse who acted wrongly and credited to the wronged spouse. Normally, this amount will represent half of the loss to the joint estate. If the asset involved was the personal property of the wronged spouse, then the full amount will be deducted. An additional amount can be deducted and paid over to the wronged spouse if the asset involved had special sentimental value to that spouse.

**6.10.2** The wronged spouse can also request an adjustment while the marriage is still in force. This can be useful if the spouse who acted without proper consent has some separate property which is not part of the joint estate – if this is the case, then the loss to the joint estate can be made up from that separate property. Otherwise, there would seem to be little possibility for any practical advantage from such a step. If there is no separate property, then the loss to the wronged spouse would have to be paid out of the couple's joint property, with a

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<sup>65</sup> The stronger provisions pertaining to land and suretyship stem from section 7(2) of the Married Persons Equality Act read together with the Deeds Registries Amendment Act 2 of 1996, which amends the Deeds Registries Act 47 of 1937 on these points.

<sup>66</sup> For interpretation of a similar provision in a South African statute, see *Distillers Corp Ltd v Modise* 2001 (4) 1071 (O). Here, one spouse married in community of property executed a deed of suretyship without the consent of the other spouse. However, the deed contained the statement that the spouse in question was "legally competent to execute it". The court found that a reasonable man in the position of the creditor would be entitled to assume, on the basis of this statement, that the spouse had the required written consent from the other spouse.

<sup>67</sup> Section 8.

corresponding adjustment when the marriage comes to an end and the joint property is divided.

**6.11** If one spouse is repeatedly entering into transactions without the required consent of the other spouse, or is recklessly squandering the joint estate, the other spouse can go to the High Court or to a magistrate's court and request a general suspension of the irresponsible spouse's power to deal with the joint estate, or an order forbidding the irresponsible spouse to engage in specific transactions.<sup>68</sup>

**6.12** One question which arises concerns the forum for adjustments requested on the basis of transactions made without the necessary spousal consent. This question is not addressed specifically in the statute. If such an adjustment is requested at the time of dissolution of the marriage, it would be logical to request the legal authority overseeing the dissolution to make the adjustment – which could be the High Court in the case of a civil divorce, and either the Master or a magistrate in the case of the estate of a deceased spouse. Requests for adjustment during the subsistence of a marriage would seem to be the province of the High Court alone, which would make the procedure too costly and inconvenient to benefit most Namibians.<sup>69</sup>

## **Effect on marriages “out of community of property”**

**6.13** As a result of the repeal of marital power by the *Married Persons' Equality Act*, both spouses in civil marriages which are “out of community of property” have the right to conduct transactions with their own separate property, without any consent or interference by the other spouse.

**6.14** The *Married Persons Equality Act* also addresses the sharing of expenses for household necessities in marriages “out of community of property”.

**6.14.1** All spouses have a mutual duty to support and maintain each other. This is not usually complicated if the marriage is “in community of property”, where the assets are pooled and shared. But if the marriage is “out of community of property”, then either spouse may end up paying for household necessities out of his or her own separate property.

**6.14.2** Under the old law, wives had the right to run up accounts for household necessities (such as rent or groceries or furniture purchased under a hire-purchase contract) which their husbands were then liable to pay.

**6.14.3** Under the new law, either spouse can enter into debt for household necessities which that spouse and the other spouse are both liable to pay. The person who is owed money can sue to get it back from either spouse, or from both, if necessary.

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<sup>68</sup> Section 11, “Power of court to suspend powers of spouse”, read together with definition of “court” in section 1.

<sup>69</sup> Section 8 does not specify the forum involved, but the definition of “court” in section 1 seems to indicate that only the High Court would have jurisdiction over such adjustments.

**6.14.4** The cost of household necessities is supposed to be shared between the spouses according to their respective means. If one spouse contributes more than his or her fair share, that spouse can bring a court action against the other spouse to recover the difference. That spouse can also ask for an adjustment at the time the marriage comes to an end.

## Effect on customary marriages

**6.15** Rights over marital property in customary marriage were not addressed by the *Married Persons Equality Act*. The Act addressed only certain limited aspects of customary marriages pertaining to guardianship over children and domicile (which means a person's country of legal residence).

**6.15.1** The Act gave husbands and wives in both civil and customary marriages equal powers of guardianship in respect of children of the marriage. Equal guardianship means that both spouses have the right to exercise full powers of guardianship independently, with the exception of a few important decisions which require the consent of both spouses. These decisions include the right to sell land belonging to the minor child, or doing anything which affects the child's right to that land.<sup>70</sup>

**6.15.2** The Act makes a wife's domicile independent of that of her husband in both civil and customary marriages, and provides that the domicile of children of the marriage will be the place with which they are most closely connected.<sup>71</sup>

## Overview of impact of law

**6.16** The symbolic import of this Act is probably even more important than its practical provisions, as it sends out a clear message that the law will no longer recognise husbands in civil marriages as "heads of household" – an aspect of the law which generated much controversy both inside and outside Parliament.

**6.16.1** In fact, debate on this point was so fierce that additional language was added to the original draft to emphasise the fact that the legal removal of the designation of head of household would not interfere with a family's right to treat the male as the head of the household privately. The Act stated that one effect of the abolition of marital power was that "*the common law position of the husband as head of the family is abolished*", with the subsequently added proviso that

*nothing herein shall be construed to prevent a husband and wife from agreeing between themselves to assign to one of them, or both, any particular role or responsibility within the family.*

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<sup>70</sup> The other exceptions, which are not relevant to a discussion of marital property, are consent to marriage of a minor child, consent to adoption of a minor child, removal of a minor child from Namibia by a parent or any other person, or application for inclusion of the child's name in a parent's passport.

<sup>71</sup> These aspects of the law, although praiseworthy, will be practically relevant to few Namibians.

**6.17** At the time of writing, there appear to have been no court cases brought specifically under the Act, although the Act may have been used in practice as a basis for adjustment in cases of divorce or death.

**6.18** Feedback from rural areas indicates that rural men and women do not have a good understanding of the provisions of the *Married Persons Equality Act*, even though many men and a few women have heard of it (see the box below).

### **PUBLIC MISUNDERSTANDING OF THE MARRIED PERSONS EQUALITY ACT**

Interestingly, many women say they have heard of this Act, but give incorrect information about what the Act 'says'. Some women, who seem to be guessing, think that "*maybe it is a law to protect women against their husbands*"; it gives women a greater share of property in divorce; and it tells men to cook and clean (which is said not to work because Owambo men will never cook or clean). However, the majority of women who guess at the contents of the Act think it 'says' that "*if a man passes away his wife and not his family must inherit the house*". Although this is a good guess, the law does not state terms of inheritance. One woman even claims to know a woman who has used this Act to stop her husband's relatives from taking property after his death. Of those Windhoek women who know about the Act, their knowledge of its contents is somewhat limited. However, Dolly, who is one of the youngest women (23 years old), has the best understanding of the Act:

*The Married Persons' Equality Act is the Act that promotes equality between married couples. This is equality in terms of owning properties ... When the husband is alive it helps a woman to have rights; even to open her own business, or buy a house without her husband's approval.*

The Windhoek women who know about the Act have heard about it from radio, television and the newspapers – they also tend to be younger than those who have not heard of it, indicating that younger women may have better access to information sources and thus may have a better understanding about their rights than older women. Rural women are less likely to have heard of or know the contents of this Act than their Windhoek counterparts. Only two of the rural women have heard of this Act and those two guess that the contents of the Act are that it prohibits a woman's in-laws from confiscating property after her husband's death, which is incorrect.

The vast majority of men from Windhoek have heard of the Married Persons' Equality Act. More Windhoek men than women have a good working knowledge of the contents of the Act, although men living in the rural areas know about the Married Persons' Equality Act but have less informa-

tion about its contents than their urban counterparts. Men say they have heard about this Act through talking with their male colleagues, the public debates that took place prior to the Act becoming law, and announcements in the mass media that the Act was made into law. As previously discussed, many men, in both the public and private sectors, tried desperately to prevent the Act from being passed into law, which seems to have led to a high level of awareness, especially among men. However, several of men's 'guesses' about what the Act 'says' are incorrect, such as the idea that a man can decide if the Act applies to his wife; *"it gives all men and women property equally"*; it dictates terms of inheritance; *"it is for young, educated people"*; and *"during a divorce case the man must move out of the house"*. The majority of rural men simply state that the Act gives equality to men and women within marriage, with little other explanation, and several rural men puzzlingly admit *"most of us do not understand this Act"*.

As with so many other aspects of gender equality, most men do not agree with the contents of the Act. As with other reforms aimed at gender equality, several men 'blame' the Married Persons' Equality Act for causing social and marital discontent such as *"this Act brings problems between couples who were initially living together well"*; women who 'misuse' the Act to take men's property; and *"The Act mostly disadvantages men ... that is why men continue to cause domestic violence"*. Tomas, a 43-year-old Owambo man sums up the feelings of many men when he says:

*This Act says a man and a woman in a family should be equal. They share things equally in their marriage. This Act to me seems as if it is there to make men feel inferior to women. This Act is more for women than men. I feel that we are no longer valued as we were in the past. They say it is equality in marriage but this Act is more one-sided.*

Even men who say that they agree with the Act do not fully understand it and think that it advantages women. For example, Illonga (53-year-old Owambo man) agrees that men need to change but thinks that, *"The fact of a woman sitting in front and the man at the back, it is very painful"*. Some men state that although the Act is a law, they do not think men, especially in the rural areas, will abide by the provisions in the Act. Simon, a 31-year-old Owambo man explains that, *"Very few people put this Act into practice. Say for example in the rural areas, do people really make use of this Act? I don't think so. There is no one to make people understand this Act well! It is true that traditional customs and beliefs affect this Act in many aspects, but they will not listen"*. Indeed, rural men who have an idea of what the Act means, do not like it. Lew (48 years old) exclaims, *"The law affects men because it goes against some of our customs. A man is regarded as head of the household but the law says it is incorrect!"*, in fact, several men say that rural men *"will not follow such an Act"*.

Interestingly, far more men than women in both the rural and Windhoek areas know about the Married Persons' Equality Act and many have found

out about it through other men, particularly because of its contentious nature. These data indicate that although men are not happy about it, they know that legally, women should have equal rights within marriage. The Married Persons' Equality Act is an important step towards creating a legal basis for gender equality.

**Debie LeBeau,**

*Structural Conditions for the Progression  
of the HIV AIDS Pandemic in Namibia,  
University of Namibia, 2004 at 30-31  
(based on research in Owambo, Herero,  
Nama and Damara communities).*

## 7. COMMUNAL LAND REFORM ACT

**7.1** The *Communal Land Reform Act 5 of 2002* (which came into force on 1 March 2003)<sup>72</sup> contains provisions which are intended to provide increased protection for widows. In terms of the new law, if a husband dies, his widow has a right to remain on the land if she wishes. She is entitled to keep the land even if she re-marries.<sup>73</sup>

**7.1.1** However, the right to retain the land through a chain of re-marriage is not indefinite. If a surviving spouse who stays on the land re-marries and then dies, the new surviving spouse still has a right to remain on the land. But if this second "surviving spouse" dies, then the land reverts to the appropriate traditional authority to determine who has the right to stay on the land – which could be the current surviving spouse, "any child from any of the marriages" or "any other person". The decision must be made in consultation with the members of the concerned family or families identified by the traditional authority with reference to the relevant customary law.<sup>74</sup>

**7.1.2** This is a welcome form of protection for women, although the Communal Land Boards which supervise the implementation of the Act are at the time of writing still establishing themselves. These supervisory bodies must be vigilant to make sure that widows do not come under pressure from their extended families to "decline" their right to the land.

**7.2** The same rules apply to widowers, although few problems have been experienced in practice where the husband is the surviving spouse.

**7.3** If there is no surviving spouse when the holder of the right to occupy the communal land dies, or if the spouse does not consent to remain on the land, then

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<sup>72</sup> It was brought into force by Government Notice 33 of 2003, *Government Gazette* 2926.

<sup>73</sup> Section 26(2)-(3), *Communal Land Reform Act*.

<sup>74</sup> Section 26 (3)-(4), *Communal Land Reform Act*.

the land is to be re-allocated to a child of the deceased identified by the Chief or Traditional Authority as being the rightful heir.<sup>75</sup>

**7.4** This is not technically a law reform on inheritance or marital property. The Act provides that a customary land right “endures for the natural life of the person to whom it is allocated”,<sup>76</sup> and the widow or widower does not inherit the land right but rather receives it through “re-allocation”.<sup>77</sup> Nevertheless, this change to customary practice should be considered in the context of family and property issues.

**7.5** The departure from custom in the *Communal Land Reform Act* was preceded by related actions.

**7.5.1** In 1992, Parliament passed a resolution requesting traditional leaders to allow widows to remain on their land, but cases of forcible removal of widows and seizure of their property, sometimes by violence, continued.<sup>78</sup>

**7.5.2** It has also been reported that the traditional leaders in Ondonga voluntarily revised their laws in 1993 to provide that widows would no longer have to pay to remain on their land when their husbands died, and that they would no longer be restricted to certain portions of the homestead during the mourning period, as was traditional, but would be allowed to move freely around the homestead to protect the property if necessary during this time. Similar decisions were subsequently adopted by all seven traditional authorities of Owambo.<sup>79</sup>

**7.6** These developments illustrate the prioritising of gender equality over traditional land rights, which could be viewed as a logical precursor to more far-reaching reforms on marital property and inheritance.

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<sup>75</sup> Section 26(2)(b) and (3)(b), *Communal Land Reform Act*.

<sup>76</sup> Section 26(1), *Communal Land Reform Act*.

<sup>77</sup> Section 26(2) and (3), *Communal Land Reform Act*.

<sup>78</sup> See Republic of Namibia, *First Country Report under the Convention on the Elimination of All Forms of Discrimination Against Women*, December 1995 at 145. The text of the resolution was as follows:

**Motion on the Rights of Women and Orphans**

That –

1. while the drought situation is still on, immovable properties, particularly the fields and the dwellings thereon, of the deceased persons should not be taken away from the widow or widowers and orphans;
2. fees payable to headmen as transfer payments on land inherited by the widow and children should ease to be paid meanwhile;
3. all food-related items should not be taken from the surviving spouse and children.

6 August 1992, introduced by the Hon P Ithana (MP, SWAPO)

<sup>79</sup> MO Hinz, “Family Law in Namibia: The Challenge of Customary and Constitutional Law”, in John Eekelaar and Thandababtu Nhlapo, eds. *The Changing Family – Family Forms and Family Law* (Hart Publishing, 1998) 139, at 145-47.

# Chapter 5

## FIELD RESEARCH: OPINIONS ON LAW REFORM RELEVANT TO MARITAL PROPERTY

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*This chapter highlights the concerns and preferences of people interviewed in nine regions of Namibia concerning issues of marital property under both civil and customary marriages.<sup>1</sup>*

*Some of the information in this chapter comes from a study conducted in 2002 by the Gender Training and Research Programme of the Multi-Disciplinary Research and Consultancy Centre of the University of Namibia with the support of the LAC on “Women’s Property and Inheritance Rights in Namibia”.<sup>2</sup> This study will be referred to as the “**UNAM study**”. The information was drawn from the raw data collected for the study, in addition to the final report.*

*This set of research data was supplemented by a small targeted study conducted by the Legal Assistance Centre in 2002, designed and analysed specifically for this report. This study, which will be referred to as the “**LAC study**”, interviewed key informants and selected couples married under customary law and under civil law.*

*Direct quotes from the interviews have been used liberally, to allow the informants insofar as possible to “speak for themselves”.*

*Such a broad survey cannot possibly give any deep understanding of specific customs, which must be considered in the historical, social and economic context of the community in question. But this survey does give a sense of the degree of variation and change in customs across and within specific ethnic groups in Namibia.*

*This chapter includes preliminary recommendations which flow from the field work. Further technical and legal aspects of the issues raised will be discussed in subsequent chapters of this report, where more detailed final recommendations are made.*

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<sup>1</sup> The nine regions were: Caprivi, Erongo, Karas, Kavango, Khomas, Kunene, Omaheke, Omusati and Oshana. The UNAM study covered six regions: Caprivi, Karas, Kavango, Khomas, Omaheke and Omusati, while the LAC supplementary study covered the same 9 regions: Caprivi, Erongo, Karas, Kavango, Khomas, Kunene, Omaheke, Omusati and Oshana.

<sup>2</sup> Debie LeBeau, Eunice Ipinge and Michael Conte, *Women’s Property and Inheritance Rights in Namibia*. University of Namibia, Windhoek, 2004 (hereinafter “UNAM study”).

# 1. METHODOLOGY

## UNAM study

**1.1** The fieldwork plan and questionnaire administered by UNAM was planned with input from a Steering Committee involving a range of organisations, several of which were recipients of grants from US-AID for projects involving women's property and inheritance rights. The groups represented on the Steering Committee were:

- Gender Training and Research Programme, Multi-Disciplinary Research and Consultancy Centre at the University of Namibia
- Legal Assistance Centre
- Department of Sociology
- Urban Trust Namibia
- Namibia Development Trust
- Multimedia Campaign on Violence Against Women and Children
- Law Reform and Development Commission
- Ministry of Women Affairs and Child Welfare
- US Agency for International Development.

**1.2** The study was designed to collect qualitative data through the administration of semi-structured questionnaires to key informants and members of small focus groups. The questionnaire was developed with extensive input from the members of the Steering Committee. Interviewers for this portion of the field research were selected and supervised by UNAM.

**1.3** This field research component involved a total of 48 focus group discussions and 60 individual key informant interviews divided evenly amongst six different regions and conducted during 2002. The basis for the selection of regions was the need to involve a range of ethnic groups with a variety of descent patterns (patrilineal, matrilineal and bifurcated):<sup>3</sup>

**Caprivi Region:** The Caprivi Region has 4.4% of the total Namibian population, who are primarily Lozi speaking and have matrilineal descent groups, but with strong patrilineal influences. The two areas selected were Katima Mulilo as the largest town in the region and one nearby rural village.

**Karas Region:** The Karas Region has 3.8% of the total Namibian population, who are primarily Nama speaking and have patrilineal social organisation. The two areas selected were Keetmanshoop, the largest town in the region, and one rural communal area.

**Kavango Region:** The Kavango Region contains 11.0% of the total Namibian population. Residents of this region are primarily Rukwangali speakers with a

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<sup>3</sup> All of the population figures below are taken from Republic of Namibia, 2001 Population and Housing Census: Preliminary Report, 2002 at 12. The descriptions of descent patterns are based on JS Malan, *Peoples of Namibia*, 1995 at 18, 35, 71 and 120.

matrilineal descent pattern. The two areas selected were Kaisosi, a suburb of Rundu (the largest urban area in the region) and the rural area of Mabushe.

**Khomas Region:** The Khomas Region, with 13.7% of the total Namibian population, was selected for inclusion because it is a mixed-ethnic area and primarily represents the attitudes of urban dwellers in the Greater Windhoek Area.

**Omaheke Region:** The Omaheke Region has 3.7% of the total Namibian population. The study targeted Otjiherero speaking people who have a bifurcated descent pattern. The two areas selected for this study were Gobabis which is the largest town in the region and one rural communal farming settlement.

**Omusati Region:** The Omusati Region contains 12.5% of the total Namibian population. Speakers in this region are primarily Oshiwambo, with a matrilineal descent pattern. The two areas selected for inclusion were Outapi, the largest town in the region, and Omufitugueelo, a rural village.<sup>4</sup>

**1.4** Key informants were selected based on their knowledge of the communities under consideration. They included community, church or business leaders, traditional leaders (such as headmen, chiefs, senior headmen or traditional authorities), regional councillors, school leaders (such as principals and teachers), church leaders, elderly people with traditional knowledge, women community leaders (such as from women's groups and business women), and where possible woman in different marriage types ("in community of property", "out of community of property", customary, or cohabitation).

**1.5** Focus groups were selected to fit demographic criteria designed to elicit views from a range of informants. Men and women were interviewed separately, and focus groups were divided into two age groups (25-40 years of age, and over 40 years old). Separate focus groups were held in urban and rural settings in each region. Each focus group consisted of four to six people. Because of the length of the questionnaire, each focus group was asked to answer only 50% of the questions.

**1.6** Research teams consisted of two persons for each region – a senior researcher functioning as supervisor and an interviewer who spoke the primary language of the people living in the region.

**1.7** This report has drawn on raw data from the UNAM study as well as the published summary.

## LAC study

**1.8** The UNAM survey was supplemented by 81 additional semi-structured qualitative interviews in 9 regions conducted by the Legal Assistance Centre during 2002 to elicit more detailed information on issues particularly pertinent to legal topics. Interviewees were selected purposively to fit particular criteria, such as men and women

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<sup>4</sup> UNAM study at 29.

married in civil and customary marriage, and under different property regimes. Some of the interviews involved married couples who were interviewed together.

**1.9** The questionnaire used for these interviews was developed independently by the Legal Assistance Centre, and administered by LAC staff lawyers and UNAM law students engaged specifically for this purpose. The interviewers were also responsible for transcribing their notes and/or recordings in English.

**1.10** The 9 regions involved in the supplementary study were Caprivi, Erongo, Karas, Kavango, Khomas, Kunene, Omaheke, Omusati and Oshana.

## 2. DIFFERENT TYPES OF MARRIAGES

**2.1** As explained in Chapter 4, two types of marriages are recognised in Namibia: civil and customary. Civil marriages can take place in court (solemnised by a magistrate) or in church (solemnised by a marriage officer). A customary marriage is an agreement between two kin groups, usually without the involvement of the traditional authorities.<sup>5</sup> Customary marriages take place within the community, usually with various rituals attached.

**2.2** The UNAM study asked the people interviewed about the different ways people can marry within their culture. Respondents were also asked to describe the most common way that people in their culture marry. The findings of the UNAM study on this point were summarised as follows:

*As previously stated, [customary] marriage is contracted between two kin groups rather than between two individuals. In most Namibian communities there are elaborate rituals and wedding ceremonies at which both families officiate. These same relatives will be contacted if problems arise within the marriage. Although both civil and customary marriages are recognised in all Namibian communities, many especially rural people say that they still prefer customary marriages ... [D]ata from this research indicate that many people in Namibian communities have a 'double' marriage; usually getting married in a religious or civil ceremony as well as having a customary marriage. Most Namibian communities have customs where animals are slaughtered, rituals and ceremonies are performed and gifts are exchanged between the extended families of the bride and groom. Most people feel that there must be some type of ceremony for a couple to be considered married, otherwise community members may feel that the couple is not married but only cohabitating.*<sup>6</sup>

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<sup>5</sup> Heike Becker and Manfred O Hinz, *Marriage and Customary Law in Namibia*, Centre for Applied Social Sciences, Working Document 30, 1995 at 49.

<sup>6</sup> UNAM study at 36.

### 3. CIVIL MARRIAGES

#### Understanding of marital property regimes in civil marriages

**3.1** Before being able to extract ideas from people interviewed during the community consultation sessions for the LAC study (ie key informants and couples married in various ways), it was necessary to ascertain what they knew about the various ways of organising property in a civil marriage. Interviewees were first asked if they understood the terms “in community of property”, “out of community of property”, “accrual system” and “ante-nuptial agreement”. In some cases they were asked to explain their understanding of these terms, to check the accuracy of their perceptions.

**3.2** More than two-thirds of the respondents in the LAC study had a general understanding of the two main systems: “in community of property” and “out of community of property”.

**3.2.1** The exceptions to this were in Caprivi and Kavango, where the majority of respondents had only a little or no knowledge of these systems.

**3.2.2** In Oshana Region, respondents noted that the level of knowledge varied amongst different people, saying that those with education and job experience usually had a better understanding.

**3.3** The UNAM study noted that most people understand that the marital property regime will have an impact on property division during a civil divorce.

**3.4** A study conducted by the Namibia Development Trust (NDT) almost a decade earlier than the LAC and UNAM studies, involving women from three Owambo groups (Mbalantu, Kwambi and Kwanyama), found slightly fewer people knowing the difference between being married “in community of property” and “out of community of property”. Compared to the LAC study’s 66%, the 1994 NDT study found that only 49% of the Mbalantu respondents, 54% of the Kwambi and 56% of the Kwanyama knew about the two property regimes.<sup>7</sup>

**3.5** Although it would be tempting to conclude from the findings of these three studies that awareness of marital property regimes is on the increase, the studies’ target groups differ significantly, making comparison over time quite difficult.

**3.6** Respondents’ understanding of these two systems can be indicated by the following quotations:<sup>8</sup>

*“In community of property” means that everything that the couple owns belongs to both of them. [female security guard, age 38, Omaheke Region]*

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<sup>7</sup> Namibia Development Trust with assistance from SIAPAC-Namibia, Friedrich Ebert Foundation and Centre for Applied Social Sciences, *Improving the Legal and Socio-Economic Situation of Women in Namibia*, 1994 at 54 (hereinafter “NDT study”).

<sup>8</sup> Unless otherwise indicated, all quotations come from the LAC study.

*“In community of property” means that the property owned belongs to both spouses and it may not be sold without the permission of the other. [male respondent married in community of property, Kunene Region]*

*“Out of community of property”, I understand to mean that once you get divorced each spouse takes what belongs to him/her. [male handyman, age 46, Omaheke Region]*

*“Out of community of property” is when the property that belongs to one of the husband and wife before and after marriage belongs to that person alone. [female respondent married in a civil marriage, Khomas Region]*

**3.7** In contrast, very few people know about the “accrual system”. For example, in Oshana, Khomas, and Kunene Regions a handful of respondents had a little knowledge about accrual and one respondent in Karas had heard the term but could not explain what it meant. Respondents from the other regions did not know about the “accrual system”.

**3.8** In some cases the respondents’ understanding of accrual was incorrect. For example, one female respondent in Kunene thought accrual was for those couples who first cohabited and acquired property together during this period. She thought that once such a couple decided to marry they would have to marry “in community of property” because this property belonged to both of them.

**3.9** Knowledge about ante-nuptial agreements also proved to be very limited. A few respondents, such as those in Erongo and Oshana Regions, knew about the possibility of entering into ante-nuptial agreements, and one respondent in Khomas learned about the ante-nuptial agreement through the marriage officer.

**3.10** Even amongst these respondents who were aware of ante-nuptial agreements, most did not have the correct understanding. For example, three different couples in Erongo thought that when the priest provides pre-marital counselling and asks whether the couple wants to be married “in community of property” or “out of community of property”, the decision they make is the ante-nuptial agreement.

**3.11** In Karas, two male respondents noted that *“ante-nuptial contracts are only known to the white people and the younger generation.”* Respondents from both Omaheke and Erongo felt that the making of ante-nuptial agreements is for the *“rich, the young, and educated people”*. All agreed in all regions that the making of ante-nuptial contracts was not commonplace.

**3.12** These findings coincide with previous conclusions made by the LAC in a study of civil divorce cases in Namibia. That study found that only about one-fifth of the divorce cases examined involved marriages by ante-nuptial contract.<sup>9</sup>

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<sup>9</sup> This study involved 434 divorce cases dealt with by the High Court during the period 1990-1995. Legal Assistance Centre, *Proposals for Divorce Law Reform in Namibia*, 2000.

**3.13** Few couples register ante-nuptial contracts in Namibia, and they are popular primarily with urban residents in the upper income brackets. This geographic and economic bias is plausible considering that the assistance of a lawyer is generally required for an ante-nuptial contract.

## PRELIMINARY RECOMMENDATIONS

**Implement a widespread awareness campaign around the various property regimes, especially amongst marriage officers and traditional authorities who may be providing advice to engaged couples.**

**The 1994 NDT study determined that most women went to their future husbands or parents to get advice on how to get married and recommended that men and parents should be targeted for any education on marriage. We recommend that educational initiatives be aimed at women, men, parents, and people in leadership positions.**

**Since there appears to be only a basic understanding of the main property regimes, a widespread awareness campaign around all property regimes will be necessary before civil society can effectively contribute to the debate on law reform. We suggest utilising television and radio as well as workshops and booklets.**

**Develop alternatives to the making of formal ante-nuptial agreements so that couples who want to use them are not dependent on lawyers accessible only to those with economic means living in urban areas.**

## Most common marital property regime for civil marriages

**3.14** The LAC study indicates that the most common marital property regime in Namibia appears to be “in community of property”, with two exceptions.

**3.14.1** The one exception is Omaheke Region where respondents reported that both “in community of property” and “out of community of property” regimes are equally common.

**3.14.2** The other exception is amongst the Muslim population. Community of property does not exist under Islamic law and all husbands and wives own their own property.

**3.15** The 1994 NDT study corroborates this finding for three Owambo groups (Mbalantu, Kwambi and Kwanyama), where between 76 and 80 percent of couples surveyed were married “in community of property”.<sup>10</sup>

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<sup>10</sup> NDT study at 52.

**3.16** The current finding also accords with previous LAC divorce research, as represented by the tables below. As Table 2 confirms, “in community of property” appears to be more popular even in the regions north of the former Police Zone, where “out of community of property” has since 1950 been the default regime for black couples as a result of the operation of the *Native Administration Proclamation 15 of 1928* (as explained in Chapter 4).<sup>11</sup>

**Table 1: Marital property regime indicated in divorce cases in the High Court in Namibia 1990-1995**

	#Cases	Percent
In community of property	308	71.6
Out of community of property	118	27.4
Accrual	2	0.5
Other	2	0.5
<i>Total</i>	430	100.0

**Source:** Legal Assistance Centre, *Proposals for Divorce Law Reform in Namibia*, 2000 (Table 20A). A mathematical error in the original table has been corrected here.

**Table 2: Marital property regimes indicated in divorce cases in the High Court in Namibia 1990-1995 by place of marriage**

	IN COMMUNITY OF PROPERTY		OUT OF COMMUNITY OF PROPERTY		TOTAL	
	#Cases	Percent	#Cases	Percent	#Cases	Percent
Khomas	128	69.6	55	29.9	183	100.0
Otjozondjupa	19	70.4	8	29.6	27	100.0
Erongo	30	73.2	11	26.8	41	100.0
Hardap	39	90.7	4	9.3	43	100.0
Karas	15	83.3	3	16.7	18	100.0
Omaheke	13	72.2	5	27.8	18	100.0
Kunene	5	100.0	0	0.0	5	100.0
<b>Oshikoto</b>	13	86.7	<b>2</b>	<b>13.3</b>	15	100.0
<b>Oshana</b>	6	85.7	<b>1</b>	<b>14.3</b>	7	100.0
<b>Ohangwena</b>	4	66.7	<b>2</b>	<b>33.3</b>	6	100.0
<b>Kavango</b>	4	100.0	<b>0</b>	<b>0.0</b>	4	100.0
<b>Omusati</b>	2	50.0	<b>2</b>	<b>50.0</b>	4	100.0
	278	74.7	93	25.0	371	100.0

In the regions printed in bold, the *Native Administration Proclamation 15 of 1928* provides that the default regime for marriages between blacks is *out of community of property*. In contrast, the default regime for all other marriages in Namibia is *in community of property*. **Source:** Legal Assistance Centre, *Proposals for Divorce Law Reform in Namibia*, 2000.

**3.17** What is not clear from the research is **WHY** “in community of property” is most common, even in areas where it is not the default position.

**3.17.1** The LAC study shows that the vast majority of respondents knew that they “could make an agreement between themselves about how to share property” before they got married. (The number of respondents who knew this was more than double the number who did not know.)

<sup>11</sup> It must be kept in mind that the LAC divorce case sample included only a small number of cases from these regions. It is also possible that the sample for these regions may have included white, coloured or mixed-race couples, for whom the default regime is “in community of property” in all parts of the country. The default regimes are explained more fully in the section on “Default positions” in Chapter 4.

**3.17.2** The difficulty and expense of making an ante-nuptial agreement could explain the preference for “in community of property” in the parts of the country where it is the default regime for most residents, but this does not explain why it is also common amongst couples who had to obtain it by actively declaring that they did not want the default regime of “out of community of property” which would have otherwise applied to them.

**3.17.3** It could be assumed that the concept of “in community of property”, and possibly also the practice, comes from customary marriage traditions (ie that property would be shared equally, or owned by the husband with the wife never owning her own property except for some very specific household or personal items).<sup>12</sup> For example, this assumption can be drawn from the following quotation:

*“In community of property” is our culture; a culture of sharing.* [male respondent married in community of property, Karas Region]

**3.17.4** Furthermore, although not stated explicitly in all cases, clearly the church has had some influence on people’s choice of property regime (see below, where one-third of the respondents felt the church strongly influenced their choice of property regime, which was in almost all cases “in community of property”).

## “Best” property regime for civil marriages

**3.18** In the LAC study, key informants were asked: “Which system do you think is best for most people in Namibia?” Married respondents were asked, “What system do you think should apply automatically to civil marriages if the couple does not make an agreement between themselves on how to share property?”

**3.19** While responses and reasoning on this point varied widely between the regions and within the regions, “in community of property” stood out as being the “best” system in the minds of most respondents. Although the sample for this study was small and selected, responses can still be “quantified”. Table 3 summarises the response from the various regions.

**Table 3: Opinions of “best” system to apply as default regime**

Region	I-COP	O-COP	Accrual	Ante-nuptial	Should be no automatic default
Omaheke	1	3	1	0	0
Caprivi/Kavango	6	2	0	0	2
Oshana	8	0	5	0	0
Karas	1	2	0	2	4
Kunene	4	0	0	0	0
Khomas	1	2	1	1	1
Erongo	11	2	0	0	0
Muslim	0	1	0	0	0
<i>Total</i>	32	12	7	3	7

Source: LAC Study.

<sup>12</sup> Becker and Hinz, quoting JC Bekker, *Seymour’s Customary Law in Southern Africa* (5<sup>th</sup> edition) at 250, state that “... community of property and of profit and loss was thought to be strange to the mind of the average Black person ...” Becker/Hinz at 21), but this statement seems to refer to colonial perceptions rather than the situation on the ground.

**3.19.1** Respondents in Kunene and Oshana Regions suggested that the “in community of property” regime would be the best system because “*this is based on Namibian traditions, norms and religious beliefs*”.

**3.19.2** Within Caprivi, Kavango, and Erongo Regions some respondents felt “in community of property” was the best and other respondents preferred “out of community of property”, without giving consideration to the other possible options. In the other regions the respondents’ opinions varied across all four options.

**3.19.3** Amongst the Muslim communities, “out of community of property” is the only recognised system and therefore it would have to be the preferred default system.

**3.20** Just over half of all the respondents mentioned “**in community of property**” as being the best default system, but in many cases this preference appeared to be based on the fact that this is the most familiar system.

**3.20.1** Other reasons given for this choice highlighted the point that the majority of people in Namibia depend on others and this regime is based on values of “*mutual trust, sharing and understanding between couples*”. For example:

*“In community of property” should be made applicable automatically, because “out of community of property” is alien to me and most people. It causes friction if one person owns one thing and the other something else. This causes an attitude problem. In community of property is to everyone’s benefit. “Out of community of property” leads to problems as people may have an attitude of ‘it’s my CD player, it’s my car’, etc. It causes disunity. [male respondent married “in community of property”, Karas Region]*

*“In community of property” should apply to all people in Namibia because “out of community of property” and the “accrual system”, as we see it, will cause problems in the marriage as one party may feel that he/she is more the boss over the property as he/she has brought more property to the house. [married couple “in community of property”, Khomas Region]*

**3.20.2** For several respondents, “in community of property” was appropriate because it represented or enforced the “union” or “bond” that they felt marriage should be about, as in the following examples:

*The most suitable system is the “in community of property” regime since it is the core of the marriage foundation. Marriage is the union of two souls; hence, there must also be union when it comes to property. The underlying reason being to foster respect amongst spouses and to avoid arguments between the spouses. [male key informant married “in community of property”, Kunene Region]*

*“In community of property” is an acceptable and a better system for marriage, since it strengthens the bond between spouses. [male key informant married “in community of property”, Kunene Region]*

**3.20.3** Similarly, several respondents focused on the “love” aspect of marriage and how a couple goes into marriage without expecting to ever get divorced. Because “sharing” and “trust” were considered the key words at the time of the wedding, “in community of property” was considered to be the best regime:

*We have discussed and agreed about this in advance and have agreed on “in community of property”. I mean when you get married, you don’t get married to be divorced, so you don’t make provision for that by getting married “out of community of property” in case you get divorced. I won’t get divorced! [female engaged to be married “in community of property”, Karas Region]*

*“In community of property” is a system based on love. Even though the expenses are both the husband’s and the wife’s, you promise to love through ‘thick and thin’. [female respondent married “in community of property”, Kunene Region]*

**3.20.4** A few respondents emphasised the point that they felt “in community of property” was best for the children from a marriage. For example:

*“In community of property” system reduces divorce, fosters respect and protects the future of children. [male respondent married in community of property, Kunene Region]*

*“In community of property” should be the default regime because then one is secure and you know the spouse and children are also provided for. [male respondent married in community of property, Erongo Region]*

**3.21** About 20 percent of the respondents in the LAC study believed that “**out of community of property**” would be the best default system for Namibia. The reasons for this opinion varied considerably.

**3.21.1** Some people emphasised the point that nowadays more people are educated and both partners are often working and earning their own money. One conclusion was that “out of community of property” makes sense in today’s situation, to simplify the process of dividing property and money after divorce or death. The following quotations are a sample of these thoughts:

*Getting married “in community of property” was better for most people in the past, due to existing circumstances. The man was considered the head of the household and the main breadwinner. Now it is better getting married “out of community of property” as both partners are*

*breadwinners and each want to keep his or her own property, especially educated people. [male respondent married “in community of property”, Karas Region]*

*Educated people prefer the “out of community of property” system as the best system nowadays. Most people work nowadays and want to keep their property. [male respondent married “in community of property”, Karas Region]*

**3.21.2** A few respondents, notably all female, emphasised the point that “out of community of property” reduces problems if there are debts being piled up by one partner, especially in the case of gambling, as follows:

*“Out of community of property” is the best when there are debts. For example you find spouses who are compulsive gamblers and they run up debts into the thousands and [if “in community of property”] the other spouse has to be liable for these debts. [female respondent, Khomas Region]*

**3.21.3** Other respondents felt that “out of community of property” would help to reduce problems and confusion upon divorce or death:

*“Out of community of property” is the best for a number of reasons such as when assets are frozen upon the death of one spouse [under “in community of property”], this causes hardship to the surviving partner. [female respondent, Khomas Region]*

*With “out of community of property” all parties will know what belongs to whom and thus there will be no conflict about property when the parties divorce or if one party dies. [male respondent, Khomas Region]*

**3.22** A minority of the respondents in the LAC study thought that the “**accrual system**” was the best default system.

**3.22.1** In Oshana Region, three respondents married in civil marriages felt that the “accrual system” should apply automatically. Two of them provided specific reasons which related to the idea that each partner should get their fair share after death or divorce:

*The “accrual system” is the best because a woman who works during the marriage and contributes may be left with nothing. Thus whatever she provided support for and contributed towards during marriage will ensure her some security in the event of a death or divorce. [female respondent, Oshana Region]*

*One does not always discuss these issues prior to marriage, therefore it is better to use the accrual system, because one can keep possessions*

*acquired prior to marriage and share those acquired during marriage.*  
[female respondent married in community of property, Oshana Region]

The third, a female respondent in Windhoek who seemed to be well aware of the “accrual system”, similarly felt that property brought into the marriage should be kept separate from property acquired together during the marriage, because “*during the marriage each spouse makes a contribution and this should be shared amongst the couple*”.

**3.22.2** Similarly, other responses emphasised the need to recognise efforts put into gaining wealth and property before marriage and the shared contributions during marriage. Accrual would best protect the interest of each partner’s relatives in terms of inheritance and also protect children from previous relationships, while still recognising the contributions that both partners make during the marriage.

*The “accrual system” is regarded as best suited because problems arise when inheritance is at stake, as extended family claims that certain property acquired before marriage was done with their help and the wife played no role in acquiring such properties. The family of the husband claims succession of all properties, and also when there is a conflict between marital regimes and traditional values of marriage. The concerns of the extended family of either spouse must be addressed as they do not want to be neglected.* [male respondent, Oshana Region]

*The “accrual system”, as you explain it to me, will be the best system for most people in Namibia, because some of us, like me, have children before the marriage who might not be the children of your husband. If you marry according to the “accrual system”, those children can at least inherit the property you owned before the marriage. Property acquired during the marriage can then be shared as both spouses contribute.*  
[female respondent, Khomas Region]

**3.22.3** One female respondent who was married “in community of property”, felt that the accrual system would not be good as the default system because it was only appropriate for those couples who were already independent before marrying, ie those who had already acquired their own property, insurance policies and so forth and had pre-marital children.

**3.23** Seven respondents, with over half from Karas Region, felt that people must be well informed and then have the **freedom of choice to select the system that meets their own needs**. At least one respondent gave the impression that people tend to choose “in community of property” only because they are most familiar with this regime. Several people emphasised that couples are not sufficiently knowledgeable to make a well-informed choice, recommending that the education process must improve. Some suggested that **no default system** should be provided, so that couples would be forced to inform themselves and consciously choose a system. These views are reflected in the following quotations:

*I cannot say which system is the best. This decision depends on the relationship between the two people, and on their tradition and cultural background. People should be able to decide on this themselves. [female key informant married in community of property, Karas Region]*

*Many people get married “in community of property” automatically without knowing what options are available. The marriage officer should be obliged to inform people about the different systems and to ask them which they want to choose. [married couple, “in community of property”, Karas Region]*

*People should just be able to tell the marriage officer which regime they prefer, without being forced to sign anything. [Kavango Region]*

*We thought we could only get married “in community of property” [Tswana male respondent, Omaheke Region]*

*I did not know that any inheritance was considered to be part of the estate and therefore had to be shared if married “in community of property”. [female married “in community of property”, Karas Region]*

**3.24** In conclusion, all the comments suggest that opinions are so diverse that it would be difficult to dictate one system to the people of Namibia. The impression is that many feel that “in community of property” is the best because this is the regime they know the best, and because of the influence from chiefs and traditional leaders and in some cases churches (see below). The key will be to ensure that people are well informed about the various options and can make a choice based on correct and detailed knowledge, not solely because of traditional beliefs and never through coercion or intimidation.

**3.25** One issue that came out during discussions on the “best” system and the system that should be used as the default was the problem of “property grabbing”. Several respondents in Oshana felt that the parents of both spouses should be ensured of getting a small percentage of the estate when one spouse dies, to prevent uncontrolled property grabbing. A mechanism for accomplishing this could be added to any of the underlying marital property systems.

## **PRELIMINARY RECOMMENDATIONS**

**The discriminatory provisions of the *Native Administration Proclamation* on marital property should clearly be repealed, as already recommended by the Law Reform and Development Commission.**

**Thus the law must select a system that applies to *all* Namibians. Three options seem to follow from the consultations:**

- (a) Drop the default concept altogether and require every couple to choose a marital property regime for themselves after being educated on the various ways to share property. This could be accomplished through a simpler alternative to an ante-nuptial agreement which need not involve lawyers, although couples who wish to do so would still be free to make a detailed ante-nuptial agreement. This approach would be the most flexible in allowing existing polygamous marriages or cohabitation arrangements to be taken into account if necessary.
- (b) Install the “accrual system” as the default system as this combines the ideals and the practicalities of both “in community of property” and “out of community of property”. However, because this system gives husbands and wives independent power to deal with their separate property during the subsistence of the marriage, this default might continue to disadvantage women who are likely to bring less property into the marriage.
- (c) Make “in community of property” the default regime for all marriages, as this seems to be the most widely understood and preferred. This regime has the advantage, in terms of the *Married Persons Equality Act*, of requiring joint decision-making by husbands and wives during the subsistence of the marriage.

The pros and cons of these three options will be discussed in more detail below in Chapter 8.

## Church influence on choice of marital property regime

**3.26** Most respondents in the LAC study stated that they learned about the different marital property options from the church marriage counsellor. Only one respondent mentioned that the civil marriage officer told them about the options.

**3.27** Almost two-thirds of the respondents stated that the church officers simply explained the different regimes, without trying to dictate which system was best or was “required”.

**3.27.1** Those who felt the church did not directly prescribe the couple’s decision explained as follows:

*I am not aware that the church propagates any particular system. Although the church preaches that ‘you are one’, it does not mean that*

*the spouses should join their estates literally. The emphasis is on spiritual unity rather than material things. The parties are left with the discretion to decide whether they see spiritual unity as material unity. [male Nama traditional leader married “in community of property”, Karas Region]*

*One regime is not really encouraged, but from a Biblical point of view, the union of man and woman goes more in line with a marriage in community of property. The choice is then left for the couple to decide “in community of property” or “out of community of property”. They are not forced but sort of advised. [male elder, Apostolic Mission, Erongo Region]*

**3.28** On the other hand, 13 respondents said that the church always recommended “in community of property” while one respondent felt the church “favoured” “out of community of property”.

**3.28.1** Comments from those who said the church strongly suggested “in community of property” were as follows:

*The Catholic Church encourages couples to marry “in community of property” because they feel all the property in the common home belongs to both partners, and the couple must share everything. [male Tswana respondent, Omaheke Region]*

*The churches encourage people to get married “in community of property” because the Bible says that when a man and a woman get married they become one. Thus everything they acquire together must belong to them both and their children. [male Damara respondent, Omaheke Region]*

*Yes, the church encourages people to choose the “in community of property” regime since at the beginning God created a man and a woman and married them or joined them together for good. Since marriage has been instituted by God for unity this also covers everything they have in their marriage. [female pastor and marriage officer, Oshana Region]*

**3.28.2** Similarly, one male church leader in Rundu says he tells the couples that come to him for marital information, “in community of property’ is the best choice because now you will be united and you must share everything”.

**3.28.3** In contrast, one female Damara respondent based in Omaheke Region said she was told by the church it would be best to choose “out of community of property”, “so they can avoid being responsible for the others spouse’s debts”.

**3.28.4** In the Muslim community, under Islamic law there is no “in community of property”, so all couples must be married “out of community of property”. The husband and wife always own their own property separately. However, the

Muslim marriage officer must ensure that the marriage is registered in terms of the laws of the country.

## PRELIMINARY RECOMMENDATION

**Couples must be well informed about the various marital property options so they can make a choice based on detailed knowledge, not solely because of traditional beliefs and never through coercion or intimidation.**

### Knowledge about ante-nuptial arrangements

**3.29** As noted above, the LAC study indicates that most respondents were informed before they got married about the different marriage regimes (mainly “in community of property” and “out of community of property”), and knew that they could make an agreement between themselves before they got married on how to share property. (The number who had this level of awareness was almost double the number who did not.) However the concept of a default system does not seem to be clear to many, complicated by the fact that the default system still differs between different races and regions. Furthermore, the steps for making a valid change to the default marital property system are not well-understood.

**3.30** The LAC study indicates that there is also confusion about when and how the choice must be declared.

**3.30.1** Two respondents in northern Namibia stated that they declared verbally on the day of their wedding that they wanted to be married “in community of property” and that this is now written on their marriage certificate. However, as explained in Chapter 4, this is not sufficient to make their choice enforceable against third parties.<sup>13</sup>

**3.30.2** None of the LAC respondents mentioned that they made an ante-nuptial contract, or a written declaration within a month before their wedding, as dictated by the laws which currently apply in the different parts of Namibia.

### Ability to change the marital property regime after the marriage

**3.31** One important issue to consider is the case where a couple might want to change to a different property regime after the marriage has taken place.

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<sup>13</sup> As explained above in Chapter 4, the law holds that a private agreement made between husband and wife prior to the marriage on their marital property system can be enforced between the two of them, but would not stand up in court if a third party were involved.

**3.31.1** At the moment, as explained in Chapter 4, the general common law rule on marital property regimes in Namibia includes the concept that “community once excluded cannot be introduced, and once introduced cannot be excluded”. An ante-nuptial contract cannot generally be varied by a post-nuptial agreement between the spouses.

**3.31.2** Namibia needs to decide if this law should be made more flexible as has been done in South Africa. Circumstances change and law reform may want to provide an outlet for these changed circumstances, in the same way that it is possible to change the terms in a business contract as long as both parties agree.

**3.32** To assess the need for law reform on this topic, the LAC study asked key informants and married couples (in civil and customary marriages), “Should a husband and wife be able to change their minds about how to share property after the marriage has taken place? Why or why not?”

**3.33** The data indicate that the vast majority of respondents (more than double the number of those with a different opinion) felt that couples should be able to change their mind and choose a different marital regime after the marriage if they wish.

**3.33.1** Of those respondents who said “Yes” to this question, 60 percent were females, while of those who said “No” exactly half were females and half males.

**3.33.2** When looking at the individual regions, in all the regions except Omaheke more respondents were in favour of allowing couples to change their mind. In Omaheke Region, the respondents were split in half.

**3.34** Twelve reasons were cited as to why couples should be allowed to change their minds. These reasons are listed in Table 4.

**Table 4: Reasons for allowing changes to property regime after marriage**

Rank	Reason	No. of times reason cited
1	Circumstances change	6
2	Misunderstood property regime issues/choice at time of wedding	5
3	One partner is abusing alcohol	4
3	One partner is wasting resources/property	4
4	One partner is not productive/prosperous	3
5	Gambling	2
6	Must protect one’s own interest	1
6	Ready to divorce	1
6	Lack of love	1
6	Lack of trust	1
6	Lack of respect	1
6	One partner is abusive	1

Source: LAC Study

**3.34.1** These affirmative opinions are represented in the following quotations:

*In cases where the parties made an uninformed decision and then changed their minds as they see this system as not being good for them anymore, they should be allowed to change. Love is blind at first and then people start seeing things clearer later on. [Nama male traditional leader, Karas Region]*

*Yes, a husband and wife should be able to change their minds because at the beginning everything seems perfect and later one realises that your partner is not the person that you thought she or he was. The one spouse can become a person who gambles or an alcoholic. Because of these habits she or he can waste money and at the end of the day it is the children who suffer. [Damara female respondent, Omaheke Region]*

*If you are married “in community of property”, you may realise you do not want this if your partner is not contributing to your common wealth. In these situations one should be able to change to “out of community of property”. [Damara male respondent, Omaheke Region]*

**3.34.2** One male respondent from Oshana Region felt a couple should be allowed to change their mind, but cautioned that “it depends on the situation between the spouses. One should not do it to cheat the wife”.

**3.34.3** Three respondents in Kunene Region emphasised strongly that the property regime could only be changed if both partners agreed to the change. One respondent felt that the reason for wanting to change had to be “substantial”.

**3.35** In contrast, four reasons were cited as to why couples should not be allowed to change their minds, as indicated in Table 5.

**Table 5: Reasons for NOT allowing changes in property regime after marriage**

Rank	Reason	No. of times reason cited
1	Made your choice before the wedding, must stick with it	4
2	A change would create conflict and misunderstandings	3
3	A change would create distrust	1
3	A marriage is a union and should not be changed	1

Source: LAC Study

**3.35.1** These negative opinions are represented in the following quotations:

*If a husband and wife are allowed to change their minds, it will bring instability to the marriage because once they are given the chance to change they will want to do it again and again ... In the Tswana tradition, a marriage is not only a union between a man and a woman and it does not only concern the two. It is a union between the two*

*families and if the husband and the wife want to change their marital property regime, they should consult their elders and the elders will help them to sort out their problems. [Tswana male respondent, Omaheke Region]*

*Such changes will only create distrust and destroy the essence of marriage. [female agricultural officer, Caprivi Region]*

*In my community, the family must approve the marriage and give their blessing so if you change it [the regime] afterwards, the family will not help you if you experience problems in the marriage. [male respondent, Kavango Region]*

*No, they should leave the regime as is. Otherwise the one spouse may undermine the other. If they really want to change then they should divorce and remarry under a new agreement. [Owambo male respondent, Oshana Region]*

## PRELIMINARY RECOMMENDATION

**Based on the views of the majority of the respondents in this research, the law should be made more flexible so that couples can change their property regime after they are married as long as they both agree to the change. This added flexibility would have no impact on those who do not feel change should be allowed, as they can simply ignore the option for change.**

## 4. CUSTOMARY MARRIAGES

**4.1** As noted in Chapter 4, customary marriage takes place when a man and a woman are married according to the customs of their community, but without a marriage officer. Currently no registration process or regulating system is in place for customary marriages. Generally though, customary marriage is regulated mainly by unwritten customary law, which according to Becker and Hinz “represents the law governing the actual social life of most Namibians in their day-to day lives. Customary law is clearly the body of rules and actions which has the most effect on the lives of most people, and particularly women”.<sup>14</sup>

**4.2** These unwritten customary laws typically differ from community to community – and sometimes even within communities – as reiterated below by the respondents. Because of the wide range and often contradictory nature of the data, the sources

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<sup>14</sup> Becker/Hinz at 5.

for each assertion in this section are clearly indicated in the text as well as in the footnotes.

## **The influence of descent patterns on marital property**

**4.3** According to both the UNAM study and the 1995 report of Becker and Hinz, there are various ways that people in Namibia trace how they are related to each other.

**4.3.1** The UNAM study states that in Namibia there is basically patrilineal descent amongst the Nama and Damara, matrilineal for the Owambo and Kavango and bifurcated descent for the Herero communities, while the Caprivi people are matrilineal but with strong patrilineal influence.

**4.3.2** The 1995 study by Becker and Hinz differs slightly on the terminology. They refer to Herero kinship patterns as 'double descent' (rather than 'bifurcated') with every individual belonging to both a patrilineal and a matrilineal line. For people living in Caprivi (Fwe, Subiya and Yeyi), they say: "*the kinship system heeded by the Caprivian communities can be more correctly labelled as cognatic, rather than either patrilineal or matrilineal.*"

**4.4** The UNAM study found that most respondents' concepts of their descent patterns reflect the patterns identified above, with the exception of the Nama and Khomas Region people.

**4.4.1** The Nama see children related to both sides of the family with the mother's side being more important. The UNAM study theorises that this emphasis on the mother's family may be due to the presence of many single mothers amongst the Nama. One reason given for being related to both sides of the family is that although the mother has raised a person, that person carries his or her father's name.

**4.4.2** In Khomas Region people see children as being related to both sides of their family. Urban people seem to trace descent in a more "Western" fashion than in the rural areas.

**4.5** The descent patterns are important because customary marriages take place between two kin groups rather than between two people. The kinship system, who a person is related to and the nature of the relationship often determine who has rights to which categories of property when death or divorce occur under customary traditions.

**4.5.1** For example, according to Becker and Hinz (1995), in a patrilineal society the lineage property is owned and passed on following the lines of the patrilineal succession. Thus the husband's kin will normally see the belongings in 'his' house as 'his' property and claim them upon his death. However in true patrilineal societies, the marriage is not seen as being dissolved because of the death of the husband, and the wife will most likely remain in the husband's kin group, possibly being 'inherited' by the brother of the deceased. Therefore she will be able to make use of her deceased husband's family property.

**4.5.2** Becker and Hinz (1995) observe though that in a changing society, widow inheritance (levirate marriage) is almost non-existent and the situation in patrilineal societies has become similar to matrilineal ones. This leads often to the disinheritance of widows and a system very much like a marriage “out of community of property”.<sup>15</sup> In contrast, the more recent UNAM study (2004) finds that the practice of both widow and widower inheritance is “still common” in the matrilineal and bifurcated Owambo, Herero and Lozi communities – with the associated property consequences.<sup>16</sup>

**4.6** In the LAC study, certain respondents were asked to describe the current state of property ownership and division upon divorce or death under customary marriage laws. Some of these responses reflect the descent patterns mentioned above, implying that the categorisations of the different descent patterns remains valid.

## Ownership of property in customary marriage

**4.7** Respondents in the LAC study were asked the question, “Under the customary law of your community, what property is yours and what property is your husband’s/wife’s?”. The majority responded that **all property was owned equally (50/50)** – but these respondents came from the **Subiya and San communities**. For example:

*Under Subiya customary law, the property is owned equally between the husband and wife in a customary marriage. The property binds the two partners together just as in a civil marriage “in community of property”. But the children belong to the father. [Subiya female respondent, rural area, Caprivi Region]*

**4.7.1** However, this statement was contradicted by other Subiya-speaking respondents, who listed which property was owned by the woman and which by the man according to Subiya custom. For example, respondents stated that household goods such as furniture and dishes were owned by the woman, while cattle and cars were owned by the man.

**4.7.2** One female respondent from Omaheke Region also spoke of men’s and women’s property in a similar way, but added linens and the house to the women’s list of property and goats and sheep to the man’s. This same respondent stated that women can also own their own cattle.

**4.7.3** In the LAC study, a few respondents from the Subiya and Fwe communities also mentioned the status of the wife and the children, saying that children are “owned” by the man (the father), while the wife is “owned” by the husband. Should the husband die, traditionally the surviving wife “would go to” the brother of the deceased.

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<sup>15</sup> Becker/Hinz at 45-46.

<sup>16</sup> UNAM study at 42.

**4.7.4** Within the Muslim community, property is also not shared or owned equally, but this community appears to give greater recognition to the rights of the woman:

*Under Islamic law there is no “in community of property”. The husband and wife own their own property separately. [interviews with Muslim community]*

**4.8** Other studies have produced contradictory findings.

**4.8.1** Becker and Hinz (1995) found that **women have control over their own separate property in some communities, although the consent of the husband or the wife’s male relatives may be required for at least some transactions.** For example, they report that spouses have some control over their own individual property in matrilineal communities such as Owambo. However, they say that wives need their husband’s consent for some property transactions, where husbands do not conversely need the consent of their wives. Furthermore, modern consumer goods which confer status (such as motor cars) tend to be treated in practice as “male property” regardless of which spouse actually acquired them. Control of major property, particularly cattle, usually vests in the wife’s male relatives.<sup>17</sup> Becker and Hinz say that in Herero communities both spouses may own and control property, including cattle, individually. However, they found some reports that male consent was necessary, at least as a formality, for some property transactions.<sup>18</sup> In Caprivi communities, Becker and Hinz found that wives generally have varying degrees of control over their own separate property.<sup>19</sup>

**4.8.2** LeBeau (2004) reports that **wives generally have little or no decision-making power on household matters, with men having general control over household assets and their disposition.**<sup>20</sup> This is reinforced by the UNAM study.<sup>21</sup> Many people say that married women also have to get permission from their husbands even to use property – with the exception of personal items (such as clothes and shoes) or household and kitchen items (such as cooking pots and dishes).<sup>22</sup> Immoveable property such as land and houses is considered to be the property of the husband, with the same attitude usually applying in respect of large moveable property such as cars and tractors.<sup>23</sup>

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<sup>17</sup> Becker/Hinz at 72.

<sup>18</sup> Id at 86.

<sup>19</sup> Id at 103.

<sup>20</sup> Debie LeBeau, *Structural Conditions for the Progression of the HIV AIDS Pandemic in Namibia*, University of Namibia, 2004 at 3-5 (discussing Owambo, Herero, Nama and Damara communities).

<sup>21</sup> UNAM study at 45-48 (discussing Owambo, Herero, Nama and Damara communities).

<sup>22</sup> Id at 46.

<sup>23</sup> Id at 39-41. Some people say that a wife who can prove that she bought an item of large moveable property will retain it when the marriage comes to an end, with others saying that the husband still “owns” such property even if the wife bought and paid for it.

**4.8.2.1** For example, the UNAM study determined that in Lozi society<sup>24</sup> the “women usually do not own very much property” and “that often property which women have brought into a marriage automatically belongs to their husbands”. A group of men aged 25 to 40 years old from Caprivi caustically described the situation in their own words:

*Even the Bible says women must humble themselves to their men and that is what we are still following. These equal rights we only hear it from other tribes, but we still believe that the man is the head of the place. So even if you bought TVs, radio, sofa or any property there is no way that the woman can claim that it's her property. It's even worse if she is not working she cannot touch anything or claim it belongs to her, she cannot even say anything.*

**4.8.2.2** Specific findings from the UNAM study on property ownership by ethnic group are listed below in Table 6.

**Table 6: Property ownership by various ethnic groups**

Type of Property	Lozi, Subiya, Fwe	Kavango	Herero	Owambo	Nama
<b>Property owned by women</b>					
Cooking pots	X	X		X	
Baskets	X	X		X	
Traditional items	X	X		X	
Furniture			X		
Traditional hut					X
Some livestock	X	X		X	
Chickens	X	X		X	
Any property purchased by a working woman		X			
<b>Property owned by men</b>					
Spears	X	X		X	
Guns	X	X		X	
Axes	X	X		X	
Land	X	X		X	
Houses	X	X		X	
Livestock	X	X		X	
Sacred cattle			X		
Holy fire			X		
Cars	X	X	X	X	
Tractors	X	X	X	X	
Shops			X		

**Source:** Compiled by LAC from data in UNAM study.

**4.8.3** According to an assessment of gender issues amongst the San by Becker and Felton (2001), **control over income within families, and even within communities, varies greatly amongst the San.** They report that “in most instances money is seen as the sole property of the person earning it”, while in

<sup>24</sup> In the UNAM study all of the eastern Caprivi Region ethnic groups (e.g. Subiya, Fwe, Yeyi and Lozi) are placed under “Lozi society” because Lozi is the *lingua franca* of that region.

some communities “*wives have a share in their husbands’ earnings*” for the purchase of household necessities.<sup>25</sup> This study also found that ownership of cattle is usually vested in San men.<sup>26</sup>

## **Division of marital property under customary law when a couple divorce**

**4.9** The UNAM study indicates that all of the Namibian communities surveyed have customary divorce, except for the Nama who divorce only through the courts. According to Okupa (1999), since marriage is a joining of families and not individuals, divorce is also the concern of family members from both the husband’s and wife’s sides of the family.<sup>27</sup>

**4.10** In the Muslim community, divorce is not accepted or encouraged, though the procedure to divorce involves saying, “I divorce you” three times to the wife. Women however have no right to initiate divorce proceedings and need to approach the religious leader to obtain a divorce. He will then make a decision based on plausible grounds which may include such things as the husband being uncooperative, cruel and rude; lack of maintenance; violence; prolonged absences of husbands; and terminal disability of husband.<sup>28</sup>

**4.11** Previous reports and findings from both the UNAM study and the LAC study indicate that **division of property under customary law when a couple divorces varies considerably according to the different ethnic groups in Namibia.**

**4.11.1** According to Friesan and Amoah (1999), “ownership” of property is generally not decisive, and the wife’s position may be dependent in some cases on her husband’s “good will”.<sup>29</sup>

**4.11.2** According to a student dissertation by Matota (1999), divorcing Herero couples tend to follow a fairly strict concept of separate property.<sup>30</sup>

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<sup>25</sup> Silke Felton and Heike Becker, *A Gender Perspective on the Status of the San in Southern Africa*, Legal Assistance Centre, 2001 at 35, 31 (hereinafter “Felton/Becker”).

<sup>26</sup> Felton/Becker at 28, citing Renee Sylvain, “‘We work to have life’: Ju/’hoan Women, Work and Survival in the Omaheke Region, Namibia”, 1999, PhD thesis, Graduate Department of Anthropology, University of Toronto.

In two communities studied in the Omaheke Region, each of about 30 adults, male and female, were allocated one head of cattle as start-up capital. Three years later, two-thirds of the cattle which remained were owned by men. The study did not trace the processes which led to this gender imbalance. However, it did find that stock ownership is viewed primarily as individual – only 4 adults stated that they owned stock jointly with their spouses.

<sup>27</sup> Effa Okupa, *Reform and Harmonisation of Family Laws*. Windhoek: Law Reform and Development Commission, 1999 at para 5.8.

<sup>28</sup> LAC Interviews with Muslim leaders in Windhoek.

<sup>29</sup> Tami Friesen and Jewel Amoah. “Reform of Namibia’s Customary Marriage Law: Issue Paper”, Windhoek: Centre for Applied Social Sciences, 1999 at 67-68.

**4.11.3** According to Matota (1999), Owambo communities follow the idea of separate property, although some members of Owambo communities say that the wife has the right to at least some of the household property acquired during the marriage.<sup>31</sup>

**4.11.4** According to Becker and Hinz (1995), in the Caprivi there are two classes of property: household property (such as clothes and household utensils) which is treated as joint property, and belongings acquired separately before or during the marriage which remain the separate property of the spouse who acquired them. Crops harvested from the land are treated as joint property.<sup>32</sup> Additional studies (van Windergerden 1996; Pretorius 1975) examining the situation in Caprivi note that the various cultures in Caprivi tend to recognise some categories of property as joint property, especially household goods.<sup>33</sup> The findings from the LAC study reiterate that this joint property is divided half and half in the event of a divorce, and that the Subiya tend to especially follow this practice (see Table 7 below). Pretorius (1975) notes that amongst the Fwe household property and harvested crops are treated as joint property, which must be divided, particularly if the marriage has ended by mutual consent.

**4.11.5** The LAC study's findings reiterate research on the San conducted by Thoma and Piek (1997). Interviews conducted in ten San villages in 'Western Bushmanland' in 1995 found that when a couple was divorcing, the wife and children usually returned to the home of the wife's parents. Household assets such as livestock and household items were shared between the two spouses. However, typically few assets are considered valuable, for example, houses are not regarded as significant assets because "you just build a new one".<sup>34</sup>

**4.12 Even within the same ethnic group, especially amongst the Subiya and Owambo, there appear to be different understandings about what is the group's customary law.** From the LAC study, Table 7 indicates what happens when a couple divorce, the ethnic group that made the statement, and the number of times the response was made.

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<sup>30</sup> Lucious Matota, LLB student dissertation, "The matrimonial property regime and related property relations of customary law marriages in Namibia, needs and recommendations for reform", 15 October 1999 at 27 (citing recent interviews as a source for this information).

<sup>31</sup> Ibid.

<sup>32</sup> Becker/Hinz at 99-100.

<sup>33</sup> Hester Van Wingerden, "I don't want any nonsense in my courtyard!': The Position of Women in Subia Family Law", Utrecht Unitwin Network, 1996 at 62-3; Johan L Pretorius, "The Fwe of the Eastern Caprivi Zipfel: A Study of their Historical and Geographical Background, Tribal Structure and Legal System, with Special Reference to Fwe Family Law and Succession", 1975 at 129-ff.

<sup>34</sup> Axel Thoma and Janine Piek, "Customary Law and Traditional Authority of the San" (CASS, 1997) at 22, 26, 31, 36, 42 (quotation at 22).

**Table 7: Customary law for property division upon divorce**

CUSTOM	NO. OF TIMES CUSTOM CITED							
	Subiya	Fwe	Kavango	Herero	Nama	San	Muslim	TOTAL
Property is shared equally	6		1			2	1	10
Wife & children get property	1		1		1			3
Headman, spouses & families decide how property is divided	1	1						2
Husband gets house while wife returns to her family	1			1				2
Husband & wife each get the cattle they brought into the marriage; they split the cattle they acquired during marriage				2				2
Husband gets house while wife gets furniture	1							1
Husband gets house	1							1
Husband gets car	1							1
Wife gets all household goods				1				1
Wife only gets personal property she brought into the marriage	1							1
Spouse who keeps children gets all property					1			1
One who opposes the divorce gets the home if there are children			1					1
Property division depends on who initiates divorce								1

Source: LAC Study

**4.13** One Herero woman qualified her statement of customary law procedures by adding that the wife can actually choose to give some of the household property to the husband if she wishes:

*With regard to household goods when the couple divorces, the wife is entitled to keep all the household goods but if she is good-hearted she will leave some for the husband. [Herero female respondent, Omaheke Region]*

**4.14** Division of property during divorce proceedings in a customary marriage becomes further complicated depending on who is initiating the divorce and if there is a “guilty” party or not, as is noted by these statements.

*If the husband wants to divorce the wife, he must give a good reason for this. If the reason is not a proper one, then the wife will get the property. If the wife decides to run away from the marital home and leave her husband and children, she will get none of the property. However, if the wife can prove they had marital problems and that is why she ran away, then the property will be divided between the husband and wife. [Fwe male respondent, Rundu, Kavango Region]*

*In terms of divorce under Subiya custom, one would look at which party is at fault. The innocent party would take the greater share of the property, especially in regard to cattle. [Subiya male magistrate living in North Central Regions]*

**4.14.1** Matota (1999) says that amongst the Yeyi of Caprivi Region, if the husband is at fault for causing the divorce, the traditional authority sometimes intervenes to give the wife a share of the property which the couple acquired during the marriage.<sup>35</sup>

**4.14.2** In contrast to this point by Matota (1999) and to the LAC quotations, UNAM's findings tend to emphasise greater inequality between the sexes when it comes to marital property and divorce, with the wife generally "losing out" whether she is the "guilty" or "innocent" party. For example, according to the UNAM study, in the Caprivi Region the woman found to be at fault for causing the divorce would get none of the marital property. A few Caprivian respondents in the UNAM study said that if the husband is at fault for causing the divorce, "*he may feel guilty and give the wife some of the property, but this is his right to decide*". One UNAM key informant, who is a nurse, explained that, "*our culture looks only at the woman. You are expected to be perfect but men can do whatever they want. If a woman is having an affair she will get nothing.*"

**4.15** The UNAM study notes that because only men hold customary courts, women may not be allowed to attend or may not be allowed to speak. Frequently these men are related to the husband being accused of wrongdoing, which can lead to the women not getting a fair hearing before a customary court. The UNAM data is summarised as follows:

*With most communities in Namibia, in customary divorce, heard at a customary court, the wife receives little or none of the marital property (with the possible exception of cooking pans or other small household items), even if the husband is at fault for the divorce.*<sup>36</sup>

**4.16** The UNAM study also examines the situation when the woman is accused of being "at fault" because she does not bear any children.

**4.16.1** According to one UNAM key informant, "an unofficial church leader" in Karas Region, "*a woman not having children is reason enough to ask for a divorce*". She said: "*In our culture a man cannot stay with a woman who cannot have children and he grants her a divorce. He then takes all things [property] and stays behind [in the house] and the wife must leave with her things she came into the house with*".

**4.16.2** In Kavango society, if a man divorces his wife for not having children, the wife does not have a right to any of the marital property. The UNAM key informant, who is a nurse, exclaims, "*To have children you must have land,*

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<sup>35</sup> Matota (n 30) at 25 (citing 1997 interviews as a source for this information).

<sup>36</sup> UNAM study at 39.

which has a house and livestock. What does a person without children do with land? The woman without children does not have the right to land, but has rights to personal and traditional items.” Another UNAM key informant in Kavango Region who was “an elderly man with customary knowledge” agreed with the nurse by saying, “in our culture, that woman will be given her belongings and taken back to her parents”.

**4.16.3** The UNAM study determined that Owambo society thinks similarly. Some respondents said: “The only property a childless woman can take includes any livestock that she brought into the marriage, her personal items such as clothes, some mahangu, cooking pots, baskets and traditional items that were not given to her by her husband or his extended family. The woman may not have the land, homestead, large moveable property or most livestock.” However, Owambo men age 24 to 25 years old said in a focus group discussion that “the wife should leave with nothing because now the husband must get another wife and the new wife will need to use all of the property”.

**4.17** Other, more specific, findings from the UNAM study by ethnic group are listed below in Table 8.

**Table 8: Property division upon the break-up of a customary marriage**

Custom	Lozi Subiya, Fwe	Kavango	Herero	Owambo
Wife may receive a small amount of communal property if she can prove that her husband was at fault for the break-up of the marriage	X			
The land and homestead go to the husband because men are said to be the owners of land and houses	X	X	X	X
Large movable property such as cars and tractors are also taken by men because it is believed that women should not use such property	X	X	X	X
Whoever is at fault (husband or wife) has to pay a divorce fee of at least one head of cattle		X		
If the couple has been married for a long time, the husband must also give the wife a head or two of cattle (called “fire cattle”) for the cooking and other work she has done for him		X		
Household property such as kitchen utensils go to the wife			X	X
Household property such as kitchen utensils belong to the household and are therefore kept by the husband	X	X		
Each person receives his or her own personal and traditional property during customary divorce	X	X	X	X
Traditional property given to the wife by the husband is left at the homestead with the husband				X
<i>Lobola</i> does not have to be paid back unless the wife is at fault or she is childless	X	X	X	X

Source: Compiled by LAC from data in UNAM study.

## Special handling of livestock upon divorce

**4.18** Some LAC study respondents noted special handling of livestock, especially cattle, upon divorce.

*With regard to cattle when the couple divorces, the wife will keep all the cattle that belong to her and the husband will take the cattle that belong to him. Where the wife and husband bought cattle together, upon divorce, these cattle are divided equally between the partners. [Herero female respondent, Omaheke Region]*

**4.19** The UNAM study agrees with the first part of this statement, but not the later, saying that for most groups in Namibia “the wife is usually given any property, including cattle, that she brought with her into the nuptial household” but “livestock acquired during a marriage belong to the husband.”<sup>37</sup>

**4.20** Neither study mentions what happens to the offspring of the cattle brought into the marriage if the offspring are born after the marriage commences.

## People involved in marital property distribution decisions

**4.21** The UNAM study delves into detail on the people involved in deciding who gets what property.

**4.21.1** It has found that the Nama culture is probably the most equitable because all divorce cases are handled in civil court, including the division of property. The Nama respondents in the UNAM study noted that in the past the husband got all of the livestock but now livestock are shared between the couple.

**4.21.2** According to the UNAM study, in Lozi, Owambo and Kavango societies the husband, sometimes with the help of his relatives, divides up the marital property, which means that “the wife is at the mercy of her estranged husband’s goodwill”.

**4.21.3** In the Herero community, the head of the extended families from both sides decide together on the division of property, with the help of community leaders or headmen if there is a dispute. Many of the UNAM respondents said, “people in the extended families know who each piece of property belongs to so they would not let one person keep property that does not belong to him or her”.

**4.21.4** However, according to the UNAM study, “in the Kavango, Herero, Owambo and Lozi communities most property is considered to belong to the husband regardless of how it came into the marriage, therefore, relatives would not argue with the husband if he kept most of the property”.

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<sup>37</sup> UNAM study at 39.

## CUSTOMARY DIVORCE AND PROPERTY DIVISION AMONGST THE SUBIA

summarised from **Hester van Wingerden**, "I don't want any nonsense in my courtyard!": *The position of women in Subia family law* (Utrecht Unitwin Network, 1996)

This paper gives fairly detailed information about divorce among the Subia in recent years. It is based on 35 life histories collected from widows, married women and divorced women, as well as observations of court cases and an examination of summaries of previous court cases made by tribal secretaries.

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

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

The following case studies are summarised from the report, focusing on the division of marital property:

### **Maria & Lucas**

After 12 years of marriage, Lucas issued Maria with a divorce letter, her clothes and some old dishes and told her to go to her parents. He

did not give her any explanation about why he wanted the divorce but Maria suspected he had another girlfriend. She went to her parent's village and built her own courtyard. She still had some cattle which she had never taken to her matrimonial house, following Subia customs. Unfortunately, she had to sell her cattle soon after her return to her parent's village because one of her relatives became very ill and needed money to visit a traditional healer. A few days after her return, Maria went to her husband to collect the two youngest children aged two and five. Lucas permitted her to take only the two-year-old. He kept the other seven children with him.

Maria did not agree with the division of the property and wanted back the items she had contributed to the household. When she asked Lucas for her things, he refused. She went to his older brother, who was also a member of the high tribal court, to complain about her husband. He promised he would talk to his brother about it but Lucas refused to see him. The high tribal court told Maria they would send a councillor and a policeman to reallocate the property.

Three years after the divorce, nothing has happened. Maria has still not received her things. Her parents advised her to leave the issue because her belongings are now being used by her children who are living with their father. She followed their advice. (Interview 10 May 1994).

### **Charity & Gladstone**

Gladstone married Charity in 1987. Five years later, he took a second wife against Charity's wishes. She eventually asked the district tribal court for a divorce on the grounds that Gladstone had many girlfriends, abused alcohol, beat her and favoured the second wife. Witnesses confirmed Charity's statements. The headman ordered the couple to attempt reconciliation, which did not work. Six months later, the tribal authority granted Charity's renewed request for a divorce.

Charity returned to her father with her two children, her clothes, some blankets, dishes and pots Gladstone had given her. The only child of the marriage lives with Charity, along with a child she had by another man before her marriage. Gladstone does not provide any child maintenance. (Interview 6 June 1994)

## **The “ownership” of children upon divorce**

**4.22** As in the case of division of marital property upon divorce, there are various ways to deal with child custody and access. The available research indicates that “traditional rules” are applied with some flexibility and the wishes of children are sometimes taken into account.<sup>38</sup>

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<sup>38</sup> See Dianne Hubbard, *Proposals for Divorce Law Reform in Namibia*, Legal Assistance Centre, 2000 at 11.

**4.22.1** Some LAC study respondents mentioned the issue of “ownership” of the children. For example in Subiya and Fwe cultures the father is considered to be the “owner” of the children but younger children will stay with the mother for a time:

*Under the Subiya customary law once the marriage ends in divorce, the children usually go with their father. This gives the woman a chance to remarry. A woman will not easily remarry if she had children. The fathers of children have the responsibility to take care of the children. However if the children are young, the mother will take care of them until they are old enough to go to the father. [Subiya male respondent, Katima Mulilo, Caprivi Region]*

*The children will stay with the father. This is because the children belong to the father. The father has a duty or responsibility to take care of the children. The children will be allowed to visit the mother. [Fwe male respondent, living in Rundu, Kavango Region]*

**4.22.2** The UNAM study confirms these statements from their findings by saying, “at divorce the husband has the right to retain the children in the Lozi community”. Even though the Fwe and Subiya coming from Caprivi are matriarchal, there is a strong patriarchal influence. The UNAM study also indicates that amongst Caprivi communities, if the mother died, the children would be looked after by their father and his extended family.

**4.22.3** In matrilineal communities, such as the Kavango and Owambo, the mother’s side of the family is important, and children are the responsibility of the mother’s brothers. However, according to the UNAM data, in Owambo and Kavango cultures, “who the children stay with after a divorce is much more fluid and depends on the age and sex of the child.” Most often, young children and girls stay with their mothers, while older boys stay with their fathers.

**4.22.4** Patrilineal communities such as the Nama and Damara place responsibility for the children on the father’s side of the family. Yet children generally stay with their mothers after a divorce.

**4.22.5** Similarly, in the Herero culture, children from a customary marriage belong to the husband and if the marriage breaks up the children are supposed to stay with the husband and the women of his extended family. However, young babies can stay with their mothers until they are weaned.

**4.22.6** The thinking on children’s rights in Khomas Region appears to be more “Westernised”; with respondents saying that custody of children should be decided based on the best interest of the children.

**4.22.7** In the Muslim community, the parent who has responsibility for the child depends on the age of the child:

*During the marriage, the mother has custody until they are old enough (at the age of two years) to be in the custody of the father. Then the father is responsible for the care and maintenance of the children. [Interviews with the Muslim community]*

**4.23** Table 9 summaries the various customs pertaining to child custody and access in Namibia.

**Table 9: Variation in customs for child custody and access upon divorce**

Custom	Subiya	Fwe	Kavango	Herero	Nama	Owambo	San	Muslim
Children go with father	X	X						
Children go with mother					X			
Very young children stay with mother until weaned, then go to father	X			X				X
Father or father's relatives look after children				X	X			
Mother or mother's relatives look after children			X			X	X	
Young children go with mother, older children with father			X					
Depends on resources of each parent							X	

**Source:** Compiled from LAC study, UNAM study and information collected in Dianne Hubbard, *Proposals for Divorce Law Reform in Namibia*, Legal Assistance Centre, 2000.

**4.24** However, statements like those above indicating that children would live with their father after divorce or death do not seem to be borne out by national statistics. According to the *Namibian Demographic and Health Survey 2000*, only 4% of Namibia's children under the age of 15 are living with their fathers but not their mothers, while one-third are living with their mothers but not their fathers. Another one-third are living with neither of their natural parents.<sup>39</sup> The UNAM study ends up confirming the national statistics, saying that "in most regions people say that the maternal grandmother (mother's mother) often ends up caring for the children if the mother is unable to care for their daily needs".

## **Division of marital property under customary law when one spouse dies**

**4.25** Although this report will not examine inheritance in detail, it is important to have some understanding of the treatment of marital property when a spouse in a customary marriage dies.

<sup>39</sup> Ministry of Health and Social Service, *Namibia Demographic and Health Survey 2000*, at 12.

**4.26** As discussed above, strictly speaking, this question is separate from that of inheritance. When a married person dies, only the property which is viewed as belonging to the deceased is distributed amongst the deceased's heirs. The property which rightfully belongs to the surviving spouse is not part of the deceased's estate and so is not available for distribution to the heirs. A separate but obviously related question is whether the surviving spouse has any entitlement to inheritance of some share of the property of the deceased.

**4.27** However, public perceptions of what happens when a spouse dies do not separate these legal questions so neatly. Therefore, it is necessary to take a look at the broader question of 'who gets what' when a spouse dies in an attempt to understand the treatment of marital property when the marriage is ended by death.

**4.28 As in the case of divorce, the customary rules for division of marital property upon the death of one spouse appear to be complicated and contradictory.** Table 10 below indicates how property is divided if the wife dies and Table 11 below indicates how property is divided if the husband dies, according to the LAC study.

**Table 10: Customary law for property division upon death of wife**

Custom	NUMBER OF TIMES CUSTOM CITED							
	Subiya	Fwe	Kavango	Herero	Nama	San	Damara	TOTAL
Husband gets house	4		1					5
Husband keeps own property while wife's property goes to wife's family	1		1			2		4
Property division depends on the two families' discussions	3	1						4
All property goes to husband and children					2			2
Livestock goes to husband and children	1						1	2
Goes to husband and children, but they can decide if they want to give some to the deceased wife's family					1			1
Goes to husband and children if there are children; if no children, goes to husband and deceased wife's mother and siblings	1							1
Children get property	1							1
Furniture goes to children	1							1
Wife's family takes everything			1					1
Personal belongings of deceased wife and one live cow goes to deceased wife's family				1				1
Children go to deceased wife's family	1							1

Source: LAC study.

**Table 11: Customary law for property division upon death of husband**

Custom	NUMBER OF TIMES CUSTOM CITED								TOTAL
	Subiya	Fwe	Ovambo	Kavango	Herero	Nama	San	Kwangali	
Goes to wife and children	4					2			6
Family of deceased husband takes everything	2			2	2				6
Part goes to wife & children and part to deceased husband's family	2						1	1	4
Wife goes to brother of deceased husband	1				2				3
If there are children, wife and children stay in marital home	1	1							2
Personal property of husband goes to deceased husband's family				1			1		2
Household goods go to wife					1				1
Cattle go to deceased husband's family			1						1
Cattle go to deceased husband's family (& they can decide if any should go to wife)					1				1
Cattle go to children	1								1
Cattle bought with marital \$\$ go to wife			1						1

Source: LAC study

**4.29** The statements below further elaborate on the customary rules mentioned above:

*Under Subiya custom, traditionally upon the death of the man, the deceased's family members take charge of the property. The father and brothers of the deceased summon the wife, as well as the children to state the acquisition of the estate. If the parents are dead, the eldest brother will take the role of distributing the items of the estate. Certain pots and plates are given to the wife, as well as cattle for both the wife and children. The wife is told she is free to live in the same house or she may return to her parental home. In most cases the surviving spouse will remain at the marital home. If there are children, they and the wife will get the cultivation land. If there are no children then the land will be divided between the wife and deceased's family members. Clothes of the deceased will be shared between brothers and sisters. Parents of the deceased will also receive a small share of such things as livestock. [Subiya male magistrate living in North Central Regions]*

*In a Nama marriage, the property will go to the surviving spouse and children. The spouse basically keeps the property for the children and cannot sell it. [Nama male church leader, Keetmanshoop, Karas Region]*

*Children will go to deceased wife's family because husband may remarry and wife's family will not trust husband to take care of children. [female respondent, Caprivi Region]*

**4.30** Several respondents from Caprivi and Kavango Regions stated that the division of property on the death of one spouse would largely depend on the relationship between the spouses' families, for example:

*If the family of the husband suspects that the wife killed the husband, then the wife will not get any of the property. In contrast, if the family thinks the wife is innocent, then she may inherit the husband's property but she still must share it with the husband's family. [Fwe male respondent living in Rundu, Kavango Region]*

**4.31** The UNAM study summarises marital property distribution at time of death of one spouse as being based in principle on the lineage regime:

*The rules of inheritance differ between matrilineal and patrilineal communities. In matrilineal communities the deceased husband's family, customarily his male relatives – typically his nephews but in contemporary society all of his relatives – inherit all matrimonial property regardless of how or who brought the property into the marriage. In patrilineal communities it is frequently the deceased husband's children – usually his firstborn son – who inherit the matrimonial property. In this case the widow is more likely to inherit small items or maintain control over property inherited by her children if the children are still too young to manage the estate.<sup>40</sup>*

**4.32** However, **the UNAM study finds that the property of a couple married in customary marriage in practice often goes to the husband's extended family upon his death, in communities which follow a range of kinship patterns.** In most Namibian communities, very little of the marital property is considered as "belonging" to the widow, and she is precluded by custom from inheriting substantial property.<sup>41</sup>

**4.32.1** For example, the UNAM study found that the most valuable items usually go to the extended family members of the deceased man in Kavango, Herero, Owambo and Lozi communities. Women in these communities are generally not allowed to inherit marital property, which is considered by and large to belong to the husband regardless of how it came into the marriage. Thus, widows may be left with only small items of little economic value – such as personal items, kitchen utensils, traditional items and small livestock.

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<sup>40</sup> Id at 49, citing Effa Okupa, "Reform and Harmonisation of Family Laws", Law Reform and Development Commission, 1997 at 9.3.

<sup>41</sup> Id at 50-ff.

**4.32.2** However, in Nama communities and in more urbanised environments, the widow and the children are the primary heirs when a husband dies.<sup>42</sup>

**4.33** Table 12 below summaries the UNAM findings on who gets what property upon the death of a man.

**Table 12: Customary inheritance**

Custom	Lozi Subiya, Fwe	Kavango	Herero	Owambo	Nama
Land goes to wife & children					X
Land goes to deceased husband's extended family	X	X	X	X	
Home & other immovable property goes to wife & children					X
Home & other immovable property goes to deceased husband's extended family	X	X	X	X	
Large movable property goes to wife & possibly sons					X
Large movable property goes to deceased husband's male relatives	X	X	X	X	
Money goes to wife & children		X	X		X
Money goes to deceased husband's male relatives, usually brothers and possibly adult sons	X				
Money goes to deceased husband's brothers and nephews and sometimes his children				X	
Livestock goes to wife & children or widow divides amongst children					X
Livestock is divided amongst deceased husband's extended family, although older children may get a head of cattle and younger children some goats		X		X	
Livestock is divided amongst deceased husband's extended family			X		
Livestock is divided amongst children and some may go to the deceased husband's extended family	X				
Household property such as furniture goes to wife & children					X
Household property such as furniture goes to wife			X		
Household property such as furniture goes to the deceased husband's extended family (except the wife is given a grain basket)				X	
Household property such as furniture goes to the deceased husband's extended family (or sometimes the wife)		X			

<sup>42</sup> Id at 50-52.

Custom	Lozi Subiya, Fwe	Kavango	Herero	Owambo	Nama
Household property such as furniture is divided amongst the children and sometimes the deceased husband's extended family	X				
Deceased man's personal property goes to deceased man's sons and younger brothers			X		X
Deceased man's personal property goes to deceased man's extended family		X		X	
Deceased man's personal property goes to deceased man's children and possibly extended family	X				
Traditional items go to deceased man's male relatives, including older sons		X	X		X
Traditional items go to deceased man's relatives				X	
Deceased man's traditional items go to deceased man's children and possibly extended family	X				

Source: Compiled by LAC from data in UNAM study.

**4.34** In summary, the UNAM study concludes: “from the above listing of who should inherit from a man when he dies, it is clear that the Nama favour the widow and any children he leaves behind, while in Kavango, Herero, Owambo and Lozi, a deceased man's natal extended family inherit most of the larger more economically valuable items”.<sup>43</sup>

**4.35** The UNAM study also found that evolution of customary law on this point was moving in contradictory directions, with some communities reporting recent trends towards greater inheritance by widows and children, and others reporting increased greed and ‘property grabbing’ by the deceased person's relatives.<sup>44</sup>

**4.36** The UNAM study found further that many people are aware of the possibility of using oral or written wills, but some say that these would not be observed “without a fight” if they went against custom.<sup>45</sup>

**4.37 In contrast to the UNAM study, a 1999 FAO study found marked distinctions based on lineage systems affecting the disposition of household property upon the death of a spouse, with clear differences in custom between matrilineal communities in the Oshana Region and patrilineal communities in the Caprivi Region (see box below).<sup>46</sup>**

<sup>43</sup> Id at 52.

<sup>44</sup> Id at 53-54.

<sup>45</sup> Id at 52-53.

<sup>46</sup> EJ Matanyaire and E Timpo, “The Impact of HIV-AIDS on Farming Communities in Namibia”, Windhoek: Food and Agriculture Organisation of the United Nations (FAO), 1999 at 17-34.

## CASE STUDIES OF FAMILY DEATHS IN OSHANA AND CAPRIVI

EJ Matanyaire and E Timpo, *The Impact of HIV-AIDS on Farming Communities in Namibia*, Windhoek: Food and Agriculture Organisation (FAO), 1999 at 17-34

A 1990 FAO study examined households with deaths from HIV/AIDS in 12 farmer-extension development groups in the Oshana Region and 12 in the Caprivi Region.

In the matrilineal communities of Oshana, surviving wives continued to work the land but lost most or all of the household cattle when their husbands died. Small livestock (sheep and goats) were also taken by the relatives of the deceased. This property division affects draught power and the supply of manure for fertilizer, as well as overall financial security, thus leading to a serious reduction in food security for the widow and her household. Conversely, when wives died, both land and livestock remained with the surviving husband for the use of the household.

Indications were that the traditional systems wherein family heirs took over the responsibilities of child maintenance were breaking down. Uncles and relatives helped in some cases with school fees and uniforms, but the majority of households which had experienced deaths reported that financial problems had prevented some or all of the children in the household from continuing to attend school.

In the patrilineal communities of Caprivi, where children inherit their fathers' property, land and livestock remained with the household regardless of which spouse died.

**4.38** Under Islamic tradition, if one spouse dies, the estate will be divided as follows:

- (1) Creditors must first be paid
- (2) One-third of the estate goes to charity (this is compulsory).
- (3) Two-thirds of the estate is split between the surviving spouse and children, with the male children receiving a larger part of the estate than the female children as females will get married and obtain property from her husband's family.<sup>47</sup>

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<sup>47</sup> On the death of both spouses in the Muslim community, children are placed in the care of their paternal grandfathers. If there is no grandfather then they become wards of the state. Any inheritance due to the children must be kept in trust for them until they are able to provide for themselves.

## **Lobola and the impact of paying lobola on marital property**

**4.39** The LAC study did not cover issues of *lobola*<sup>48</sup> because it was felt to be adequately covered by the UNAM study. The following summarises the results of the UNAM study on *lobola*, providing an overview of *lobola* trends amongst five of Namibia's ethnic groups and giving an indication of the impact of *lobola* on marital property. This section also interweaves findings from the predominantly secondary research study conducted by Becker and Hinz (1995).<sup>49</sup> Both of these studies examined the Owambo and Kavango communities, the Lozi/Caprivi groups, and the Herero, while UNAM also studied the Nama.<sup>50</sup>

**4.40** Both Becker and Hinz (1995) and the UNAM study almost a decade later found that the payment of *lobola* is quite common amongst many of Namibia's ethnic groups. The UNAM study found that ***lobola is paid by the groom's family to the bride's family in most Namibian communities, and in most cases a lobola payment is considered necessary for the couple to be considered customarily married.*** There are a few exceptions:

**4.40.1** The Nama have a form of *lobola* which usually takes the form of an exchange of gifts between the two extended families. When *lobola* is paid it is usually paid in a smaller amount than the other Namibian cultural groups.

**4.40.2** Amongst the Kavango groups, *lobola* is seen to be relatively new because instead of paying *lobola*, traditionally the groom would move to the homestead of wife's family and undertake work for a specified period of time,

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<sup>48</sup> The UNAM study states that *lobola* is bride-wealth or bride-price, and it is an amount of money or goods that the groom's family pays to the bride's family before the couple can be considered customarily married. UNAM study at 36. Becker and Hinz say that "the formerly usual term 'bride-price' has been widely criticised for erroneously suggesting that the bride would be 'purchased' as a commodity' and 'it has been proposed that the term be replaced by the more neutral 'bride-wealth' or 'marriage payment', and even recently 'wedding gift'. However, they choose to use the term 'marriage consideration', on the grounds that it is "comprehensive and therefore adequate to describe different forms of the institution". They go even further by saying that the term '*lobolo*' can be used when discussing patrilineal societies and 'marriage ratification custom' in matrilineal societies. Becker/Hinz at 49-51.

Moreover, Becker and Hinz make a distinction between '*lobolo*' and '*lobola*', saying that the former is customary in patrilineal systems and the latter in southern African patrilineal systems. In patrilineal systems the payment transfers the wife and her future offspring to her husband's lineage, while the wife in a matrilineal community continues to belong to her lineage after marriage and so will the future children. The contemporary usage of the patrilineal term '*lobola*' in a matrilineal community such as the Owambo or in a double descent system as for the Herero, implies that a change of meaning is occurring. The form of the gift may be the same, but "men nowadays often claim their wife's obedience because they regard the giving of the marriage consideration as the 'purchase' of the wife which establishes male authority within the marriage" and "husbands justified their authoritarian and male supremacist attitude towards their wife with the argument that they had 'bought' her by paying '*lobola*'. Becker and Hinz note that this view contradicts research done in the 1960s (Tuupainen 1970) where Ndonga informants specifically emphasised that the marriage gift did not equate to a 'payment' for the bride. Becker/Hinz at 59-62, 81-83.

Since *lobola* is the most common term used in southern Africa and it is the term used throughout the UNAM study, it will be the term of choice for this paper.

<sup>49</sup> Becker/Hinz (n 5).

<sup>50</sup> Any finding not specifically referenced in this section comes from the UNAM study.

such as building houses, herding cattle, fetching firewood. Amongst some Kavango people, *lobola* is not paid because it is equated to selling their daughters.

**4.40.3** Amongst the Mbalantu, one of the Owambo cultures, *lobola* is not paid because “our daughters are not for sale”.<sup>51</sup>

**4.44** *Lobola* is usually negotiated between the two families and is paid by the head of the groom’s extended family to the head of the bride’s extended family. There are a few exceptions to this system.

**4.44.1** Amongst the Herero, the bride’s family determines the amount and type of *lobola* to be paid and amongst the Owambo the father of the bride determines the amount.

**4.44.2** The UNAM study noted that within the Lozi and Herero communities, if the groom has money he can pay the *lobola* himself rather than his family. Becker and Hinz substantiate this point only for the Herero.

**4.45** The amount of *lobola* varies from ethnic group to ethnic group.

**4.45.1** As mentioned earlier the Nama, if paying *lobola*, usually pay less than other ethnic groups. This is also true of the Kavango communities.

**4.45.2** The amount of *lobola* is often based on the qualities of the bride (her behaviour and characteristics).

**4.45.2.1** This is true in Lozi and Kavango societies. For example, amongst the Lozi, less *lobola* would be paid if the bride already has a child, was previously married, or is an older woman.<sup>52</sup>

**4.45.2.2** Currently amongst the Lozi and Herero the amount can also vary based on the level of education of the bride.

**4.45.3** The degree of the groom’s financial standing and/or his family can also influence the amount of *lobola* in Lozi and Kavango communities.

**4.45.4** In contrast, Becker and Hinz quote Tuupainen (1970) on the Owambo subgroup Ndonga, saying that traditionally the marriage gift was always the same and did not depend on either the bride’s or the groom’s family wealth or on qualities of the bride, such as education.<sup>53</sup> Similarly, Becker and Hinz found that traditionally amongst the Herero, the amount of the payment did not depend on the bride’s qualities but was usually six head of stock.<sup>54</sup>

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<sup>51</sup> A study conducted by NDT in 1994 corroborates this finding noting that less than one-quarter of Mbalantu and Kwambi respondents undertook *lobola* gift-giving compared to 80 percent of Kwanyama. NDT (n 7) at 55 (Table 9.5).

<sup>52</sup> Becker/Hinz at 95-96,

<sup>53</sup> Id at 60.

<sup>54</sup> Id at 81.

**4.46** According to the UNAM study, although the amount of *lobola* differs both within and between the various communities that have the practice, it appears that *lobola* amounts have steadily risen.

**4.47** The form of payment of *lobola* also varies. The typical and traditional form of *lobola* is in head of cattle, but more recently cattle and/or cash can be paid by the Herero and Owambo. The groups living in Caprivi used to only provide a small ceremonial gift such as an axe or hoe, but nowadays a considerable gift in the form of cattle and/or money is provided, but no specific amount is dictated. The Nama tend to pay in small-stock (goats or sheep), while the Kavango may pay up in a head of cattle, but payment in the form of *mahangu* millet or a hoe is also common.

**4.48** In most cases if *lobola* is not paid, then the couple is not considered to be customarily married.

**4.48.1** Exceptions would include the Kavango and some Owambo communities.

**4.49** However, the UNAM study notes that in Namibian communities where *lobola* is customarily paid, there are some specific situations in which it may be acceptable not to pay *lobola*.

**4.49.1** Amongst the Lozi, Kavango, and Herero, *lobola* is not paid when the groom's family is too poor to pay *lobola* or if both families agree that *lobola* does not need to be paid.

**4.49.2** If 'cross-cousins' are marrying within the Kavango and Herero cultures, then *lobola* would not be paid.

**4.49.3** Within Herero society, *lobola* would not be paid by the man's family if his wife dies and he is now marrying a female relative of the wife's family.

**4.49.4** Amongst the Nama, *lobola* would not be paid if the bride already has a child.

## **The impact of *lobola***

**4.50** The UNAM study especially examined the impact of marriage and *lobola* payment on women's rights to own property.

**4.50.1** In Lozi society because *lobola* has been paid, any property a woman brings into the marriage rightfully belongs to her husband.

**4.50.2** In Herero culture, people distinguish between smaller household items such as furniture and televisions that a married woman can buy and own, versus larger valuable items such as shops and cattle. For the latter, even if the married woman buys these with her own earnings, they automatically belong to her husband.

**4.50.3** In contrast, within Kavango custom, either a married woman alone, or she and her family, can own any property that a working woman has purchased.

**4.51** The UNAM study notes that within Owambo (for those communities that pay *lobola*), Herero, and Lozi communities and to some extent amongst the Kavango, if *lobola* was paid and the wife dies, the widower is inherited by another female relative of the deceased wife. In this case *lobola* is not paid for the new wife because the widower's extended family has already paid for the right to have a wife for the widower from the deceased's extended family.

**4.52** In some communities, the payment of *lobola* is perceived to give the husband and the husband's extended family rights of control over the wife including the rights of control over her domestic production, fertility and offspring.

**4.52.1** This is currently true amongst most many Lozi and Herero, but it was not the case in the past for the Herero (according to Becker and Hinz).<sup>55</sup>

**4.52.2** Amongst the Nama, the husband has rights over the wife if *lobola* has been paid, but the husband's extended family does not have rights over the wife, no matter if *lobola* was paid or not.

**4.52.3** Within Kavango society, the man always has rights over his wife no matter if *lobola* has been paid or not.

**4.53** "Rights of control over children are also linked to the payment of *lobola*, as well as descent patterns".<sup>56</sup> Parental rights secured by the payment of *lobola* may include the right of the father's family to custody of children in the event of divorce or the mother's death.

**4.53.1** In matrilineal societies the payment of *lobola* only secures the husband's rights of control over the children in certain circumstances, and the responsibility for financial support and for any reprimand of children rests with the mother's brother.

**4.53.2** In principle, "*in patrilineal communities the payment of lobola secures the father's rights of control and care over all aspects of the children's upbringing*".<sup>57</sup> Yet in the Nama communities interviewed for the UNAM research, people feel that the wife has a right to keep the children should death or divorce occur.

**4.53.3** According to both the UNAM study and Becker and Hinz, in Lozi society, the payment of *lobola* means that the father has a right to keep the children after the death of his wife or in cases of divorce. Becker and Hinz specifically note that *lobola* "*does not transfer the wife's reproductive capacity to her husband's fam-*

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<sup>55</sup> Becker/Hinz at 82.

<sup>56</sup> UNAM study, referencing Okupa (n 27) at para 3.26.

<sup>57</sup> Ibid.

ily”.<sup>58</sup> The children of a couple belong to both their mother’s and their father’s sides, but *lobola* “does give certain personal rights to the husband” such as the “right to be *pater* to her children”.<sup>59</sup> However, data from the UNAM research also indicate that the age of the children is a factor because “it would not be wise for a husband to take a breastfeeding child. Therefore, babies would stay with their mothers until they are weaned”.<sup>60</sup>

**4.54** During the UNAM study, respondents were asked if *lobola* had to be paid back should the couple divorce. In most cases the answer was “no”.

**4.54.1** Becker and Hinz similarly find that the return of *lobolo* is not generally required in Ovambo, Nama or Damara communities. In Ovambo communities, the *oyonda* which is given by the prospective husband is traditionally an ox which is slaughtered at the wedding feast and thus is more in the nature of a “marriage ratification custom” than *lobolo*. It cannot be, and normally is not, returned in the case of dissolution of the marriage. However, there is some evidence that a repayment of the *oyonda* is expected under certain conditions: if the wife leaves the husband and she has not yet cultivated his field, borne his child or become pregnant by him.<sup>61</sup>

**4.54.2** One exception was amongst the Lozi, where the UNAM study reported that *lobola* must be repaid if the marital break-up is the wife’s fault. Becker and Hinz corroborate this point, saying that “if the wife deserts the husband without good reason, *lobola* must be returned.” In contrast, “if the husband ‘has been bad’ and his wife leaves him, he will receive half of the *lobolo* while the other half will be given to the wife” but “no return of *lobolo* is due if the husband has dismissed his wife.”<sup>62</sup>

**4.54.3** Becker and Hinz found that traditionally, in Herero communities, the *otjitungia* had to be returned in a divorce if the woman was the “guilty party”.<sup>63</sup> However, it is not clear if this custom is still observed. The UNAM study finds that there is a “divorce fee” which must be paid by the guilty party, which is arguably not the same as return of *lobola*.<sup>64</sup>

**4.55** In some Namibian communities, a woman is perceived as ‘property’, and this is often linked to the payment of *lobola*.

**4.55.1** For example the Katima Mulilo magistrate during the LAC study described the following situation for Caprivi Region:

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<sup>58</sup> Becker/Hinz at 96.

<sup>59</sup> Id at 97.

<sup>60</sup> UNAM study at 37.

<sup>61</sup> Becker/Hinz at 62, note 250.

<sup>62</sup> Id at 96.

<sup>63</sup> Id at 82.

<sup>64</sup> UNAM study at 199.

*If the husband dies, the family feels that the woman and all his property belong to them as they paid lobola for her. So they take everything. In the past they would even take the wife and find a new husband normally from their family. This does not happen anymore. They only take the property and the wife is sent back to her family. [Female magistrate, Katima Mulilo, Caprivi Region]*

**4.55.2** Others made similar statements:

*Traditionally the brother of the deceased would marry the surviving wife. [Subiya male magistrate living in North Central Regions]*

*Due to the cultural system, the woman is always regarded as the property of the husband's family, therefore they are always manipulated by that family. [Owambo female church leader and marriage officer, North Central Regions]*

*In the Muslim community, the groom traditionally paid dowry to the woman in the form of one ounce of gold. This amount is now subject to change and inflation and it could be in any form such as cash. [Interviews with the Muslim community]*

**4.55.3** Similar findings came from the UNAM study research population. The payment of *lobola* is perceived by many as giving the husband and the husband's extended family rights of control over the wife.

**4.56** The UNAM study concludes that "although *lobola*, in and of itself, is not a cultural impediment to women's rights to property, contemporary interpretations of what rights having paid *lobola* grant to the husband and his family imply that some people feel that paying *lobola* gives the husband absolute rights over his wife and her economic production".<sup>65</sup> This study goes on to state that most *lobola* customs do in fact effectively discriminate against women because some men believe that their wives are equivalent to property for which they have paid. The UNAM study recommends, therefore, that the customary practice of paying *lobola* should be reviewed and addressed through information campaigns and legislative reform. It suggests that it may be possible to avoid abolishing *lobola*, while ensuring that any law reform concerning the rights of women and their children are not hindered because *lobola* has been paid.

## PRELIMINARY RECOMMENDATION

**We agree with the UNAM study's assessment and recommend that, while it is not necessary to outlaw *lobola*, law reform should ensure that the custom is not applied in a way which reduces women's personal or property rights. In particular, ownership and control**

<sup>65</sup> Id at 56.

over property accumulated during a marriage needs to be de-linked from lobola, and replaced with a gender-neutral approach. Similarly, rights of control over children should be separated from lobola and premised on the best interests of the child.

## Widow and widower inheritance

**4.57** The UNAM study determined that the practices of widow inheritance (levirate) and widower inheritance (sororate) are still common amongst the Owambo, Herero and Lozi.

**4.57.1** When a husband dies in Owambo, Herero and Lozi communities, one of his male relatives – usually the deceased husband’s brother, nephew or uncle – will ‘inherit’ his widow. The husband’s extended family generally decides who will inherit the widow. This chosen relative will move into the deceased’s household and take over the property. If the widow does not accept this arrangement, she will be expected to leave the marital household and all of its property and return to her own extended family. In most cases the widow is expected to have sexual relations with the man who inherits her, unless she is elderly in which case the couple will simply live together.<sup>66</sup>

**4.57.2** In Herero communities, an adult son can take over as the head of the household so that the widow need not be inherited. This practice was initially intended to protect widows and minor children, but in recent times the motivation seems to be the desire to keep the marital property within the husband’s family.<sup>67</sup>

**4.57.3** Widowers (surviving husbands) are also inherited in Owambo, Herero and Lozi communities, usually by a younger sister, cousin or niece of the deceased wife. However, widowers have more freedom of choice in the matter, since a refusal to re-marry within the wife’s family does not have the same economic consequences for the widower. The widower is expected to have sexual relations with his new wife.<sup>68</sup>

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<sup>66</sup> In Lozi communities, the widow is also supposed to undergo ritual cleansing whereby she is required to have sexual intercourse with another man before she is married to her deceased husband’s relative.

<sup>67</sup> Id at 42.

<sup>68</sup> Ibid. The UNAM study elaborates on the custom as follows (at 42):

*In Herero, if the widower’s family would like him to be inherited they bring a cow to the deceased wife’s family as a gift for the new wife, otherwise, no additional exchanges – such as additional lobola – take place. Traditionally in the Kavango societies a widower is inherited by one of her younger sisters. Although the practice of widower inheritance has also been greatly reduced, a widower is more likely to be inherited than a widow, if the deceased wife’s family likes the widower, they will look for another wife for him from within their family.*

**4.58** According to the UNAM study, these practices are declining in some communities in recent times.

**4.58.1** In Kavango communities, widow and widower inheritance were traditionally practiced, but have now all but disappeared due to the impact of HIV/AIDS and increased awareness of gender issues. In contemporary Kavango societies, the widow stays with her deceased husband's family for one year after the man's death to mourn his passing. The family will then decide if she is to stay with them (without being inherited), or if she should be returned to her parents.<sup>69</sup>

**4.58.2** The practice is also declining in Lozi communities because of HIV/AIDS and other social changes, such as advancements in women's right and the impact of Christianity.<sup>70</sup> (This is supported by the statement of the Katima Mulilo female magistrate quoted above.)

**4.59** The findings of the UNAM study are supported to some extent by earlier studies.

**4.59.1** Levirate was reported by Becker and Hinz (1995) as being still common in some Herero communities, although not compulsory for the widow.<sup>71</sup>

**4.59.2** According to Okupa (1997) sororate is still practised in some communities, although this also seems to be an optional choice for the sister.<sup>72</sup>

**4.60** The UNAM study makes the following suggestion: "*The practice of widow inheritance is degrading to women and makes them vulnerable to physical abuse at the hands of the inheriting husband, exposes both men and women to the risk of HIV infection, and no longer serves the purpose of protecting young widows and children. Spousal inheritance should be discouraged through information campaigns and possibly addressed through legislative reform.*"<sup>73</sup>

## PRELIMINARY RECOMMENDATION

**We recommend that the law should, at the very least, make sure that property consequences do not force anyone to accept the practice of widow or widower inheritance against their will.**

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<sup>69</sup> Ibid.

<sup>70</sup> Id at 42-43.

<sup>71</sup> Becker/Hinz at 83.

<sup>72</sup> Effa Okupa, *Reform and Harmonisation of Family Laws*, Law Reform and Development Commission, 1997 at paragraph 8.7.

<sup>73</sup> UNAM study at 56.

## Disposition of family home upon death of one spouse

**4.61** Some LAC study respondents were asked specifically what typically happens to the family home under customary law if one spouse dies. The findings showed that the widow is usually in a vulnerable position. For example:

*If the wife dies, the husband will stay in the house with the children. But if the husband dies, the children will have a say as to whether the wife can remain in the house or must go. [Subiya female respondent, Katima Mulilo, Caprivi Region]*

*If my husband dies, I will stay in the house with the children, but his family could come and chase us out of the house. [Subiya female respondent, Katima Mulilo, Caprivi Region]*

**4.62** Generally the UNAM findings support the information obtained in the LAC study.

**4.62.1** Amongst the Lozi community, traditionally the widow can remain on the property with the children, but she is inherited by one of the deceased husband's male relatives.

**4.62.2** Amongst the Owambo and Kavango, whoever inherits the land will inherit the homestead – and this is traditionally the deceased husband's family.

**4.62.3** In Herero society the man who inherits the land also inherits the home – and this is typically the deceased husband's younger brothers or nephews, or sometimes the deceased husband's eldest son.

**4.62.4** In the Nama culture, the widow and possibly the children would get the land and home.

**4.63** In principle, this issue should already have been resolved in respect of communal land by the Communal Land Reform Act 5 of 2002. In terms of this law, a widow has a right to remain on her deceased husband's communal land if she wishes, even if she re-marries. If there is no surviving spouse when the holder of the land right dies, or if the surviving spouse does not wish to remain, the land will be re-allocated to a child of the deceased identified by the Chief or Traditional Authority as being the rightful heir.

### PRELIMINARY RECOMMENDATION

**Communal Land Boards should vigilantly monitor the implementation of the rule protecting surviving spouses' rights to remain on the communal land of the deceased, and also to make sure that widows do not come under pressure from their extended families to "decline" their right to remain on the land.**

**The possibility of extending similar protection to the surviving spouse outside of communal areas should be considered.**

## **Conclusions on marital property distribution under customary law**

**4.64** In conclusion, information obtained in the LAC supplementary research and the UNAM research indicate that there are some common views within specific ethnic groups about customary laws concerning marital property. Variations that occur within the ethnic groups may be because customary laws are typically not written down, and their articulation depends on the memory and oral statements of traditional leaders and community members. There are also sometimes, understandably, differences in understanding and attitudes towards particular customary law rules between men and women and between different generations.

**4.64.1** Variations can also occur because some customary laws are officially changed, or frozen by being put into writing. Hinz (1997), for example, mentions that The Laws of the Ondonga (*The Ooveta dhoshilongo shOndonga*), which were first enacted recorded in writing in January 1989, introduced a significant protection for widows regarding household property. Originally, a widow was restricted to her hut or the homestead kitchen during the mourning period for her husband. During this period the relatives had ample opportunity to search the homestead and take anything they wanted. Since the enactment of the *Ooveta*, the widow can move freely in and around the homestead, allowing her to watch over the property until the end of the mourning period. The 1989 changes also allowed widows to remain on the land that they had occupied with their husbands, although “they were required to pay for their continual occupation according to the size of the land”. According to Hinz, further amendments were made to the *Ooveta* in 1993, when the payment requirement was dropped.<sup>74</sup>

**4.65** The varying ideas about traditional customs within and between the many ethnic groups of Namibia create a colourful society, but can prove to be quite onerous at the time of any disagreement or apparent unfairness when a marriage breaks up or one spouse passes away. The diverse responses will also prove to be troublesome when any attempt is made to reconcile customary and civil marriage laws.

**4.65.1** This point was acknowledged by some respondents during both the UNAM and the LAC studies. Some people mentioned that there are conflicts between civil law and customary law when it comes to the distribution of property.

**4.65.2** For example, one magistrate in the north felt that civil law should prevail over customary law when necessary to protect vulnerable persons:

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<sup>74</sup> Manfred O Hinz, “Law Reform from Within: Improving the Legal Status of Women in Northern Namibia”, 39 *Journal of Legal Pluralism and Unofficial Law* 1997 at 69-79.

*I prefer that traditional values are followed but the danger is that the extended family members may grab property especially upon the death of the husband. In such cases of conflict, civil law should prevail over customary law. [Subiya male magistrate living in North Central Regions, LAC study]*

**4.65.3** Others seemed to feel that families would always tend to follow the customs they are used to, regardless of civil law:

*Divorce has different traditional connotations than in civil law. Traditionally the woman would just leave the house and she is divorced. [Owambo male respondent, North Central Regions, LAC study]*

*This is the law of Africans. Whatever they want to do, the law won't change. Whenever people say to leave the property to the wife they won't. Only people like me will leave the property to his wife. Most people will go and take the livestock or property and say that it is for my uncle or for my brother. [81 year old Gciriku man with customary knowledge, Kavango Region, UNAM study]*

## PRELIMINARY RECOMMENDATION

**It may be useful to hold an intensive series of public workshops within each of the ethnic groups to discuss customary laws and gain a consensus on which laws should and could be changed by way of law reform, or when any harmonisation of civil and customary law takes place. Otherwise, law reforms which affect custom may simply be ignored on the ground.**

## 5. COMMUNITY ATTITUDES TOWARDS LAW REFORM

### Problems with division of marital property

**5.1** Key Informants in the LAC study were asked: "What problems do people experience with property when a marriage breaks up or when one of the partners dies?"

**5.2** Of the almost 70 responses to this question by key informants, **20% described problem-free division of marital property.** Just over half of these positive responses came from male respondents and were from the following ethnic groups: Tswana, Damara, Nama, Herero, Afrikaner and "Coloured". The following quotations summarise this opinion.

*In our community there are really no problems experienced by married people when they divorce. It is like an unwritten rule in which everybody knows that the wife will get the property and the husband must go and start all over again. Also, the same applies when one of the parties dies; the surviving spouse gets all the property. [Tswana male respondent, Omaheke Region]*

*The grabbing of property by the family upon the death of one of the spouses is not common in my culture. What happened is that the surviving spouse remains with the property and s/he will decide to share with the family of the deceased if s/he wants. The property is kept by the spouse for the benefit of the children although s/he can use it as s/he likes. The younger children usually get more. [Nama female respondent, rural area in Karas Region]*

**5.3** In contrast, **80% of the responses from key informants described problems that occur during marital property division.** About 57% of these negative responses came from male respondents and were from the following ethnic groups: Owambo, Subiya, Kwangali, Lozi, Damara, Nama, Herero, and “Coloured”.

### **Problems with division of marital property upon divorce**

**5.4** During divorce, the most common problem cited in the LAC study was that “*the couple fights over who gets what during divorce*” with eleven respondents mentioning this problem. Other problems identified as occurring during divorce are listed in Table 13.

**Table 13: Problems with property division upon divorce**

<b>Rank</b>	<b>Reason</b>	<b>No. of times reason cited</b>
1	The couple fights over who gets what	11
2	Wife is chased off property	3
3	Difficult to determine who stays with children in the marital home	1
3	Husband must leave the home	1
3	Conflict between customary and civil laws	1
3	If married in community of property the partner with the best lawyer will get the biggest share of the property	1
3	Divorce is expensive	1
3	Divorce can only be obtained in Windhoek	1
	<i>Total</i>	20

Source: LAC study

**5.4.1** More often than not the wife is the one who experiences the most problems. Respondents expressed this as “*the wife suffers*”, “*the wife is expected to leave the home and land*”, and “*the wife is left as a destitute*”.

**5.4.2** One respondent specifically mentioned the problems of dividing cattle when a marriage breaks up within the Herero culture:

*What I have observed is that when a marriage breaks up and the couple is married in community of property, the spouse who contributed the most to the joint estate is usually reluctant to divide the property because he feels*

*that he is losing out. Women are as a result disadvantaged. Especially with Herero men; they are always unwilling to give up some of their cattle to the woman. [Herero female, Windhoek, Khomas Region]*

**5.4.3** Thus, it appears that the legal protections which are already in place for civil marriages (such as the equal division of property in marriages “in community of property”, spousal maintenance and child maintenance) are not always enforceable in traditional settings.

## **Problems with division of marital property upon death**

**5.5** With regard to the division of marital property upon death, many respondents in both the LAC and the UNAM studies mentioned **the problem of property grabbing** by the extended family, which typically affects the woman when the husband dies. The following quotations from the LAC research vividly describe this problem:

*People experience a lot of problems of property grabbing, which can take place during the funeral even. The surviving spouse is harassed and threatened to surrender. By the time the funeral is over, there is no property left to inherit. [female respondent, Katima Mulilo, Caprivi Region]*

*If you are married and your husband dies, everything is rightfully yours, but often the husband’s relatives take everything. When my husband died, they knew I was his wife, but they took everything – even the cutlery. When I got married, I only found two chairs and a pot. During our marriage I bought a lot of furniture – chairs, the double bed. They took it all! [Subiya female respondent, rural area, Caprivi Region]*

*The family of the deceased usually comes and confiscates everything they know of or think that their relative contributed, irrespective of the marital regime the couple was married in. [Damara male respondent, Khorixas, Kunene Region]*

*Usually what happens these days is that the wife is just used by the family to claim the benefits from the husband’s place of employment. Once the money is claimed the wife is not given any. [Fwe male respondent, Rundu, Kavango Region]*

*The in-laws can grab property and it is a hassle to get a legal remedy. The in-laws are ignorant of the civil law system of succession. [Owambo female respondent, North Central Regions]*

*When one spouse dies, the family of the deceased spouse likes to interfere and to decide what the surviving spouse (usually the wife) should inherit. They start making comments about how the wife did not take proper care of the husband and thus she should only be entitled to a small portion of the husband’s property. [Damara female respondent, Omaheke Region]*

**5.6** The UNAM findings also note that the practice of widows being evicted from their homes and all property confiscated by the deceased husband's relatives is still common in most traditional societies. The UNAM study found urbanised Khomas Region residents are more likely than their rural counterparts to feel that a deceased man's widow and children should inherit the marital property, including the land they live on, and suggests that this data indicates a shift towards more "Western" styles of inheritance which favours women's rights to property.

**5.6.1** However, a 1994 study determined that respondents in *rural* areas also believe that the wife should inherit the property rather than the deceased husband's extended family.<sup>75</sup>

**5.7** In contrast, some LAC study respondents feel that the extended family is not properly taken care of and that this causes the property grabbing problems, as follows:

*I know of one old woman whose son passed away without leaving her anything. The son left everything to his wife and children. The case went to court and it was ruled in the wife's favour. The mother was very disappointed. She was left with nothing by a son who she depended on. [female respondent, Katima Mulilo, Caprivi Region]*

**5.8** Beyond the case of the surviving spouse, the UNAM research also notes the problems of property grabbing in relation to orphaned children when both parents die. According to the UNAM study, most respondents say that the person or persons who inherit(s) the majority of the parents' property should also inherit the orphaned children. "However, people in most communities note the ever increasing tendency of property grabbing whereby the deceased's family members take all of the property and leave the poverty stricken children to be cared for by other relatives."<sup>76</sup>

**5.8.1** Specifically, the UNAM study found "that in several matrilineal societies such as in Kavango and Owambo, the matrilineage gets the children while the patrilineages get the marital property."<sup>77</sup>

**5.8.2** This study further says that "some Nama and Owambo people also mention that extended family members take the children and property 'in trust' for the children, but then waste all of the property before the children are old enough to claim their inheritance."<sup>78</sup>

**5.8.3** The UNAM study concludes that "in many cases orphan children are not receiving their share of inheritance, even in societies where it is the custom that children inherit from their parents. Clearly the rights of orphan children are being infringed upon and the AIDS pandemic will only worsen the situation."<sup>79</sup>

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<sup>75</sup> NDT (n 7) at, eg, 64.

<sup>76</sup> UNAM study at viii.

<sup>77</sup> Id at 35.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

**5.9** Several other problems related to marital property division at the time one spouse dies were mentioned and are described in Table 14.

**Table 14: Problems with property division upon the death of one spouse**

Rank	Reason	No. of times reason cited
1	Property grabbing by the extended family of the deceased #	14
2	Family of deceased fights with surviving spouse	7
3	Family of dead husband takes all	4
3	The wife is kicked off the land	4
4	The two extended families involved fight	2
4	Illegitimate children are not covered by inheritance laws*	2
4	Property gets frozen at death and the surviving spouse cannot use any of the property (money) to prepare for the funeral	2
5	Deceased woman's family gets all of her personal belongings	1
5	Deceased man's uncle makes all the decisions about property division and the wife always suffers	1
	<i>Total</i>	<i>37</i>

Source: LAC study

# As noted above, property grabbing when it comes to land is in theory being addressed by the Communal Land Reform Act 5 of 2002, which states that communal land must be re-allocated to a surviving spouse upon the death of spouse in whose name the land was held. Furthermore, the right to remain on the land will not change should the surviving spouse decide to remarry.

\* This point is correct. Under Namibian civil law, children born outside of marriage are disadvantaged when it comes to inheritance. Such children may not inherit from their fathers or their fathers' families unless they are named in a will, even if paternity is proven or acknowledged. The Children's Status Bill which is before Parliament as of March 2005 should change this, to place all children on an equal footing when it comes to inheritance.

## Respondents' suggestions for law reform

**5.10** In the latter part of the LAC study, various questions were asked and discussions were held to ascertain if changes should be made to existing customary or civil laws on marital property. Those who felt that changes were necessary provided their opinions on the nature of these law reforms.

**5.11** Respondents in the LAC study were first asked if there should be any special changes to the law regarding the marital home upon divorce or the death of one partner. **Of the 45 respondents who were asked this question, 96% stated that there should be special rules concerning the marital home.** This opinion was shared by both male and female respondents and across all ethnic groups. Only two respondents based in Swakopmund differed, saying "*the couple must sort it out themselves*".

## Treatment of the marital home upon divorce

**5.12** In the case of divorce, the vast majority of respondents felt the home should stay with the spouse who keeps the children, with about half saying that this would typically be the wife, as follows:

*If a couple divorce, the man should move out of the house so the wife can live in it with the children. It does not matter whether she is the guilty party or not. It would be difficult for me to leave my wife out in the street with nowhere to go. I grew up with my mother and I want the same for my children. [Nama male paralegal, Karas Region]*

**5.12.1** In this regard, it must be noted that in the Subiya, Fwe and Muslim communities more often than not the children would go with the father as long as they were old enough.

**5.12.2** No one mentioned what should happen in the case where some children might go with the mother and some with the father. No one elaborated on who should be able to remain in the house if there were very young children staying with the mother and older children staying with the father. No one elaborated on what would happen if all the children were young at the time of the divorce and stayed with the mother but then went to the father after a few years when they were older.

**5.13** The next most favoured proposal was that the house should be sold and the proceeds split fifty-fifty or that the house should be “shared” fifty-fifty. In this later point, the concept of “shared” was not defined, but one could imagine that the house could be valued and the spouse staying in the house would have to pay the other spouse half the value of the house, as it is unlikely that a divorced couple could remain in the house, both “sharing it” in physical terms. This option de-links the house from the question of which spouse should take the children, which would arise with the most favoured option described above.

**5.14** Coming close behind the fifty-fifty sharing of the house, the third most cited opinion was that the “non-guilty” party should be able to stay in the house. This goes along with the current Namibian civil law on divorce which requires that someone be “at fault”.<sup>80</sup> Under Namibia’s various customary systems a number of reasons for divorce are recognised, which also follow the concept of “fault”.<sup>81</sup> This option becomes more confusing when the issue of “who initiates the divorce” comes into play. Some people stated that the one who wants the divorce and initiates it should leave the house to the other. However in many cases it will be “the innocent spouses” who initiate divorce because they can no longer stay in a marriage where they feel they have been wronged. This option also does not take into account marriages which actually end amiably due to “irreconcilable differences”.

**5.14.1** For both civil marriage and customary marriage, the Law Reform and Development Commission has proposed moving away from the concept of fault by making ‘irretrievable breakdown’ the sole ground for divorce, and even

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<sup>80</sup> Under civil law, the four grounds for divorce are adultery, malicious desertion, imprisonment for at least five years, and incurable insanity. One party to the marriage is determined to be the ‘guilty’ party, and only the ‘innocent’ spouse is eligible for spousal maintenance.

<sup>81</sup> Customary reasons for divorce include adultery by the wife, taking a second wife without the consent of the first, barrenness, and various forms of unacceptable behaviour such as drunkenness, witchcraft or neglect of the children.

to allow couples to make a joint application for divorce if they are in agreement about the marital breakdown.<sup>82</sup> If this 'no-fault' recommendation is followed, then this option for the marital home would no longer make sense.

**5.15** Each of these three opinions was spread across all the ethnic groups. The first and last opinion (house to go with children, house to go with 'innocent party') were shared equally by men and women, while the second opinion (house should be split fifty-fifty) was expressed by twice as many women as men.

**5.16** Various other "rules" for what should happen to the house upon divorce were proposed by smaller numbers of respondents. These include:

- The husband should get the house because the wife always returns to her own family. (3 Subiya and San respondents cited this opinion)
- The "poorest" partner should get the house. (3 respondents from Swakopmund)
- Share of the house should be based on the civil law marital regime that the couple married in. (2 respondents from Swakopmund and 1 Lozi respondent from Caprivi)
- If the couple is still paying for the house, the payment should be shared. (1 "Coloured" female respondent from Windhoek)
- The spouse who can afford to pay for the house should be able to keep it. (1 Subiya respondent from Caprivi).

## PRELIMINARY RECOMMENDATION

**Since the vast majority of respondents feel that the law should intervene on decisions about the marital home, this issue should be considered as a candidate for law reform.**

**We recommend that the rights and situation of minor children should take precedence over those of the spouses. If preference for the right to remain in the marital home is given to the spouse who keeps the children, exceptions would have to be considered if each spouse became responsible for some of the children or in the case where the children first stay with the mother when young and later move in with the father. Another problem with this approach is that it might inspire parents to seek custody purely to obtain the right to the home. Thus, this approach, although popular, raises some concerns.**

**For couples without children, the best recommendation might be for the couple to split the marital home fifty-fifty, either by selling it and sharing the proceeds or where the one partner staying in**

<sup>82</sup> Law Reform and Development Commission, *Report on Divorce*, Project 8, LRDC 13, November 2004.

the house must pay out half of the value to the partner leaving the home. If the one partner is not capable of buying out the other partner in one payment, a long-term payment plan may have to be implemented. This is in fact often the outcome in civil divorces “in community of property”, where all marital property must be split 50-50. On communal land, the spouse who remains in the home could give appropriate compensation to the spouse who leaves.

The treatment of the marital home upon divorce is dealt with in more detail in Chapter 14.

## Treatment of the marital home upon death of one spouse

**5.17** Respondents were also asked if there should be any special changes to the law regarding the marital home upon the death of one partner. By far, most respondents felt that the house should be owned equally by the surviving spouse and the children in the case of death, as noted in the following quotation:

*If one spouse dies, the home should be given to the surviving spouse and the children. In my case when my husband died, his relatives took the house and rented it. They did not even give me part of the rent. I built that house with my own hands! [Subiya female respondent, rural area, Caprivi Region]*

**5.17.1** This opinion was expressed by more men than women. Members of all ethnic groups expressed this opinion, with the exception of the Fwe.

**5.18** The next most cited opinion was that the home should go to the surviving spouse. This opinion was expressed by more women than men. Again, members of all ethnic groups expressed this opinion, with the exception of the Fwe. Quotations illustrating this opinion are as follows:

*The surviving spouse should own the house, and the children should have the right to use it. When the surviving spouse also dies, the house should be sold and the proceeds should be divided equally amongst the children, or any child should have the option to buy the house from the others at market price. [Afrikaner male Headmaster, Keetmanshoop, Karas Region]*

*The surviving spouse, no matter what marital regime they got married under, should always inherit the house. The couple, not just one person, built up the home. One cannot expect the surviving spouse to be on the street or to go back to his/her parents, who might not even be alive. [Afrikaner male widower, Swakopmund, Erongo Region]*

**5.19** Several respondents felt the emphasis should be on the children’s rights and the house should go to the children, as follows:

*When one of the spouses dies the house should be owned by the survivor and the children, and they should have the right to stay in the house. However, this is conditional. If the survivor gets married again s/he should pass the house on to the children. This is to avoid the second spouse owning the house and leaving the children in destitute. When a couple divorce, who do not have children, the house should be sold and the proceeds should be shared equally between the two. If there are children, the spouse keeping the children should keep the house. If a spouse remarries, the new spouse should be barred from inheriting the house. [Nama female respondent, rural area in Karas Region]*

*When one of us dies, the other should have the right to stay in the house, but the children should own it. The survivor should stay in the house on the condition that s/he does not remarry. A third party cannot stay in our marital home. If we get divorced, the guilty one should leave, unless we are married out of community of property. In that case, the owner of the house should keep the house. [Afrikaner female respondent, Keetmanshoop, Karas]*

*If the husband dies, the children should decide if their mother can stay or go. [Subiya female respondent, Caprivi]*

**5.20** In contrast to what often appears to happen in practice with “property grabbing”, only one lone respondent in Caprivi Region felt that the marital home should go to the family of the deceased spouse.

## PRELIMINARY RECOMMENDATION

**Since almost all respondents felt that the marital home upon the death of one of the spouses should go to the surviving spouse and the children (if any), this law reform should be given serious consideration. Possible legal structures for this arrangement will be discussed in detail in Chapter 14.**

### Recommendation on treatment of other marital property

**5.21** Respondents were asked what should happen to the other property upon divorce or death.

*What should happen to other marital property upon divorce?*

**5.22** Upon divorce, by far most respondents felt that the property should be shared equally. This opinion came predominantly from woman and the following ethnic groups: Asian, Afrikaner, San, Owambo and people residing in Swakopmund.

**5.23** Other opinions were as follows:

- The one who gets the house with the children should get all the property in the house. (3)
- The wife must always get a share in the marital property. (3)
- The “poorest” should get the marital property. (2)
- Depends on the marital regime. (2)
- Spouses should take their own personal property and share the common property. (1)
- The guilty party must leave with only their personal belongings. (1)

## PRELIMINARY RECOMMENDATION

**The majority of respondents felt that marital property upon divorce should be shared equally between the spouses. This could be accomplished through application of default marital property regimes of “in community of property” or “accrual”, or some newly-created system designed for the Namibian situation. The options are discussed in more detail below in Chapter 6.**

### *What should happen to other marital property when one spouse dies?*

**5.24** Similarly, respondents were asked what should happen to the other property upon the death of one spouse. The vast majority felt that the marital property should be given to the surviving spouse and children, as indicated in the following quotation:

*Upon death, the property should remain in the house for the survivor and the children. It should not go to the deceased’s family, because the couple worked together for it. [Afrikaner female respondent, Keetmanshoop, Karas Region]*

**5.24.1** This opinion was expressed by more women than men, and from the following ethnic groups: Owambo, Nama, Afrikaner, “Coloured” and several residents from Swakopmund.

**5.25** Other opinions were as follows:

- Left to children because the surviving spouse may remarry. (3)
- Left to surviving spouse. (3)
- Surviving spouse and children should decide how marital property should be divided. (2)
- Shared between surviving spouse and deceased’s family. (2)
- Personal property of deceased should go to deceased’s family and the rest to surviving spouse. (1)
- Based on prior agreement between the two spouses. (1)
- Based on discussions between the two families. (1)
- “If the deceased was supporting the extended family, there should be some distribution in their favour”. (1)

## PRELIMINARY RECOMMENDATION

Almost all respondents felt that other marital property upon the death of one of the spouses should go to the surviving spouse and the children (if any).

However, it must be remembered that these public responses do not distinguish between (a) dividing the marital property to determine what belongs to the surviving spouse and what belongs to the estate of the deceased spouse (b) distribution of the property in the estate of the deceased spouse amongst the heirs.

Another way of dealing with the needs of the surviving spouse and children is through maintenance from the estate of the deceased, separately from the question of inheritance. The concept of maintenance could also be used to provide for any extended family members who were dependents of the deceased spouse.

The outcomes favoured by the public are similar to the procedures currently applied to some estates by the *Intestate Succession Ordinance*, and to requests to the Master of the High Court for maintenance from deceased estates.

Possible legal frameworks for giving effect to this preference are discussed in Legal Assistance Centre, *Customary Laws on Inheritance in Namibia: Issues and questions for consideration in developing new legislation* (2005).

## Law reform with particular reference to customary marriages

### *Law reform and marital property distribution in customary marriages*

**5.26** Respondents who were interviewed about customary marriage during the LAC study were asked two different questions regarding law reform and marital property distribution in customary marriages.<sup>83</sup>

**5.26.1** One question asked, *Should there be law reform, which makes any changes to the existing (customary) system for sharing property upon divorce or the death of one partner?*<sup>84</sup>

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<sup>83</sup> Three different questionnaires were used for this research: "Key Informant", "Civil Marriage" and "Customary Marriage". In comparison to the first two questionnaires, very few people were queried using the "Customary Marriage" questionnaire: six from Caprivi Region, two from Windhoek (Komas Region), one from Rundu (Kavango Region) and one from Omaheke Region, for a total of only ten respondents. Only the "Customary Marriage" and "Key Informant" questions contained questions specifically focusing on customary marriage.

**5.26.2** The other question asked, *Should customary law on how property is shared within a marriage stay in place as it is, or should there be one law on these issues which applies to everyone in Namibia?*<sup>85</sup>

**5.27** When examining these two questions answered by all key informants and people married in customary marriages, responses indicated that more people want to see some law reform, compared to those who do **not** feel any law reform is necessary (ie about two-thirds of the responses indicate that law reform is necessary).

**5.27.1** When looking at women only, about 66% of the women's responses indicated that change is necessary. When looking at men's responses only, interestingly, about 80% of the responses from men indicated that change is necessary.

**5.27.2** In terms of regional and ethnic group comparisons, groups that wanted to see law reform were Kavango, Herero, Tswana, Owambo, Damara and Nama. Groups who did not want law reform were San and Afrikaner. (However, the number of persons interviewed in these groups was very small and any conclusion must be viewed with caution.) In Caprivi Region, about the number of responses indicated that people did not want law reform was about twice that of responses indicating change was necessary.

**5.28** However, the picture was quite different when only responses from people **in customary marriages** were examined for these two questions. Amongst these, only about 40% of the responses indicated that law reform was necessary. One San woman said, *"it would be impossible to have one law, there are too many different cultures in Namibia"*.

**5.28.1** When looking at women only within this selected group of respondents married in customary marriage, the women's responses were divided about evenly between the two opinions, with only two more responses indicating that no reform was necessary. However when looking at men's responses only, *no men* in a customary marriage felt that change was necessary.

**5.29** In conclusion, it appears that there is quite a difference in opinion between the general public and people who are married within a customary marriage, and between men and women. The key informants overall want to see customary law reform. Women in customary marriages are split evenly about customary marriage law reform and marital property, while men in customary marriages do not want to see change.<sup>86</sup>

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<sup>84</sup> Asked in the "Customary Marriage" questionnaire.

<sup>85</sup> Asked in the "Customary Marriage" and "Key Informant" questionnaires.

<sup>86</sup> It is interesting to compare the findings of earlier discussions on this issue between traditional leaders of the Ndonga society (the King's Council) and members of the Law Reform and Development Commission's Women and Law Committee. According to Hinz (1997), the Council was not willing to give a straight answer on whether they thought new acts on inheritance were necessary, but they did express the "firm belief in their capacity to handle" the administration of estates. MO Hinz, 1997, "Law Reform from Within: Improving the Legal Status of Women in Northern Namibia" in *Journal of Legal Pluralism* 39 at 76.

**5.30** Of those who wanted to see some law reform, many respondents in the LAC study particularly wanted the problem of **property grabbing** to be addressed, as the following quotations indicate:

*I think that the law should state that the extended family may not interfere with the property distribution. The extended family often tries to use customary law that does not fit in with the modern way of thinking in terms of property division. This allows the family to grab property from the surviving spouse. This makes the customary law unfair to women. It should be fair to both sexes. [Kwanyama male respondent, Rundu, Kavango Region]*

*Property grabbing should be discouraged. We need assistance from the law to protect widows and children from greedy relatives. [Subiya male traditional leader, rural area, Caprivi Region]*

*Under the law, the wife and children should not be disadvantaged [Damara female respondent, living in Windhoek]*

*The law must protect the rights of the surviving spouse. [Subiya male respondent]*

*The Subiya customary law is good, but the people do not follow it. According to custom I am supposed to get at least half the property or all of it if there are children, but I was disinherited even of the house that I built myself. Customary law should stay the same, but women should be able to get protection if they are disinherited [Subiya female respondent, rural area, Caprivi Region]*

*I know of two experiences in Rundu, where a woman was disinherited by her husband's relatives. The children were also taken away. But after a few years, the husband's relatives returned the children to her after they wasted the husband's estate for themselves and their own children. [Kwangali female respondent, Kavango Region]*

*The law must be straightforward. It must look with big eyes to people who interfere in other people's marriages, especially after death. [Female School Secretary, Oshana Region]*

**5.31** While ten respondents recognised the problem of property grabbing and did not condone it, they felt the solution should be to provide something to the extended family rather than ignoring them completely. They made the following statements:

*Under customary law, the extended family always expects something. This is a problem. We need to find a middle way because we cannot do away with customary law at this stage. Therefore needy relatives should be provided for, to curb the problem of property grabbing. [Lozi male church leader, Katima Mulilo, Caprivi]*

*The law should cater for the extended family, because the current civil law only focuses on the nuclear family. There is often neglect of the spouse's parents or*

siblings. Therefore by law, at least a small portion of the estate must go to the family of the deceased, as a gesture of appreciation, especially in regard to the parents of the deceased. [Subiya male magistrate living in North Central Regions]

There must be rules to protect the interests of both parties [surviving spouse and extended family] and such rules should balance the interests of both parties. [Subiya male magistrate living in North Central Regions]

The family of the deceased must inherit 25 percent so they can meet their own needs. [Female Human Rights Monitor from Rundu]

A certain percentage must go to the surviving spouse and a certain percentage to the deceased spouse's family so they do not bewitch each other. [3 Subiya women and 1 Subiya man]

**5.32** The UNAM study offers an alternative solution to addressing the problem of property grabbing, by suggesting that any law reform to customary property sharing and inheritance should first focus on “modern” property:

*How do you tell people they have to give a woman (who is considered not related to them) a piece of their ancestral land? Given the fact that people make distinctions between ‘modern’ forms of property (such as cars and houses in town) and ‘traditional’ forms of property (such as homesteads and cattle), property distribution should first of all focus on women’s rights to ‘modern’ property. Traditional property seems to contain an element of emotional attachment and changes in the distribution of traditional property will be met with strong resistance in the rural communities. Therefore, focusing on women’s access to modern property will be less emotive and more likely to gain acceptance within the local communities.*<sup>87</sup>

**5.33** Several other suggestions for customary law reform were suggested by respondents in the LAC study:

- A female human rights monitor from Rundu, three Caprivi female residents, and a Herero woman felt that under customary law, “on divorce, property should be shared on a fifty-fifty basis, as in ‘in community of property’ civil marriages.”
- One “Coloured” woman and one Herero woman felt that all existing customary laws on marital property should be abolished.
- A Damara couple said that the surviving spouse (especially the wife) and children must be considered first when it comes to any property division.
- One Subiya male felt that all property should always go to the “innocent” party upon divorce.
- One Subiya male said, “the property should go to the children; let the spouses go their separate ways”.

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<sup>87</sup> UNAM study at 55.

- One respondent from Karas Region felt that any inherited property should not be part of the joint estate for any couple married in community of property.
- One Subiya man felt the law should always require a written agreement between spouses.

## Law reform on divorce in customary marriages

**5.34** In the LAC study, both key informants and people in customary marriages were asked if there should be law reform on divorce in customary marriages. More people married in terms of customary law felt that no changes should be made. In contrast, the vast majority of people not in customary marriages felt that customary laws on divorce should be reformed.<sup>88</sup>

**5.34.1** On both sides of the coin, male and female respondents were split about even.

**5.34.2** Of the 26 respondents wanting reform, 14 wanted one law to be applicable to all Namibians.

**5.35.3** Those supporting change made the following comments:

- Customary laws on divorce should follow civil laws. (4)
- Upon divorce, the law should state that marital property must be divided equally. (2)
- The law must protect the women. (2)

**5.35.4** Those who want the customary laws to remain as is, made the following comments:

- “*Married by custom, divorce by custom.*” (2 Tswana men and 1 San man)
- “*Our laws are fair as is.*” (1 San woman and 1 San man)
- “*Each couple must sort out their divorce agreement by themselves.*” (1 couple in Swakopmund)

**5.35.5** A few respondents not wanting change provided further elaboration, as follows:

*When it comes to customary law divorce, I feel that the formalities applicable to civil marriages should not be applied to customary law divorces because a divorce under our tradition does not only involve the man and*

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<sup>88</sup> The UNAM study found the same behaviour and response in relation to inheritance: “Although rural informants indicate that property inheritance by the deceased husband’s male relatives ‘might’ be unfair to the widow, many of these same people also did not think the system should be changed. However, Khomas Region residents are more likely than rural dwellers to say that customary systems of inheritance are not fair and a widow should inherit some marital property.” UNAM study at 53.

*the woman but the two families. Divorce under customary law should remain as it is. [Tswana male respondent, Omaheke Region]*

*Under customary law, when the man divorces the woman, he packs her personal belongings and sends her back to her parent's house together with six head of cattle. I feel that the manner in which customary law deals with divorce should remain the same because I don't see any problems. [Herero female respondent, Omaheke Region]*

*Under the civil law the women may report their marital problems to the police or Childline. The civil law allows people not involved in the problem to try and solve the problem; it has procedures to be followed. At times civil law causes marriages to come to an end quickly. But under customary law, the families of the spouses and community leaders usually get involved in the negotiation process. Men fear their parents, more than the law in my tradition. Women on the other hand do not trust the pastors and family members in taking part in the mediations. Under customary law the mediators try to find the culprit and punish him or her. The mediators help to distribute the property. [Fwe male respondent, Kavango Region]*

*Customary law on divorce is fair under the San people, because the husband is required to consult with the parents of the wife and traditional leaders before he divorces the wife. Also there should be a valid reason before one can divorce. [San female respondent, Khomas Region]*

**5.36** The UNAM study similarly found differing attitudes towards civil and customary laws when it comes to divorce. Amongst the different ethnic groups interviewed, most respondents from Karas and Khomas Regions felt that the civil law makes provision for property to be shared equally and that civil law is more likely to protect women's rights to property during a divorce. In contrast, the Lozi and Kavango respondents felt that civil law unfairly advantages women because they get property that rightfully belongs to the husband.

## **PRELIMINARY RECOMMENDATION**

**In the context of divorce law reform, consideration should be given to extending the safeguards on the division of marital property to customary marriages, without imposing a High Court procedure that would be expensive and inaccessible to rural dwellers. Practices of mediation by extended families and traditional leaders should not be disturbed.**

## Law reform on inheritance in customary marriages

**5.37** During the LAC study, key informants and people in customary marriages were also asked if there should be law reform on inheritance in customary marriages. Overall results were similar to those on divorce. More people married within the customary law felt that no changes should be made, while the vast majority of people not in customary marriages felt that customary laws on inheritance should be reformed.<sup>89</sup>

**5.37.1** More women than men did not want any change.

**5.37.2** Slightly more men than women wanted change.

**5.37.3** Of the 30 respondents wanting reform, 18 wanted one law to be applicable to all Namibians.

**5.37.4** Those supporting change made the following comments:

- Laws should be changed to ensure that the extended family cannot have a say. Extended family “*must be kept out*”. (7)
- Laws should be changed to always benefit the surviving spouse and children. (5)
- The wife must be protected. (3)
- Laws must be fair to both sexes. (1)
- The needs of the children and their education must come first. (1)
- The law must require all to make out a will. (1)

**5.37.5** Elaboration of these points was as follows:

*There should be one law on inheritance, which applies to everyone in Namibia, because customary law rules disadvantage the women and children. [Herero female respondent, Omaheke Region]*

*When a husband dies, the family tends to ignore the fact that the woman could have bought furniture for the house and that not everything belongs to the man. [Damara female respondent, Omaheke Region]*

*According to the Bible, women should be under their husbands, but this does not mean that he should mistreat her. Thus if customary law allows men to treat their wives unfairly, it is not good and should be done away with. Also the customary law way of inheritance is unfair and should be done away with. [Nama female respondent, Khomas Region]*

*Customary law needs to change. The extended family must only have a say after the surviving spouse and children have given their opinion on how property should be treated. [Respondent living in Swakopmund]*

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<sup>89</sup> See previous footnote for comparison with the findings of the UNAM study.

*I particularly have a problem, with practiced customary law. The customary law as it is, is not fair and should be enforced in a much more equitable manner. What normally happens is that the deceased family disinherits the surviving spouse and children. In our culture, the cattle that circulate within the family revert back to where they came from. But the cattle that the spouse acquired during the marriage also go to the deceased's family. Those cattle, the house and property, like furniture should be inherited by the surviving spouse and children. [Male respondent living in Swakopmund]*

**5.37.6** One San woman who wanted customary laws to remain as is, said that their customary laws are fair as they stand.

***Should the law make a rule stating that some property must be left to the surviving spouse and children?***

**5.38** Currently the law states that a spouse has no duty to leave any part of his or her estate to the surviving spouse or to the children of the marriage. People who make wills can leave their property to anyone they wish. However, if there is no will, the law varies according to race, as described in Chapter 4.

**5.39** When respondents were asked, “*should the law make a rule stating that some property must be left to the surviving spouse and children?*”, an overwhelming number of respondents felt that there should be specific legal rules dictating that some marital property must be left to the surviving spouse and children. This opinion came from all the various ethnic groups participating and was shared just about equally between men and women. Only seven respondents believe that such rules are not necessary. These respondents came from the following groups: Owambo, Nama, Subiya and Afrikaners.

**5.40** Those respondents who felt the law should provide for the surviving spouse and children expressed various opinions on the percentage or amount of marital property. The vast majority of respondents (30) stated that “some” marital property must go to the surviving spouse and children. Again this opinion was stated almost universally across ethnic groups. Only a few more women had this opinion than men.

**5.41** The other respondents qualified their opinion by being more specific about the amount to be shared, as follows:

- At least 50 percent of marital property to surviving spouse and children (7 respondents)
- All marital property to surviving spouse and children (6)
- 90 percent of marital property to surviving spouse and children (1)
- All marital property to surviving spouse and children, with one-third to surviving spouse and two-thirds to children (1)
- Three-quarters to surviving spouse and one-quarter to deceased spouse's family (1)
- One-quarter to surviving spouse and three-quarters to deceased spouse's family (1).

**5.42** Slight variations on this sharing were stated as follows:

- The law should only consider minor children and in this case, 25 percent should go to the surviving spouse, 25 percent to the minor children and the rest to the deceased's family.
- Namibia should follow what Zambia does. In Zambia the law specifically states that in the event of the one spouse dying, the other spouse must get 50 percent, the children must get 30 percent, the surviving parent must get 20 percent and any other dependants must get 10 percent.
- Whatever happens with the rest of the marital property, the wife must be allowed to remain on the land.
- The law must specify that the wife and children must get all the property. But if the person who died was also taking care of someone else then this person must also be considered and be given some of the property. So they must also be provided for.
- One Damara couple said, "Cultures are changing and there are marriages between two cultures with different beliefs, so the surviving spouse and children must be provided for."

**5.43** A few respondents elaborated on the reasons for which the surviving spouse and children must get a share, by saying:

*I feel that there should be a law stating that some property must be left to the surviving spouse and the children because the surviving spouse had somehow contributed to the accumulation of the other spouse's wealth. It would be fair if the surviving spouse can at least get 1/3 of the deceased's spouse wealth and the rest can be divided among the children. [Damara male respondent, Omaheke Region]*

*The law should make a legitimate portion obligatory where the spouse and children are disinherited. Because the parents work for the children, the child knows that his/her parent's property will be his/hers later on. The child has a legitimate expectation in this regard. This is more important than the reasons for disinheritance be it bad behaviour, hatred etc. [Nama female respondent, Karas Region]*

*A legitimate portion should be allowed. No wrong committed by the disinherited spouse can justify the disinheritance. The spouse also did good before doing the wrong. Children should not be disinherited because at the end of the day they are a burden to the state. [Nama male respondent, Karas Region]*

*One Nama couple married "in community of property" emphasised that all children must be treated equally in the eyes of the law, saying: *Adopted children and premarital children should be afforded the same benefits as marital children. Provision should be made for them to share equally with marital children especially if they lived together in one house, grew up together and are part of the same family environment and bond.**

**5.44** Several respondents who felt that the law should not become involved felt that there should be unfettered freedom to dispose of property by will. They said that “*we must be able to leave our property to whomever we want*” and similarly “*the directions in any will should be followed*”. Some gave detailed reasons:

*To impose testamentary obligations is also to infringe on a person’s freedom. Usually a person will leave something to the other spouse and children – ‘giving’ must come from the heart and not be forced by law, because then it is not ‘giving’. Reasonable people will hopefully leave something for the other spouse and children. [Owambo female respondent, Oshana Region]*

*The law should not make provision to force a legitimate portion in a will. The testator knows why he/she provides what to whom. His/her wishes should be respected to the last letter and be enforced to the last word. He/she should have a free will to dispose of the property. [Nama male respondent, Karas Region]*

*I think the freedom to write a will should be upheld. Where a testator disinherits one of his children for example, because he’s a drug addict, that reason should be respected. Even if it’s a bad reason the testator should be allowed to do with his property, as he/she likes. This also applies to the surviving spouse. The law should not interfere with a person’s free will. [Female Afrikaner, Karas Region]*

## **The use of wills**

**5.45** A Kwanyama respondent noted there the idea of drawing up a will “*is not part of our custom*”, and another Kwanyama man said the same, “*under our customary law, there is no such thing as a will. The belief is that a dead man can not talk, so everyone that is around must get a share of the property*”.

**5.46** A Subiya respondent warned, “*traditional leaders will respect a will, but whether the family members will respect the will depends on them. Most people write a will if they do not trust their spouse. Most people in this area are writing wills because of the problem of property grabbing.*”

**5.47** In the case of written wills, civil law overrides custom. As explained in Chapter 4, most husbands and wives have equal rights to make wills – with a few racially-based exceptions held over from the apartheid regime.<sup>90</sup> If the deceased spouse leaves a will, then the estate which belongs to the deceased after any division of joint property has been made will be distributed according to the provisions of the will. Persons who make wills can leave property to anyone they wish. While they can choose to provide for their spouse and children, they can just as well leave property to any other relative, a friend, a stranger or even an organisation.

**5.48** However, the UNAM research found that when a written will goes against custom, the family might ignore the written will and follow customs, the written will

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<sup>90</sup> As explained in Chapter 4, some race and gender-based restrictions on the power to make wills are imposed by the Native Administration Proclamation 15 of 1928.

could be destroyed, or the family members could try to have the written will declared invalid. The family would be able to get away with this in cases where the surviving spouse for example did not know his or her legal rights under civil law or did not choose to fight the family in court.

**5.48.1** One Owambo man suggested a way to implement and control any new laws or regulations, saying, *“Maybe there ought to be a committee or board which would oversee the distribution of the estate, and such a board could operate at a regional level. The objective would be to protect the rights of the wife and children, and maybe those of the immediate relatives of the deceased spouse.*

**5.49** The UNAM study found that most people knew about the fact that a person can have a written will, although most people also said that oral wills were more common than written wills. Most of the UNAM respondents believe that the owner of the property needs the assistance of a lawyer, the bank, a police officer, the courts, a traditional leader or someone in their family to write out a will. In fact, the law only requires that the will is witnessed and signed by two people who are not the heirs of the person writing the will.

**5.50** The UNAM study further elaborates on the custom of oral wills:

*In most customary communities, the majority of people make oral wills. An older man often calls his most trusted male relative and explains to the relative how he would like his property distributed after his death (Okupa 1999:9.10). It is said that few family members would dispute this oral testimony because the person selected is known to the family members, there are usually witnesses to the oral will and there are traditional sanctions (such as the deceased man’s ghost haunting the person who has lied) against the selected family member lying about what a deceased person has said. However, some informants indicate that family arguments over the division of inheritance are not uncommon.<sup>91</sup>*

**5.51** One Oshiwambo-speaking man in the LAC study felt that the writing of wills was one area where the law should interfere even further. He said, *“most marital problems are related to inheritance, thus the law must make it a requirement for each and every person to have a will, which is registered.”*

**5.52** One male school principal from Rundu but living in Oshana Region concluded his interview with the following opinion:

*I suggest that LAC and its paralegals should work very hard so that people can understand the law especially on marriages, inheritance and will writing. This is because black cultures don’t consider children after death; they just inherit and vandalise everything and after a year or two nothing will remain with the kids, as if the parent were not working. Some will end up in streets and drop out of school.*

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<sup>91</sup> UNAM study at 53.

## PRELIMINARY RECOMMENDATION

Because of the strength of public feeling that the surviving spouse and children should be provided for, law reforms on maintenance for surviving dependants should be considered. This will be particularly crucial if marital property reforms do not alter customary law sufficiently to ensure that widows can retain sufficient property.

Discriminatory laws that restrict the power of some Namibians to devolve property by will must be repealed.

Education programmes on will-writing should be intensified so that all Namibians are aware of their rights to make a written will and their responsibility to see that any will of a deceased relative is respected. As has been attempted in South Africa, “will writing days” could be tried out, where people are invited to come and write their wills on a specific date at a designated venue with the support of volunteer paralegals and lawyers. Another possibility to increase the use of written wills would be to pass a law that anyone opening a savings account must write a will with the help of the savings institution. Similarly anyone buying a house could be required to make a written will.

Because these recommendations relate more specifically to inheritance than to marital property, they will not be elaborated in this report.

### One law for all?

**5.53** A few people recognised how difficult it would be to have one law that would apply to all people in Namibia, especially if it meant consolidating all the different customary laws into one viewpoint. One English-speaking magistrate in Katima Mulilo said the following:

*I do agree that any sexist or discriminatory custom or law should be done away with. But it would be difficult to write one general law applicable to the whole of Namibia and I am not sure that the people would be satisfied with having to do away with their customs. And even if this law is to be modelled on the existing customs, which one do you use, there are too many different conflicting customs.*

**5.54** In contrast many felt it would be important to strive for consolidation of the various customary laws into one law, and to harmonise customary and civil laws to ensure there is no contradiction with the Namibian Constitution, especially in these modern, changing times. For example:

*There should be one customary law on separation of property, divorce and inheritance. These laws should also be reflective of the positive elements and cultural reasons of all the different tribal groups, thus it may be an alternative to the civil law, but yet it would also ensure greater clarity and better enforcement than the current situation. [Oshiwambo-speaking man living in Kavango Region]*

*The supreme law of the land must prevail, this being the Constitution. Any customary laws must be reconciled to ensure that whichever custom one looks at, ultimately they are akin to the civil law and other customary laws of other tribes. Thus there will be some harmony. [Ondonga Headman, Oshana Region]*

*I think it's better if we have one law of inheritance, divorce and marital property regimes. Even if people want to follow their customs where the custom treats people differently, the law of the country should weigh more. Things can't stay as they are. [Nama male respondent, Karas Region]*

*Historically, the man was considered to be the provider, but now where both parties are providers – the supreme law being the Constitution should be given effect. The customary laws should be uniform if applied, otherwise there will be conflict between different traditional values. Also the customary law on divorce and inheritance should be one supreme law. [Subiya male respondent living in Oshana Region]*

*There should be one law regarding marital property regimes, divorce and inheritance. If there are different laws, many people will be disadvantaged, especially couples in interracial relationships. Times have changed; men and women are seen as equals and unfairness should not exist. One Namibia, one nation. [Nama male respondent, Karas Region]*

**5.55** One Damara male school principal in Kunene Region emphasised the importance of customary laws rather than civil laws by saying:

*One cannot change the culture. Traditionally if one marries you are bound by those rules. Culture should be honoured. Ways of inheritance has changed within the Damara culture. Grandchild could inherit his Granddad's goods. The state should look into old inheritance law and see how the inheritance used to be shared and make laws there under.*

**5.56** Another respondent living in Windhoek expressed the dilemma of trying to merge customary and civil laws, when she said:

*Customary law on how property is shared within a marriage should be abolished and there should be one law on these issues which applies to everyone in Namibia because customary law on inheritance disadvantages women. There should also be only one law with regard to how divorces are handled, but some of the procedures should not apply to customary law divorces because it is time consuming and it's very expensive. [Herero female respondent, Khomas Region]*

**5.57** The following point made by Hinz on customary law reform should be kept in mind: "... people are proud of their traditions and laws. They are proud of their capacity to change according to new demands ... Such law reform from within is a much better guarantee for the acceptance of new laws than enactment by parliament even with consultations ... The fruits of law reform from within grow more quickly, and thus bring more effective solutions."<sup>92</sup>

## PRELIMINARY RECOMMENDATION

**We support the approach taken by the Law Reform and Development Commission of harmonising customary law with the Constitution, rather than attempting overarching unification – particularly in the area of family law where law reforms which departed too radically from established custom might simply be ignored. However, this does not exclude the possibility of providing certain legal safeguards which are available to all Namibians.**

### General issues

**5.58** A final "wrap-up" question was asked in the LAC study: *Are there any other issues concerning property and marriage that should be addressed by law reform?* This was to solicit any final ideas concerning law reform and marital property. The following issues were raised:

- Property grabbing must be discouraged. (3)
- Only the husband and the wife should have a say about their marital property. (2)
- The problem of the wife being disinherited must be addressed. (1)

**5.59** Some respondents replied more broadly to this question, giving suggestions for marriage and family law reform in general, as follows:

- The rights of any illegitimate children must be protected. (5)
- The law must protect women's rights in marriage, especially abuse of women physically (e.g. domestic violence). (1)
- The law should protect children's rights especially when the wife dies first, as the children often suffer and are neglected. (1)
- No polygamous marriages should be allowed. (1)
- There is too much adultery. The law must punish the mistress who breaks up a marriage. (1)

**5.60** One final opinion was provided regarding education and awareness. One Owambo man felt strongly that, "*people must be educated about their rights and the law*".

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<sup>92</sup> Hinz (1997) (n 74) at 78.

In a similar vein, a man from Rundu felt that “people must be informed of the existing laws so that they know what will be the effect of their union, and this law [marital property default] making a difference between the North and the rest of the country should be abolished.”

**5.60.1** The UNAM study emphasises the impact of general education on Namibians’ views about marital property distribution, wills and customary laws. It makes the following points on education:

*Many people say that educated and urban people, especially women, are more likely to handle inheritance differently than less educated or rural people. When people are more highly educated, it is felt they become more critical of discrimination and more open minded about issues of inheritance. Educated people also become more aware of their inheritance rights and of legal instruments such as written wills, which do not exist in customary inheritance systems. Although not a truism, the more educated a person, the more likely they are to go against custom. Higher education does not mean an immediate discarding of customary norms and many highly educated people in Namibia are strong traditionalists. Some people say that urban people follow customary inheritance rules for women, while other people say that urban women act differently to their rural counterparts in that they can decide about property, they are enlightened about wills, and they are more likely than their rural counterparts to insist upon their right to inherit property.<sup>93</sup>*

## **PRELIMINARY RECOMMENDATION**

**Regardless of what law reforms are enacted, extensive education programmes should be implemented to inform people about the laws concerning marriage and marital property so that they can make educated decisions and know what impact their decisions will have on their union, their responsibilities and rights, and their children’s rights.**

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<sup>93</sup> UNAM study at xiii.

# Chapter 6

## THE RANGE OF POSSIBLE MARITAL PROPERTY REGIMES

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*There is currently no limit to the property arrangements which a couple can apply by means of an ante-nuptial agreement, although in practice most people are married either “in community of property” or “out of community of property”. The “accrual system” is also adopted by a small number of couples.*

*As explained in Chapter 4, the common-law approach to “in community of property” has already been modified somewhat by the Married Persons Equality Act, which made less far-reaching changes to the system of “out of community of property” as well.*

*The questions which need consideration are (a) what basic range of marital property systems should be available to couples and (b) whether any further statutory modifications of these basic systems are needed. This chapter will look at the first of these two questions. The second question will be addressed in Chapter 7.*

### 1. MARITAL PROPERTY SYSTEMS FOR NAMIBIA

**1.1** We propose that there should continue to be a wide range of freedom of contract with respect to ante-nuptial contracts.

**1.2** However, without placing any new limits on the freedom to enter into ante-nuptial contracts, we suggest that the three basic systems currently in use in Namibia – **“in community of property”**, **“out of community of property”** and the **“accrual system”** – be modified by statute as discussed in the following chapter and offered as “pre-packaged options” for couples who are intending to marry.

**1.2.1** As will be discussed in more detail below, we recommend that Namibia should follow South Africa in encouraging the use of the “accrual system” in preference to a strict “out of community of property” regime.

**1.3** In order to cater effectively for customary marriages, we suggest establishing by statute **a fourth basic system – a modified version of customary law** which removes current sexual inequalities in the treatment of marital property under customary law whilst preserving essential features of customary law so as to encourage public acceptance.

**1.3.1** The problem with applying any of the three basic civil law marital property regimes to customary marriage is that none of them are particularly well-suited to customary approaches to property.

**1.3.2** Yet, it would also be problematic to offer couples the option of using existing customary law property regimes, as this would not satisfy the constitutional requirement that husbands and wives must have “equal rights as to marriage, during marriage and at its dissolution”.<sup>1</sup>

**1.3.3** A further complication is the fact that extended family members have interests in certain forms of customary property which are not completely paralleled in civil law concepts of family. For example, a spouse may have inherited property from an extended family member, with accompanying responsibilities to use some of that property for the benefit of specific households or relatives.

**1.3.4** There are also certain forms of traditional property in some ethnic groups, such as holy cattle or ceremonial items, which are subject to strongly-held views about who may own them.

**1.3.5** If a regime is imposed upon customary marriages which departs too radically from the accustomed way of doing things, then there is a possibility that the law will be ignored or circumvented. In South Africa, for example, it has been reported that men are reluctant to register customary marriages because they want to avoid bringing their marriages under the statutory regime which applies “in community of property” as the default system.<sup>2</sup>

**1.3.6** With these concerns in mind, we believe that Namibia could usefully adapt approaches which are used in some other countries to the customary law conundrum.

## **2. COMPARATIVE APPROACHES TO MARITAL PROPERTY**

**2.1** Several countries approach marital property by dividing property into different categories, which leads to the application of different principles upon dissolution of the marriage.

### **Norway: “joint property”, “common property” and “separate property”**

**2.2** Norwegian law provides for three different categories of marital property, rather than for specific marital property regimes.

**2.3** In terms of the Norwegian *Marriage Act*, which came into force on 1 January 1993, the property of either spouse, whether it was owned prior to the marriage or acquired during the relationship, is considered to be the “joint property” of both

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<sup>1</sup> Namibian Constitution, Article 14(1).

<sup>2</sup> *CALS Gender Research Project Bulletin*, Vol 6, Spring 2001; *CALS Gender Research Project Bulletin*, Vol 7, 2002.

spouses. However, even though the property is considered joint, that does not mean that both spouses “own” the property. The spouse who acquired the property is still considered the sole owner even if the property is deemed “joint property”. The significance of property as joint property arises only upon divorce or death, when joint property is divided between the spouses. In this respect, Norway’s approach to “joint property” resembles Namibia’s “accrual system”.

**2.4** But this basic approach is qualified by the designation of certain property as “common property”. If the spouses acquire an asset together – for example, if it was given to them together as a gift, or they purchased it together – then the asset is “common property” and is considered to be owned by both throughout the marriage. Furthermore, an asset that has been *used* jointly by the spouses (such as a joint residence or ordinary household goods) can become common property even if it was purchased by one spouse alone, if the other spouse has contributed to the marriage by means of work in the home. Property such as housing and furniture is usually considered common property under this principle. This category of property resembles Namibia’s “in community of property” regime.

**2.5** A third category of property – “separate property” – can be created by a marriage settlement, which is essentially a written agreement that can be entered before or *during* marriage. Separate property is not subject to claim by the other spouse, and it is not taken into account when property distribution occurs. Couples may agree that all of their property, or only certain assets, should be considered separate. The agreement to keep property separate can also be limited to a particular time period, or made conditional on there being no children born of the marriage. A marriage settlement agreement must be registered to be effective against creditors. This category of property resembles Namibia’s “out of community of property” regime, but with far more flexibility.

**2.6** In Norway, the debts of either spouse are considered separate. Thus, neither spouse is liable for the debts of the other and creditors of one spouse cannot go after the other spouse’s assets. With respect to common property, a creditor of one spouse can claim only against the portion of the asset that is owned by the indebted spouse. There are exceptions for debts incurred for household, child-related, or spousal needs. If these expenditures are considered to be necessary ones, then both spouses are liable to the creditor. Also, rent payments are the responsibility of both parties, regardless of whose name is on the actual lease.

**2.7** As in many other countries, individual control of individually-owned property is limited by restrictions relating to the family home and household goods. Consent is required to encumber, lease or sell these assets, regardless of whether they are owned as joint or separate property. Norway has also enacted the *Community of Property Act* which limits what a party can do with common property. In brief, both spouses must agree before legal steps are taken to dispose of property (for instance to sell or mortgage it), and they are also required to cooperate in its use.

## *Dissolution by divorce*

**2.8** There are different approaches to division of property, depending on whether the marriage ends by divorce or death. In a divorce, the total value of the “joint property” of the spouses is determined and each spouse is entitled to a half-share (after appropriate deductions for the debts of each spouse from that spouse’s half-share). Each party has also has an equal claim to the “common property”. If the parties cannot decide which party receives the asset, it will be sold and the proceeds split.

**2.9** With respect to the family home and household goods, even if these are owned by one spouse, the other spouse can be entitled to receive them in the division process “when special reasons so indicate”. Special reasons involve the needs of the spouse and the children. In such a case, appropriate adjustments must be made in the division of joint property. At times, a spouse will be given the right to “possess” the family home for a period following divorce (depending on the needs of the respective spouses and the children), despite the fact that the other spouse has ownership of the home and continues to do so after the division.

**2.10** Certain forms of property are completely exempt from the division process, such as:

- personal items, such as family photographs
- pension and annuity rights, and certain other forms of insurance
- items of property acquired especially for the use of the children, which should remain with the custodial spouse.

Some of the exceptions can fall away if exempting the items would be obviously unfair to the other spouse.

## *Dissolution by death*

**2.11** Upon the death of one spouse, separate property goes directly to the heirs of the deceased and joint property is divided in the same manner as upon separation or divorce, with the deceased spouse’s share going to his or her heirs.

**2.12** But a notable innovation is that division of the joint property does not take place immediately after the deceased dies. The surviving spouse has an entitlement to *possession* of the total value of the joint property (“right to possession of undivided estate”). Later, upon the death of the surviving spouse, the joint property is divided between the estates of both parties. However, if the deceased left children who are not the children of the surviving spouse, the right to the undivided estate is not automatic, but requires consent from these children. The entitlement to possession is also lost if the surviving spouse remarries.<sup>3</sup>

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<sup>3</sup> Ministry of Children and Family Affairs, “Property Relations Between Spouses” 1995; *Marriage Act No 47 of 4 July 1991*.

## New Zealand: “relationship property” and “separate property”

**2.13** In New Zealand, there are two categories of property – “relationship property” and “separate property”. In brief, “relationship property” encompasses the family home and family chattels, as well as all property acquired before or after the marriage intended for the common use or common benefit of both spouses. “Separate property” is all property which is not “relationship property”.<sup>4</sup>

**2.14** There is a rebuttable presumption that all “relationship property” will be divided equally if the relationship has lasted more than three years, and this presumption can be rebutted only by showing there are extraordinary circumstances which make equal sharing repugnant to justice.<sup>5</sup>

**2.15** The laws on property division in New Zealand were recently revamped by the *Property (Relationships) Amendment Act 2001*, which took effect on 1 February 2002.<sup>6</sup> The amending act made the law on “relationship property” applicable to cohabitation relationships as well as marital relationships for the first time.<sup>7</sup>

**2.16** New Zealand law characterises property as either “matrimonial property” (also referred to as “relationship property”), or “separate property”. “Matrimonial or relationship property” includes the following:

- the matrimonial home
- family chattels, for example household furniture and the family car
- any property acquired when contemplating the marriage
- debts
- insurance on the spouses’ lives or on the matrimonial property
- superannuation, if the right to it is based on some contributions since the marriage or on a job held since the marriage
- gifts or inheritances which the owning spouse allows to become mixed with other matrimonial property
- property owned jointly or in equal shares by the spouses
- generally, property acquired by either spouse during the marriage
- property such as salary or wages which comes in during the marriage
- property for the use and benefit of both spouses, which is got out of the property owned by one spouse before the marriage
- property which both spouses agree is matrimonial property; and/or
- increases in the value of matrimonial property, income from it, or the proceeds from sale of it.<sup>8</sup>

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<sup>4</sup> *Property (Relationships) Act 1976*, sections 8-9.

<sup>5</sup> *Ibid*, section 13.

<sup>6</sup> This law made major amendments to the *Matrimonial Property Act 1976* governing division of property. The amending legislation also changed the name of the *Matrimonial Property Act 1976* to the *Property (Relationships) Act 1976*. The fact that the amended act covers couples in “de facto relationships” necessitated the law’s name change.

<sup>7</sup> *Property (Relationships) Act 1976*, section 2.

<sup>8</sup> Family Court of New Zealand, “Matrimonial/Relationship Property”, online: [http://www.courts.govt.nz/family/fair\\_shares.html](http://www.courts.govt.nz/family/fair_shares.html), at 4.

**2.17** It bears mentioning that chattels for business purposes, money and securities are specifically *excluded* from the definition of family chattels (which are “relationship property”). The amended act also excludes family heirlooms and taonga (treasured things in Maori culture).

**2.18** Property which is not “relationship property” is considered “separate property”, which is immune from claim by one’s spouse or partner. Generally, property owned prior to the beginning of the relationship and inherited property is separate.<sup>9</sup>

**2.19** “Separate property” can become “relationship property”.<sup>10</sup> This change in property designation occurs when the actions of one spouse (directly or indirectly), or some act done with “relationship property”, leads to an increase in the value of the separate property of the other spouse.

**2.20** When this occurs, the increase in value is subject to division upon dissolution of the marriage by divorce or death. (When the increase in value is because of the action of one of the partners, the value increase is apportioned according to the contribution each party made.)

### *Dissolution by divorce*

**2.21** Prior to the 2002 amendments, “matrimonial property” was divided into two sub-categories: “domestic (or core) property” and “balance property”. “Domestic property” included items such as the matrimonial home and chattels used on a daily basis by the family.<sup>11</sup> “Balance property” was the residual matrimonial property not included in the “domestic property” category. Upon divorce, “domestic property” was divided equally between the spouses, although courts were given discretion to order an unequal division if “extraordinary circumstances” made an equal division “repugnant to justice”.<sup>12</sup>

**2.22** The “balance property” was divided in a different manner. Again there was a presumption of a fifty-fifty split between the couple as a starting point. But if one spouse had clearly contributed to a greater extent than the other, an unequal division in favour of the greater contributor could be awarded.<sup>13</sup> Thus, an unequal division of this type of property was much easier to attain than for “domestic property”.

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Because the amendments changed the *Matrimonial Property Act 1976* to make it applicable to co-habiting couples as well as married couples, the terminology for property subject to the act is now called “relationship property” as opposed to “matrimonial property”. The definition of “matrimonial property” as compared to the amended “relationship property” is virtually the same, save for changing terminology to reflect the inclusion of *de facto* partnerships.

<sup>9</sup> Family Law Section of the New Zealand Law Society, “Property (Relationships) Act – questions and answers”, online: <http://www.familylaw.org.nz/media/release050401.asp> at 4.

<sup>10</sup> *Property (Relationships) Act 1976*, section 9A.

<sup>11</sup> Murray Callander, “The demise of s.15 Matrimonial Property Act – new life for extraordinary circumstances?”, online: <http://www.nz-lawsoc.org.nz/lawtalk/568pra.htm> at 3.

<sup>12</sup> Ministry of Justice, “Comparison between Matrimonial Property Act 1976 regime and De Facto Relationships (Property) Bill regime”, <http://www.justice.gov.nz/pubs/other/1998/comparison>.

<sup>13</sup> *Id* at 2.

**2.23** Now, in terms of the amended law, all of the “matrimonial property” is split in the same manner. Whether “domestic property” or “balance property”, it is split 50-50 unless extraordinary circumstances make such a division repugnant to justice.<sup>14</sup>

**2.23.1** This amendment was greatly criticised. In particular, the Family Law Section of the New Zealand Law Society submitted that this new regime removes the flexibility provided to the court, especially in its ability to recognise varying contributions made to relationships.<sup>15</sup> The government made this comment on its decision to have one rule for all “relationship property”:

*It represents the principle that a relationship is an equal partnership to which both partners contribute equally. Secondly, it simplifies both the classification and division of relationship property and is likely to provide for greater certainty. Thirdly, it should result in more couples receiving equal amounts of relationship property when their relationship ends.*<sup>16</sup>

**2.24** In addition to the change in how matrimonial property is split, the new act also provides the court with the ability to transfer money or property from one spouse to the other, resulting in an unequal split if the court finds that an economic disparity has resulted from the division of functions during the marriage.<sup>17</sup> The payment would be made out of the partner’s share of the “relationship property”. These provisions will protect those spouses who contribute to the relationship by caring for the home and children and as a result, limit their career options.

**2.24.1** Some critics of this section argue that a more flexible spousal maintenance system would be a more appropriate method of dealing with such economic disadvantages. However, the Justice and Electoral Committee commented that spousal support alone was insufficient to remedy economic disadvantage. Their view is that legislation under both the property division and spousal support statutes would complement each other and more adequately protect economically disadvantaged partners.<sup>18</sup>

**2.24.2** An example of how this provision may be applied is provided in the New Zealand Department of Justice’s pamphlet “Relationship Property: A guide to the law”:

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<sup>14</sup> *Property (Relationships) Act 1976*, Sections 11 and 13.

<sup>15</sup> Justice and Electoral Committee, “Matrimonial Property Amendment Bill and Supplementary Order Paper No 25 – Government Bill – As reported from the Justice and Electoral Committee Commentary”, online: <http://www.gp.co.nz/wooc/bills/mpa/2000-109-3-comm.html> at 9 (hereinafter “Justice and Electoral Committee Paper No 25”).

<sup>16</sup> *Id.*

<sup>17</sup> *Property (Relationships) Act 1976*, Sections 15 and 15A. Section 15A will allow an award to account for economic disparity also in situations where one spouse was able to build up the value of their separate property during the marriage. An award can compensate the partner suffering the economic disadvantage an amount to account for the increase in the other partner’s separate property.

<sup>18</sup> Justice and Electoral Committee Paper No 25 at 12.

*Helen and Ross have been married for seven years and have three small children. The marriage breaks down. Ross is an accountant earning a substantial salary and has built up his career during the marriage. Helen has been out of the paid workforce for most of the marriage while raising the children, and will continue to have the daily care of the children after separation ... The court may award Helen a greater share of the relationship property.*<sup>19</sup>

**2.25** An exception to the rule of 50-50 property division is provided for short duration relationships.<sup>20</sup> Marriages of less than three years undergo division according to contribution by the spouses. There is no presumption of an equal split. Relationships can also be deemed to be of “short duration” despite being longer than three years if a court considers this appropriate in the circumstances.

**2.26** The New Zealand legislation also provides the advantage of allowing the division of property to take place at a later date if undue hardship would result from an immediate transfer. For example, where there are children living in the matrimonial home, the court may postpone division to allow the wife and children to continue living in the home.<sup>21</sup>

**2.27** Prior to the amendments, superannuation schemes and life insurance policies were considered “matrimonial property” to be divided if the spouse in question contributed to them during the marriage. With the new amendments, only the increases in value of these items which can be attributed to the relationship are subject to division.

### *Dissolution by death*

**2.28** The amended act also includes provisions covering property division on the death of a partner. Interestingly, the act gives the surviving partner the *option* of taking either what was given to them under the terms of their partner’s will (or upon intestacy), or taking their share of the “relationship property” as provided in the act. (The share that the surviving spouse would take is governed by the same rules that apply to divorce).<sup>22</sup>

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<sup>19</sup> New Zealand Department of Justice, “Relationship Property: a guide to the law”, online: <http://www.justice.govt.nz/pubs/reports/2001/relation-property/matrimonial-book.pdf> at 6.

<sup>20</sup> *Property (Relationships) Act 1976*, sections 14 and 14A.

<sup>21</sup> As proposed for Namibia by the Law Reform and Development Commission in its *Report on Divorce* (LRDC 13, November 2004), New Zealand property division legislation applies a no-fault based system. Thus, the conduct of the parties is irrelevant to the division of property. There is an exception if the conduct significantly affects the value of the relationship property and the conduct is “gross and palpable”. *Property (Relationships) Act 1976*, section 18A.

<sup>22</sup> *Id.*, section 61.

Intestacy legislation in New Zealand falls under the *Administration Act*. This act provides the surviving spouse with an equal share in the estate. If the deceased had a legal spouse but no surviving parents or direct descendants, the spouse will get all of the estate. If there is a legal spouse and also direct descendants, the spouse will receive all the personal chattels, the first \$121,500 of the estate and one-third share of the remaining property. The other two-thirds go to the direct descendants. “How to deal with a relative dying without a will”, <http://www.howtolaw.co.nz/html/ml259.htm>. [note continues on following page]

## Multiple relationships

**2.29** There are specific provisions that apply to a person involved in more than one relationship – for example, someone who is married but also involved in a cohabitation relationship. If the relationships are successive (one after the other), the property must be divided in the order of the relationships. If the relationships are simultaneous, then the court must satisfy the claims arising from each relationship from the property that is attributable to that particular relationship. If it is impossible to determine which property is attributable to which relationship, the law states that the courts must divide the property in accordance with the contribution of the relationship to the acquisition of the particular pieces of property.<sup>23</sup>

### Canada: “family assets”

**2.30** Some provinces in Canada use an approach which is similar to that of New Zealand, with different treatment of certain forms of property. The concept of matrimonial property has been replacing the doctrine of separation of property across Canadian provinces, in recognition of the equal position of spouses within marriage, to recognise marriage as a form of partnership and to provide for the orderly and equitable settlement of the affairs of the spouses on the breakdown of the marriage.<sup>24</sup>

**2.31** For example, in the Canadian province of British Columbia, in terms of the *Family Relations Act*, each spouse is entitled to an undivided half interest in “family assets”.<sup>25</sup> A family asset is defined as “property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose.”<sup>26</sup> Even though family assets are normally supposed to be shared equally, the act allows “judicial reapportionment on basis of fairness.”<sup>27</sup> The same rules apply to persons who have lived together as husband and wife for a period of at least two years.<sup>28</sup>

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The *Administration Act* “makes no quantitative or qualitative distinction between relationships. For example, a short abusive marriage that ended in separation many years prior to the death of the deceased would have the same financial value, for the purposes of the [Act], as a lengthy *de facto* relationship that ended only with the death of the deceased.” Kristina Andersen, “Changes to Inheritance Rights from 1 February 2002”, <http://www.aucklandlawyerco.nz/DeathArticle.html> [brackets omitted].

<sup>23</sup> *Property (Relationships) Act 1976*, sections 52A and 52B.

<sup>24</sup> Government of Canada Website, Provincial and Territorial Law on Matrimonial Property.

<sup>25</sup> *Family Relations Act 1996*, section 56.

<sup>26</sup> *Family Relations Act 1996*, section 58(2). Section 58 (3) provides some examples of family assets, such as money of a spouse in a savings account if that account is ordinarily used for a family purpose or a spouse’s rights under a pension scheme.

<sup>27</sup> In considering this question, the court must take into account, the duration of the marriage, the duration of the period which the spouses have lived separate and apart, the date when the property was acquired or disposed of, the extent to which property was acquired by one spouse through inheritance or gift, the needs of each spouse to become or remain economically independent and self-sufficient and any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse. *Family Relations Act 1996*, section 65.

<sup>28</sup> *Family Relations Act 1996*, section 1.

## Botswana: choice within a race-based system

**2.32** In Botswana, the property regime options available to married couples depend upon whether they are African or non-African. The default system for non-African couples is “out of community of property”, and the default system for African couples is that imposed by customary law.

**2.33** In terms of the *Married Persons Property Act of 1971*, a non-African couple married in a civil marriage will automatically be married “out of community of property”, unless they make an ante-nuptial agreement which applies a property regime of “in community of property”.

**2.34** The marital property and inheritance of “African” couples in both civil and customary marriages is governed by customary law. However, the couple can opt into the common law system by filling out a form prior to the marriage ceremony, in the presence of two witnesses, stating that they wish their marriage to be subject to civil law. They can choose between the civil law systems of “out of community of property” and “in community of property”.<sup>29</sup>

**2.35** If an African couple do not opt into one of the common law regimes, then the property rights of the spouses will depend upon the particular indigenous group. This will often mean that the woman is unable to act independently. For example, social anthropologist Professor Schapera describes the Tswana situation as follows:

*The husband, once he sets up his own household, is for all practical purposes his own master. The woman on the other hand, passes from the legal control of her parents into that of her husband, who now becomes her guardian and as such responsible for her actions. He is the official head of the household, while she is regarded as his mothlanka (servant). She must be in all respects subservient to his will and must live wherever he chooses to build his home.*<sup>30</sup>

**2.36** Customary division of property upon dissolution of the marriage similarly depends upon the traditions and customs of the particular indigenous group of which the couple is a part. In the case of the Bakwena, “[p]roperty is divided according to the sources from which it derived and then according to the conduct of the parties.”<sup>31</sup> Griffiths examines a customary property division of a Bakwena couple:

*... under the customary system, in dealing with cattle, a woman is not allowed to claim cattle which are known as estate cattle, that is cattle which are handed down from father to son; one may only, as a woman, claim those cattle which*

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<sup>29</sup> Centre on Housing Rights and Evictions (COHRE), *Bringing Equality Home, Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa*, 2004 at 42 (hereinafter “COHRE”); A Griffiths, “The Problem of Informal Justice: Family Dispute Processing Among the Bakwena – a Case Study” (1986), 14 *International Journal of the Sociology of Law* 359 at 363; A Molokomme, “Disseminating Family Law Reforms: Some Lessons from Botswana” [1990-91] *Journal of Legal Pluralism* 303 at 310.

<sup>30</sup> Griffiths (n 29) at 370.

<sup>31</sup> Id at 363.

*you acquired from the fruits of a particular type of domestic labour, for example, from the proceeds of brewing beer. Once the property available for distribution has been established, the issue of conduct will be relevant with regard to its distribution. By contrast to the 'no-fault' principle of the statutory [civil] system, 'bad' conduct does validly affect property claims in the customary system.*<sup>32</sup>

**2.37** When the marriage is dissolved by death, women also lose out under customary systems. The bulk of the estate of a deceased husband will go to the eldest son in Tswana society, who has a duty to look after the widow and the household. The family homestead usually goes to the last-born son, who is expected to remain in the home to look after the aging widow. In practice, the focus on male heirs often lead to a total loss of financial security for women, especially where HIV may have led to the loss of all the male members of the household. In such a case, property might be passed to distant relatives and be lost to the female members of the family completely.<sup>33</sup>

**2.38** Botswana seems to be unusual in Southern Africa in the way that it applies customary law property systems to both civil and customary marriages between Africans as a default system. A race-based system such as that applied by Botswana is not recommended for Namibia, although the degree of choice given to African couples in customary marriages is a positive measure.

**2.39** It is important to note that observers say that the system of forms used to provide choices for couples in Botswana is confusing in practice. There are three different forms: one for non-Africans who wish to opt out of the default system of "out of community of property", one for Africans who wish to opt out of customary law and into the non-African default system of "out of community of property", and one for Africans who wish to opt out of customary law and into the optional system of "in community of property". In practice, even the marriage officers are said to have trouble understanding the various forms, and explaining them to couples who are about to marry.<sup>34</sup>

## **Zimbabwe: exclusion on sharing certain types of property**

**2.40** Zimbabwe's *Married Person's Property Act* provides a presumption that all marriages are "out of community of property". The parties are permitted, however, to contract out of this system, into an "in community of property" regime if they enter an agreement.

**2.41** The *Matrimonial Causes Act* enacted in 1985 gave courts the power to redistribute property on divorce in marriages which are "out of community of property".<sup>35</sup>

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<sup>32</sup> Id at 363-64.

<sup>33</sup> COHRE (n 29) at 45.

<sup>34</sup> A Molokomme (n 29) at 310-11.

<sup>35</sup> Section 7(1)(a) of the *Matrimonial Causes Act 1985* states:

*Subject to the provisions of this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, the court may make an order with regard to:*

The act is significant in that it applies to both statutory and customary marriages – provided that the customary marriage is registered.<sup>36</sup> In terms of this act, “the courts now have the power to order the transfer of property from one spouse to another when dissolving or separating spouses from customary law marriage and general law marriages that are “out of community of property”.<sup>37</sup>

**2.42** This ability to redistribute assets is discretionary, and factors for the court to consider are provided in section 7(4) of the act. Of particular interest is factor (e): “direct or indirect contributions made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties.”

**2.43** Certain property types of property are excluded from redistribution. They are the following: inherited property, property of sentimental value, property which should be held personally due to custom.<sup>38</sup>

**2.43.1** With respect to the last exception, critics have expressed concern.

*Inheritance is unlikely to cause any problems. However, difficulties may arise with regard to the other two categories. When does property vest in a person in terms of custom and when it is intended to be held personally? This exclusion involves a two-stage inquiry. First, did the property vest in the spouse in terms of any custom, and second was it intended to be held personally by the spouse? ...*

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(a) the division, apportionment or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other;

<sup>36</sup> Alice Armstrong, “Zimbabwe: Away from the Customary Law” [1988-89] 27 *Journal of Family Law* 339, 347. Armstrong *et al* later criticise this requirement in Alice Armstrong *et al*, “Uncovering Reality: Excavating Women’s Rights in African Family Law” (1993), 7 *International Journal of Law and the Family* 314 at 359:

*... although registration is common, not all customary marriages are registered, partly because the facilities are not always available. Some marriages are not registered because bridewealth has not been paid. Thus the requirement of registration does not necessarily provide a solution, although the provision that an unregistered customary marriage is considered valid for certain purposes provides some protection for women but if the couple separate they are not entitled to use statutes, such as the Matrimonial Causes Act, to have their property divided equitably. It is therefore recommended that women be entitled to an equitable distribution of property at the end of an unrecognized customary marriage.*

<sup>37</sup> Welshman Ncube “Underprivilege & Inequality: the Matrimonial Property Rights of Women in Zimbabwe” in Alice K Armstrong, ed, *Women & Law in Southern Africa* (Harare: Zim Publishing House), 1987 at 6.

<sup>38</sup> *Matrimonial Causes Act*, section 7(3):

*The power of an appropriate court to make order [for redistribution of the assets of the spouses] shall not extend to any assets which are proved, to the satisfaction of the court, to have been acquired by a spouse, whether before or during the marriage-*

- (a) by way of an inheritance;
- (b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
- (c) in any manner and which have particular sentimental value to the spouse concerned.

Perhaps the most problematic question is whether or not land allocated to individuals or families in the communal lands falls within this exclusion. Land is undoubtedly the principal form of wealth available to rural people and, in most cases, the only property rural spouses possess at the dissolution of marriage. Thus, if it is excluded from the re-allocation process, the new law would be of very little relevance to rural women whose subsistence depends almost entirely on access to land ...<sup>39</sup>

As to the exclusion of property of 'sentimental value', this means property will be excluded if the owner is particularly attached to it in a sentimental manner. Our courts are, therefore, likely to hold that such property as affectionate rings, jewellery and other personalized works of art fall within this exception.

**2.43.2** On a positive note, Ncube makes the following observation:

*The onus of proving that any property falls within these categories [the categories of property excluded from reallocation] rests on the party seeking its exclusion from the re-allocation process. However, notwithstanding that property falling within these categories is excluded from the re-allocation process there is nothing to prevent a court from having regard to it in its assessment of the means and financial resources of the parties.*<sup>40</sup>

**2.44** If the couple opted for a marriage "in community of property", the property is split equally upon divorce and the option of discretionary redistribution does not apply (although this is debatable).<sup>41</sup>

## **South Africa: criticised for applying civil law systems to customary marriages**

**2.45** In South Africa, the *Recognition of Customary Marriages Act 120 of 1998* has made "in community of property" the default system for all future customary marriages, as it is for all civil marriages. The range of choices for the two types of marriages are now essentially the same (with special provisions for polygamous customary marriages which will be discussed below in the chapter on polygamy).

**2.46** However, Likhapa Mbatha of the Centre for Applied Legal Studies has criticised the *Recognition of Customary Marriages Act* for limiting itself to the proprietary

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<sup>39</sup> Ncube (n 37) at 20.

<sup>40</sup> Welshman Ncube, "Re-allocation of Matrimonial Property at the Dissolution of Marriage in Zimbabwe" [1990] 30(1) JAL 1, at 6.

<sup>41</sup> This point needs clarification. "There is nothing in the wording of section 7 which excludes marriages in community of property although common sense suggests that the parties' agreement should be given precedence, subject only to the interests of the minor children of the marriage. The Minister of Justice, Legal and Parliamentary Affairs has expressed the opinion that section 7 does not apply to marriages in community of property. Legislative intervention is needed to clarify the position." Ncube (n 37) at 21.

consequences available under civil law, instead of thinking beyond civil law to find a property system more appropriate to customary marriage. She is particularly critical of the fact that the new system allows customary heirs to enter into community of property without having excluded the property inherited for the use of a pool of family members from the joint estate. According to Mbatha, this pits one set of vulnerable persons against another: “Doing this replaces the property interests of the heir’s siblings, especially female siblings, with those of the heir’s wife and children.” She maintains that “family property” should be excluded from the joint estate if “in community of property” is applied to customary marriages.<sup>42</sup>

### 3. CONCLUSION

**3.1** Having surveyed a range of approaches used in other countries, we conclude that it is useful to stick with systems which are already somewhat familiar to Namibia’s population and which will fit into Namibia’s existing statutory framework (such as the *Married Persons Equality Act*).

**3.1.1** In a country like Namibia, with a population which is predominantly rural and therefore disadvantaged in terms of access to courts, it would not be helpful to introduce unfamiliar concepts or systems which are likely to lead to increased disputes.

**3.2** Whilst it is necessary to remove some of the aspects of customary law which disadvantage or discriminate against women, we believe that it is unfair to force customary law into a framework drawn from Roman-Dutch common law which is not well-suited to the nature of customary law.

**3.2.1** Respect for culture demands that customary law be respected insofar as it is not unconstitutional.

**3.3** However at the same time, it must be noted that come couples married in both civil and customary marriages in Namibia already draw on both customary law traditions as well as different norms popularised by churches and other social institutions.

**3.4** Therefore, we recommend that it would be appropriate to offer a compromise for marriages which are conducted according to customary norms, whether these marriages are technically civil or customary in nature.

**3.4.1** We propose offering a standard system which allows for the observance of customary norms on the treatment of property – as long as these norms are not based on any restrictions on women’s rights to own, manage or control property.

**3.4.2** The primary purpose of the proposed new system would be to exempt two categories of property from a couple’s joint estate under the popular system of “in community of property”:

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<sup>42</sup> Likhapa Mbatha, “Reflection on the rights created by the Recognition of Customary Marriages Act, *Agenda Special Focus* 2005 at 42-ff.

- (a) property (such as inherited property or particular categories of cattle) held by one member of a kin group for the use of various members of that kin group, and
- (b) traditional items which in terms of customary law must be held by the individual in question (such as sacred cattle or traditional pots and containers which have symbolic value).

**3.4.3** In order to ensure that the exempted property does not leave the wife (as the vulnerable spouse) without a significant share of joint property, a ceiling could be set on the value of property which may be exempted in terms of the proposed provisions.

**3.4.4** The envisaged system would not be appropriate for polygamous marriages, where there would need to be an agreement which uses “out of community of property” as a starting point and assigns property to each “house”.

**3.5** We thus envisage that there should be four “pre-packaged” options provided by statute which could be chosen by means of simple *pro forma* ante-nuptial contracts or declarations without the assistance of a lawyer:

- “in community of property”
- “out of community of property”
- “accrual system”
- a new system known as a “modified customary law system” or “in community of property with customary law property exemption”.

**3.6** Recommendations on proposed statutory modifications to the three systems already in use in Namibia (“in community of property”, “out of community of property” and the “accrual system”) are contained in the next chapter.

## Recommendation

### FOUR STATUTORY SYSTEMS

We suggest that there should be four basic systems established by statute for use by couples who are intending to marry:

- **“in community of property”**
- **“out of community of property”**
- **“accrual system”**
- **“modified customary law system” or “in community of property with customary law property exemption”**

Couples who wish to make other property arrangements by ante-nuptial agreement should be free to arrange their property affairs as they wish, provided that they should not be allowed to contract out of any of the provisions of the *Married Persons Equality Act*.

## Recommendation

### PROPOSAL FOR NEW MODIFIED CUSTOMARY LAW SYSTEM

We suggest establishing by statute as one of the standard choices for marital property regimes a “**modified customary law system**” which applies community of property to a marriage, but exempts certain property on the basis of the tenets of customary law. We suggest that the exempted property should be:

- (a) property inherited before or after the marriage and held in trust by the spouse in question in terms of customary law for the benefit of other members of the spouse’s kin group;
- (b) traditional property acquired before or after the marriage which in terms of the relevant customary law must be held personally by the spouse in question.

The exempted property will remain the separate property of the spouse in question, and will not form part of the joint estate.

The statute should specifically state that, in the case of a dispute, the onus of proving that property falls within the exempted categories should fall on the party who is claiming that the property is exempted. This could be the spouse, in the case of a divorce or a proceeding brought in terms of the Married Persons Equality Act, or someone who is trying to exclude the property from the estate of a deceased spouse.

In order to ensure that the exempted property does not leave the wife (as the vulnerable spouse) without a significant share of joint property, a ceiling could be set on the value of property which may be exempted in terms of the proposed provisions.

An alternative name for this system could be “**in community of property with customary law property exemption**”.

Polygamous customary marriages, as long as they continue to be allowed, would have to be governed by an ante-nuptial contract which uses “out of community of property” as a starting point and assigns property to each “house”.

# Chapter 7

## STATUTORY ALTERATIONS TO EXISTING REGIMES

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*The current marital property regimes in use in Namibia were outlined in Chapter 4. Post-independence statutory reforms to the regimes of “in community of property”<sup>1</sup> and “out of community of property” have already been enacted by the Married Persons Equality Act, which was also discussed in Chapter 4.*

*The previous chapter recommended a selection of four basic property regimes – “in community of property”, “out of community of property”, the “accrual system” and a new regime of “in community of property with customary law property exemption”.*

*This chapter makes recommendations for further statutory reforms to the three existing property regimes of “in community of property”, “out of community of property” and the “accrual system”, based largely on the experience of South Africa with the same property regimes.*

### 1. SUGGESTED REFORMS TO “IN COMMUNITY OF PROPERTY”

#### A. EXCLUDED ASSETS AND DEBTS

##### Excluded assets

**1.1** There are certain types of assets that currently do not become part of the joint estate in a marriage “in community of property”, in terms of the common law and certain statutes. These are:

- assets that are expressly excluded from the joint estate in an ante-nuptial contract
- assets willed or given to one spouse on the condition that they not become part of the joint estate<sup>1</sup>
- assets subject to a *fideicommissum* or usufruct<sup>2</sup>
- the engagement ring and other gifts made with a view to marriage

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<sup>1</sup> With respect to these first two types of exclusions, however, the *fruits* of such assets will be considered to be part of the joint estate unless the fruits are also specifically excluded in the ante-nuptial contract or the condition placed upon the inheritance/gift. (An example of such “fruits” would be rental income from immovable property which is excluded from the joint estate.) HR Hahlo, *The South African Law of Husband and Wife* (4<sup>th</sup> Edition) 1975 at 225.

<sup>2</sup> These are both instances where a person holds property subject to the rights of others.

# Chapter 8

## THE DEFAULT REGIME

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The previous two chapters have made recommendations on a spectrum of marital property regimes for Namibia. This chapter asks (a) whether there should be a default regime for marriages in Namibia where couples do not make a specific agreement on this point, (b) if so, what the default regime should be and (c) whether there should be one default regime for both civil and customary marriages.

### 1. SUMMARY OF CURRENT NAMIBIAN POSITION

**1.1** As explained in Chapter 4, the default matrimonial property regime applicable to most civil marriages in Namibia is “**in community of property**”. Couples subject to this default position can enter into an ante-nuptial contract prior to the wedding to adopt a different property regime.

**1.2** As a vestige of Namibia’s apartheid history, the default regime applicable to civil marriages between blacks in certain parts of northern Namibia is “**out of community of property**”, by virtue of section 17(6) of the *Native Administration Proclamation 15 of 1928*. Couples subject to this default position can change their marital property regime by making a declaration before a magistrate anytime within one month before the wedding.

**1.3** The property regimes currently applicable to **customary marriages** cannot be labelled so neatly. However, as Chapter 5 explains, there seems to be more emphasis on separate property than on joint property in most Namibian communities, even though many people say that joint property expresses their cultural values most adequately.

### 2. PROPOSED REFORMS

**2.1** The Law Reform and Development Commission has proposed the following reforms which pertain to the default position:

- Section 17(6) of the *Native Administration Proclamation* should be repealed as a matter of urgency, so that the default regime for all civil marriages in Namibia is “in community of property”.<sup>1</sup>
- “In community of property” should be the default regime for all future customary law marriages, unless the couple make an ante-nuptial agreement or a declaration which changes the default regime.<sup>2</sup>

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<sup>1</sup> Law Reform & Development Commission, *Report on Uniform Default Matrimonial Consequences of Common Law Marriages: Repeal of section 17(6) of Native Administration Proclamation, 1928 (Proclamation 15 of 1928)*, LRDC 11, Project 6, July 2003 (hereinafter “LRDC 11”).

- The property arrangements of customary marriages entered into *before* the proposed law comes into force should continue to be governed by customary law. But these couples can use a simple procedure to change their property regime to “in community of property” – as long as the husband is not married to any other women in polygamous marriages. Couples will be allowed to make this change for a period of at least two years after the new law comes into force, and maybe even longer.<sup>3</sup>

**2.2** The question of modification of the basic default position has not yet been addressed by the Law Reform and Development Commission.<sup>4</sup>

### **3. SOUTH AFRICAN POSITION**

#### **One default regime: “in community of property”**

**3.1** Under the *Matrimonial Property Act 88 of 1984*, South Africa has three marital property regimes: “in community of property”, “out of community of property”, and the “accrual system”.

**3.2** The default regime for both civil marriages and customary marriages is “in community of property”.<sup>5</sup> As in Namibia, this means that each spouse owns an undivided half share of the joint estate and the spouses administer the estate jointly.<sup>6</sup>

#### **Repeal of the apartheid dispensation**

**3.3** Until 1988, the position for black people who entered into civil marriages in South Africa was similar to that which applies to blacks in some northern parts of Namibia.

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<sup>2</sup> Law Reform and Development Commission, *Report on Customary law Marriages*, Project 7, LRDC 12, October 2004 (hereinafter “LRDC 12”).

<sup>3</sup> LRDC 12.

<sup>4</sup> LRDC 11 at 3.2.

<sup>5</sup> As discussed in more detail below, the proprietary consequences of customary marriages are governed by the *Recognition of Customary Marriages Act 120 of 1998*. In terms of this act, the proprietary consequences of customary marriages entered into before the commencement of the act are governed by customary law. However, non-polygamous customary marriages that are entered into after the act’s commencement are, like civil marriages, “in community of property and community of profit and loss” unless the spouses specifically exclude such consequences in an ante-nuptial contract. With respect to polygamous customary marriages entered into after the commencement of the act, the court must approve a written contract regulating the matrimonial property system that will apply to the marriage.

<sup>6</sup> The “marital power,” under which the husband had the sole power to administer the joint estate, was abolished in South Africa by the *Matrimonial Property Act* (with respect to white, coloured and Indian marriages, but prospectively only), the *Marriage and Matrimonial Property Law Amendment Act 3 of 1988* (with respect to black marriages, but prospectively only), and the *General Law Fourth Amendment Act 132 of 1993* (with respect to all marriages, retrospectively).

**3.3.1** In terms of section 22 of the *Black Administration Act 38 of 1927*, civil marriages between blacks were deemed to be “out of community of property”, unless both spouses signed a declaration in front of a magistrate, commissioner or marriage officer. This declaration had to be signed within one month prior to the marriage, and had to indicate the intending spouses’ wish to marry “in community of property” and “in community of profit and loss”.<sup>7</sup>

**3.4** This situation was changed by the *Marriage and Matrimonial Property Law Amendment Act 3 of 1988* (which came into operation on 2 December 1988). This act had the effect of bringing civil marriages between blacks in line with all other civil marriages.

**3.4.1** A civil marriage entered into between blacks after this act came into operation is, like all other civil marriages, governed by the *Matrimonial Property Act* which provides that the default system for all marriages is “in community of property”.

**3.5** The changeover was accomplished by way of allowing black people who were already married a “grace period” of two years in which to register changes to their matrimonial property regime. Blacks who married before the commencement of *Act 3 of 1988* could change their matrimonial regime by executing and registering a notarial contract to that effect in a deeds registry within two years after the commencement of the act.<sup>8</sup>

**3.5.1** This method was introduced by the South African government in order to help black people avoid the expense of going through a court proceeding as a result of a past discriminatory law which had affected them. It was unnecessary for such couples to approach a court for the relief required, as the act provided a method of changing one’s matrimonial property regime easily and directly.

**3.5.2** The period given for recording the change by way of notarial deed ended on 2 December 1990, and now any couple who would like to change their matrimonial regime can do so only by way of formal application to court.

**3.6** The temporary notarial option was a limited one in terms of options. Black couples affected by the apartheid-era law could use this technique *only* to change their marriages from being totally “out of community of property” to being under the “accrual system” – they could not change their marriages to “in community of property” in this manner.

**3.7** Any other change of regime required a joint application to court for leave to make the change, and the court had authority to “authorise them to enter into a

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<sup>7</sup> DSP Cronje, *The South African Law of Persons and Family Law* (3<sup>rd</sup> Edition), 1994 at 203. The *Matrimonial Property Act*, which came into operation on 1 November 1984, provided that chapters II and III of the act did not apply to marriages in respect of which the matrimonial system was governed by section 22 of the *Black Administration Act 38 of 1927*.

<sup>8</sup> Id at 204.

notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit”.<sup>9</sup>

**3.7.1** The court procedure for post-nuptial changes is available to all married couples, not just to those affected by the racially-based laws of the past. It is discussed more fully in Chapter 10.

## Transitional mechanisms

**3.8** Two questions arise concerning the transitional mechanisms which accompanied the South African reforms.

**3.9** Firstly, **why was the temporary ability to change matrimonial property regimes by the simpler procedure of notarial contracts limited to changes from “out of community of property” to the “accrual system”?** In other words, why did sections 21 and 25 of South Africa’s *Matrimonial Property Act* allow changes by notarial contract (for blacks and for certain other couples) only from “out of community of property” into the “accrual system”, and not changes from “out of community of property” to “in community of property”?

**3.9.1** One possible reason might be concern about potential prejudice to other wives at customary law – but this reason obviously applies only to couples where the husbands are black and not to other couples, whilst the statutory limitation applied to *all* couples married under strict “out of community of property” before the new system came into force.

**3.9.2** The limitation could not validly be motivated by concerns about the rights of creditors. For example, there is no corresponding obligation on a single person who plans to marry “in community of property” to notify creditors of this intention. Furthermore, a change from “out of community of property” to “in community of property” could actually be advantageous to creditors, as the estate available to secure the debt of one spouse would normally be enlarged by a conversion to an “in community of property” system.

**3.9.3** The limitation seems to have been motivated primarily by a general reluctance to allow changes in matrimonial property regimes without requiring persuasive justification of the desire for the changes. The notarial approach could be used by couples only to make the most limited form of change, to bring their marriages in line with the new norm for “out of community of property” marriages after the enactment of the *Matrimonial Property Act*. (As discussed in more detail in the previous chapter, this act transformed “out of community of property” into the less harsh separation of the “accrual system”, except in cases where couples make an ante-nuptial agreement that specifically rejects accrual.) Any more far-reaching changes require a court application, as will be discussed below in Chapter 10.

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<sup>9</sup> *Matrimonial Property Act*, section 25(2).

**3.10** The second question is **why was the notarial system for changes limited to such a brief time period?** As one South African law professor observes:

*If the notarial contract was considered to be an effective and inexpensive method for modernizing one's matrimonial property system, there appears to be no good reason why the dispensation should not have been allowed to remain operative permanently.*<sup>10</sup>

**3.11** The reasons behind these aspects of the South African legislation are not discussed in the Report of the South Africa Law Commission which preceded them,<sup>11</sup> and enquires to a range of South African academics and jurists have yielded no answers.

## **Applying the default regime to customary marriages**

**3.12** The proprietary consequences of customary marriages in South Africa are governed by the *Recognition of Customary Marriages Act 120 of 1998*, which came into operation on 15 November 2000.<sup>12</sup>

**3.12.1** This law reform was preceded by the publication of an Issue Paper and a Discussion Paper by the South African Law Commission. These documents were disseminated and discussed at a total of 23 provincial and national workshops that involved non-government organisations, women's groups, traditional leaders, the legal profession, state departments, and the religious community.<sup>13</sup>

**3.13** In general, the act extends full legal recognition to all customary marriages, whether or not they are registered in terms of the act.

**3.13.1** Any customary marriage entered into before or after the act is "for all purposes recognised as a marriage", provided that marriages entered into *after* the commencement of the act comply with the requirement that both

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<sup>10</sup> June Sinclair, *The Law of Marriage, Volume 1* at 234, footnote 79.

<sup>11</sup> South African Law Commission, *Report on matrimonial property law with special reference to the Matrimonial Affairs Act, 1953, the status of the married women and the law of succession in so far as it affects the spouses*, 1982.

<sup>12</sup> Section 2. Several laws were specifically repealed or amended to bring them in line with the new act. Amongst these were marital power sections of the *Black Administration Act 38 of 1927*, "repealed to remove South Africa's most notorious reason for the 'perpetual minority' of African women." *Memorandum on the Objects of the Recognition of Customary Marriages Bill*, attached to the Recognition of Customary Marriages Bill, B-110B-98.

Section 11(3) of the *Black Administration Act 38 of 1927* read, in pertinent part, "a Black woman ... who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian." The Transkei, KwaZulu and Natal marriage regulations were amended to remove the concept of marital power.

The act has been supplemented by the *Deeds Registries Amendment Act 9 of 2003*, which provides for the registration of immovable property in the names of persons married under the new property dispensations which now apply to customary marriage.

<sup>13</sup> "Launch of the Recognition of Customary Marriages Act No. 120 of 1998", Speech by Deputy Minister of Justice & Constitutional Development, Ms Cheryl Gillwald, 15 November 2000.

spouses are above the age of 18 (or have obtained state permission to marry at a younger age), and have given their free consent to the marriage.<sup>14</sup>

**3.14** In terms of the act, the proprietary consequences of customary marriages entered into *before* the commencement of the act are governed by customary law.<sup>15</sup> However, non-polygamous customary marriages entered into *after* the act's commencement are, like civil marriages, "in community of property and community of profit and loss", unless the spouses specifically exclude such consequences in an ante-nuptial contract.<sup>16</sup>

**3.14.1** The law did not make the change in property consequences retroactive because of concerns about the impact of this approach on existing polygamous marriages, as well as worries that other dependants (such as widows dependent on their deceased husband's heirs) would not be adequately protected under such an approach.<sup>17</sup>

**3.15** The South African Law Commission (SALC) initially recommended that customary marriages should be automatically "out of community of property" (in contrast to civil marriages which are automatically "in community of property"), unless the parties enter into an ante-nuptial agreement specifying a different system.

**3.15.1** This proposal met with strong public opposition, however, primarily on the basis that a default regime of "in community of property" would be more consonant with existing customary norms. The SALC then altered its recommendation accordingly.<sup>18</sup>

**3.16** Most of the provisions of the *Matrimonial Property Act* which apply to civil marriages that are "in community of property" apply equally to customary marriages that are "in community of property".

**3.16.1** This means, for example, that spouses married "in community of property" must obtain each other's consent for all major financial transactions involving the joint estate.<sup>19</sup>

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<sup>14</sup> For a general analysis of the act, see Victoria Bronstein, "Confronting Custom in the New South African State: An Analysis of the Recognition of Customary Marriages Act 120 of 1998", 16 SAJHR 558 (2000); AJ Kerr, 'Customary Family Law' in Brigitte Clark, ed, *Family Law Service* (Butterworths, 1988 as updated to October 2000).

<sup>15</sup> Section 7(1): "The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law."

<sup>16</sup> Section 7(2): "A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an ante-nuptial contract which regulates the matrimonial property system of their marriage."

<sup>17</sup> Bronstein (n 14) at 565.

<sup>18</sup> South African Law Commission, Project 90 – The Harmonisation of the Common Law and the Indigenous Law, *Report on Customary Marriages* (1998) at paragraphs 6.3.4.11-6.3.4.13.

<sup>19</sup> Only the provisions authorising donations between spouses and the liability of spouses for household necessities are not made applicable to customary marriages. See *Recognition of Customary Marriages*

**3.17** The *Recognition of Customary Marriages Act* provides for “equal status and capacity” of spouses in customary marriages, but this depends on the property regime applicable to the marriage:

*A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.*<sup>20</sup>

**3.18** Under South African customary law, the husband as head of household is the owner of all marital assets (although the wife may have certain rights in respect of some items) – so for customary marriages concluded *before* the act came into force, for which customary law determines the property consequences, this grant of “equal capacity” appears to be meaningless.<sup>21</sup>

**3.19** The act’s failure to make its property clauses retrospective has been criticised on the grounds that this discriminates on the basis of date of marriage and thus “produces an underclass of consistently disadvantaged people who are unable to improve their position by lawful means”.<sup>22</sup> The National Association of Democratic Lawyers (NADEL) warned that the approach taken by the law to customary marriages concluded before the commencement of the act was quite likely unconstitutional:

*Generally, customary law marriages have the effect of vesting ownership of all marital property in the husband. This includes property that the wife brings into the marriage. This allows for a situation which manifestly discriminates against women.*<sup>23</sup>

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Act, section 7(3). The issues in question are covered by section 22 and 23 of the *Matrimonial Property Act*, which are not made applicable to customary marriages.

The prohibition on donations to spouses was a common-law restriction that applied to civil marriages – therefore there was presumably no need to change it in respect of customary marriages. As for the failure to apply the provision on liability for household necessities to customary marriages, the reason for this decision has not been located.

<sup>20</sup> *Recognition of Customary Marriages Act*, section 6. As noted above, the act abolishes section 11(3) of the *Black Administration Act 38 of 1927*, which placed customary law wives in the position of minors. The act also states that the age of majority of any person will be determined by the *Age of Majority Act 57 of 1972*. *Recognition of Customary Marriages Act*, section 9.

<sup>21</sup> See AJ Kerr (n 14) at 28-ff. See also, for example, *PM v EM*, Central Divorce Court, Johannesburg, Case No I70/97, 29 November 2000. In dissolving a customary marriage concluded before the commencement of the *Recognition of Customary Marriages Act*, the divorce court found that the marriage could not in terms of section 7(1) be viewed as a marriage ‘in community of property’ for the following reason: “According to customary law a wife is a perpetual minor and cannot own, or alienate property and is subject to authority of her husband. Only husbands can own and alienate property.” The wife received only maintenance of R200/month in respect of each of the six children of whom she was given custody, as well as 50% of her husband’s pension interest, which he offered.

<sup>22</sup> See, for example, Sharita Samuel. “Women married in customary law: no longer minors”, 40 *Agenda* 23 (1999) at 27-28.

<sup>23</sup> NADEL, *Submissions on the Recognition of Customary Marriages Bill (1998)*, as quoted in Bronstein (n 14) at 566.

**3.20** A further difficulty with the approach taken to marriages concluded *before* the commencement of the act is that it is not clear what the matrimonial property system governing such marriages actually is. For example, there is debate about whether or not married women can in fact own and control any forms of property under customary law.<sup>24</sup>

**3.21** Couples who entered into a customary marriage *before* the date of the act may apply to the court for leave to change their marital property system.<sup>25</sup> The court may grant permission for a change of property regime if it is satisfied that there are sound reasons for the change, that sufficient written notice of the change has been given to all creditors, and that no other person will be prejudiced by the change.<sup>26</sup>

**3.21.1** This option for change is unlikely to assist many women since the spouses must act jointly to request the change. Few husbands married under customary law are likely to be eager to relinquish any of their sole rights over property. As one commentator notes, “*it can be confidently predicted that there will be very few applications of this type*”.<sup>27</sup>

## **Implementation of the *Recognition of Customary Marriages Act***

**3.22** The Centre for Applied Legal Studies (CALS) is conducting ongoing monitoring of the implementation of South Africa’s *Recognition of Customary Marriages Act*. They have found that whilst women are eager to register their customary marriages, men are more reluctant to do so.

**3.23** Registering officers have been reluctant to register marriages unless the application is made by both spouses, even though the act provides for registration by an individual spouse or even an interested third party, because of their fear of registering a non-existent marriage on the basis of fraudulent identity documents. According to CALS, men have a greater incentive not to register their customary marriages unless forced to do so “*because of the patriarchal system that assumes that all property in the man’s possession belongs to him alone*”.<sup>28</sup>

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<sup>24</sup> See Bronstein (n 14) at 568-70. Bronstein asserts that court should develop interpretations of customary law in accordance with living customary law (as opposed to static official versions of customary law) and with the letter and spirit of the South African Bill of Rights.

<sup>25</sup> If the marriage is polygamous, all of the spouses (and all other persons with a sufficient interest in the matter) must be joined in the proceeding.

<sup>26</sup> See *Recognition of Customary Marriages Act*, section 7(4). Compare section 21(1) of the *Matrimonial Property Act*.

One other difference is that section 21(1) of the *Matrimonial Property Act* requires sufficient notice of the proposed change to “all the creditors of the spouses”, whilst section 7(4) of the *Recognition of Customary Marriages Act* requires sufficient written notice of the proposed changes to “all creditors of the spouse for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the *Gazette*”.

<sup>27</sup> Bronstein (n 14) at 568.

<sup>28</sup> CALS *Gender Research Project Bulletin*, Vol 6, Spring 2001; CALS *Gender Research Project Bulletin*, Vol 7, 2002.

**3.24** CALS also found that community attitudes are far from accepting the concept of joint decision-making by husband and wife. Some women feel unable to make domestic decisions alone, even when their husbands are absent or have deserted the family. Many men, on the other hand, feel that it is unnecessary to involve their wives in financial decisions (such as the sale of cattle), and are not willing to give their wives information about their wages.

**3.25** CALS concludes that “*male dominance in the domestic sphere continues unaltered despite the legal provision requiring women and men in customary marriage to share decision-making*”. They suggested that efforts should be directed at convincing men to share power within the family, and at changing negative attitudes on the part of both women and men which have the potential to frustrate the legal provisions.<sup>29</sup>

## **4. DEFAULT PROPERTY REGIMES IN OTHER AFRICAN COUNTRIES**

**4.1** It does not seem useful to attempt a general survey of default systems in countries around the world. Instead, we have collected here only information on a few other African approaches.

### **Botswana: “out of community of property” or customary law**

**4.2** As explained in Chapter 6, in Botswana, the default system for non-African couples is “out of community of property”, and the default system for African couples in both civil and customary marriages is that imposed by customary law.

**4.3** A non-African couple married in a civil marriage will automatically be married “out of community of property”, unless they make an ante-nuptial agreement which applies a property regime of “in community of property”. An African couple can opt into the common law system by filling out a form prior to the marriage ceremony, in the presence of two witnesses, stating that they wish their marriage to be subject to civil law. They can choose between the civil law systems of “out of community of property” and “in community of property”.<sup>30</sup>

**4.3.1** Some of the problematic aspects of this approach were discussed in Chapter 6.

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<sup>29</sup> CALS Gender Research Project Bulletin, October 2002.

<sup>30</sup> Centre on Housing Rights and Evictions (COHRE), *Bringing Equality Home, Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa*, 2004 at 42 (hereinafter “COHRE”); A Griffiths, “The Problem of Informal Justice: Family Dispute Processing Among the Bakwena – a Case Study” (1986) 14 *International Journal of the Sociology of Law* 359, at 363; A Molokomme, “Disseminating Family Law Reforms: Some Lessons from Botswana” [1990-91] *Journal of Legal Pluralism* 303, at 310.

## Zimbabwe, Kenya and Tanzania: “out of community of property” with judicial discretion to re-distribute

**4.4 Zimbabwe’s** *Married Person’s Property Act* provides a presumption that all marriages are “out of community of property”. The parties are permitted, however, to contract out of this system, into an “in community of property” regime, if they enter an agreement. However, as explained in more detail in Chapter 6, the *Matrimonial Causes Act* gives courts the power to re-distribute property on divorce in both statutory and customary marriages which are “out of community of property” (provided that the customary marriage is registered).<sup>31</sup>

**4.5 In Kenya**, marital property is divided with reference to the English *Married Women’s Property Act 1882*, which is a vestige of British colonial occupation. Marital property is essentially separate property – which means that each spouse retains whatever she or he owned before marriage, as well as what he or she acquired during marriage. However, despite this underlying concept of separate property, the courts have recently moved towards a fair (although not always equal) division of property based on the financial and non-financial contributions made by both spouses. This approach has been applied to marriages under both customary law and Islamic law, as well as to civil marriages.<sup>32</sup>

**4.6 In Tanzania**, the *Law of Marriage 1971* integrated the law on marital property for all forms of marriage. This law established a system of separation of property. Section 114(2)B provides that the “contribution made by each party in money, or work towards acquiring of assets” will be considered by the courts, which have reportedly begun to “incline towards equality of division.”<sup>33</sup> As in Kenya, caring for the children and home has also been recognised by the courts as a relevant contribution.<sup>34</sup>

## Senegal: “in community of property” default for monogamous marriages

**4.7 In Senegal**, there are three possible types of marriages: monogamy, limited polygamy (with a maximum of two wives) and polygamy (with a maximum of four wives). The default property regime for all monogamous marriages is “in community

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<sup>31</sup> Welshman Ncube “Underprivilege & Inequality: the Matrimonial Property Rights of Women in Zimbabwe” in Alice K Armstrong, ed, *Women & Law in Southern Africa* (Harare: Zim Publishing House 1987) 3, at 6.

<sup>32</sup> Celestine Nyamu Musembi, “‘Sitting on her husband’s back with her hands in his pockets’: Commentary on Judicial Decision-Making in Marital Property cases in Kenya”, *International Survey of Family Law* 2002 at 229-ff. *Kivuitu v Kivuitu* [1991] 2 *Kenyan Appeal Review* 241 was the seminal case on non-financial contributions. The *Nderitu* case (Civil Appeal No 203 of 1997, Nairobi) held that child-bearing counts as a contribution to family welfare and creates an entitlement to marital assets.

<sup>33</sup> JS Read, “Milestone in the integration of personal laws: the new law of marriage and divorce in Tanzania” [1972] 16 (1) *J.A.L.* 19.

<sup>34</sup> A Armstrong, “Uncovering Reality: Excavating Women’s Rights in African Family Law” (1993) 7 *International Journal of Law and the Family* at 345. See the discussion of the case of *Bi Hava Mohamed v. Ally Sefu*.

of property”, whilst polygamous marriages may be “separate property” (analogous to “out of community of property”) or a system known as the “dote regime” (discussed in more detail in Chapter 9 on polygamy).<sup>35</sup>

## **Ethiopia: “in community of property” mandatory for all civil marriages**

**4.8** In Ethiopia, couples who are married in terms of civil law have no choice at all regarding their marital property regime. The *Family Code 2000* provides that, as a requirement for registration and legal recognition, “*all income derived by personal efforts of the spouse and from their common or personal property shall be common property*”. When the marriage is dissolved, each spouse has a right to his or her own property plus a half share in the common property. This has the effect of an “in community of property regime” (although it also appears to bear some similarity to the “accrual system”).<sup>36</sup> However, the protection which this mandatory common property regime might provide for women is to a great extent undermined by the husband’s continuing ‘marital power’:

*[T]he Code codifies certain customary practices: it designates the husband as the head of the family and gives him the authority to administer household property. The husband is given the right to control and manage common property and to make all decisions regarding such property. Whereas the Code requires that the husband act judiciously and not alienate property without the consent of his wife, strong traditional and cultural beliefs discourage women from enforcing this requirement.*<sup>37</sup>

**4.9** Customary marriages are not recognised under civil law, and property in such marriages still follows customary law.<sup>38</sup>

## **Overview of default systems in other African countries**

**4.10** While “out of community of property” seems to be the default option in many African countries, there is a recognition that this approach can lead to unfairness which requires rectification by judicial re-distribution. However, in a country like Namibia where such a high proportion of the population is rural-based, it makes sense to try to minimise court cases and the need for judicial involvement in property re-distribution. Thus, “out of community of property” does not appear to be a good choice for a default regime in Namibia.

**4.11** “In community of property”, or variations of this, are also used in other African countries as the default regime for at least some types of marriages. Given the strong community preference for this system reported in Chapter 5, it should be considered as the Namibian default option.

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<sup>35</sup> COHRE (n 30) at 102-3.

<sup>36</sup> Ibid at 51-52.

<sup>37</sup> Ibid at 52.

<sup>38</sup> Ibid at 52-53.

**4.12** We also assert that the “accrual system” would also have a number of advantages as the choice for a default regime, even though this system does not appear to be well-known in Namibia or in other African countries.

## 5. ISSUES TO CONSIDER IN NAMIBIA

**5.1** The first question to consider is: Should there be a default regime, or should the law provide **no default** so that all couples are forced to choose from a given set of options and record their choice on the marriage certificate?

**5.1.1** We suggest that government should give consideration to the option of **no default system, whereby couples entering into a marriage are forced to choose a property regime** after a standardised explanation by the civil or customary marriage officer. As discussed in Chapter 6, we would suggest that the choices should be the following:

- (a) **“in community of property”**
- (b) **“accrual system”**
- (c) **“out of community of property”**
- (d) **a modified customary law system**, whereby certain forms of property are automatically excluded from the joint estate (as proposed in Chapter 6).

**5.1.2** However, should this option be chosen, care must be taken to ensure that couples have the information they need to make a fully-informed choice, and that both intending spouses participate freely in the decision-making process:

*In Botswana, Rwanda, Zimbabwe and Swaziland, for example, laws often allow a choice of different regimes: “in community of property” or “out of community of property”; and separate or joint ownership of marital property. Frequently, the choice itself, or at least the consequences thereof, are not made clear to the couple to be married, especially not to the woman, thereby leaving her with little or no actual decision-making power over the kind of regime to be entered into... WLSA Swaziland points out that in Swaziland, most women “at the time of contracting the marriage, were not aware of the consequences of the very marriage they were entering into, let alone that there were other options available to them”. While a choice between marital property regimes may seem to be the best solution, education on their details and consequences is badly needed to make the choice and the regimes effective. Also, administrative systems for registration of the marriage regime must ensure that women and men engage equally in the decision-making process, with their full knowledge of the regimes and their consequences.<sup>39</sup>*

**5.2** Alternatively, if a default regime is chosen, what should be the **default system for civil marriages**, and what should be the **default system for customary marriages**?

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<sup>39</sup> Ibid at 176.

**5.2.1** If a default regime is to be applied, it would be simplest to **apply one default regime to all marriages**, particularly in light of the fact that many of the other basic minimum requirements for the two types of marriages (such as the minimum age for marriage) are in the process of being harmonised. Having a single default regime would facilitate public education, and hopefully avoid confusion of the sort experienced in Botswana (as described in Chapter 6). Another point in favour of a single default regime would be to ensure that customary marriages are no longer seen as having “second-class status” as in the apartheid past. A single default system would avoid the perception that there are different laws for different races, whilst still providing a full range of choices for married couples.

**5.3 If a single default regime is chosen, we recommend that the government consider one of the following two possibilities as the default regime for both civil and customary marriages: “in community of property” OR the “accrual system”.**

**5.4** The following are **arguments in favour of “in community of property”** as the default regime:

- “In community of property” is the most familiar and popular property regime at present, as the research reported in Chapter 5 shows.
- This system fits well with concepts of marriage advanced by churches.
- This system is also conceptually easy to understand.
- This system can be of particular benefit to a spouse (usually the wife) who takes care of the home or tills the fields instead of earning a cash income.
- The application of the *Married Persons Equality Act* to “in community of property” marriages gives husbands and wives greater equality in decision-making powers.

**5.5** The following are **arguments against “in community of property”** as a default regime:

- The *Married Persons Equality Act* is not easy to enforce in practice, particularly given the absence of requirements for prior written consent. This means that in practice, husbands may retain greater control over joint property despite the good intentions of the *Married Persons Equality Act*. Even if the act is strengthened as recommended, enforcement may still be difficult, particularly in rural areas and amongst people who are not well-informed about their rights.
- “In community of property” appears to be a relatively radical departure from customary law, which may mean that couples in customary marriages will be reluctant to apply it in practice.
- “In community of property” is not well-suited to take into account claims on property from extended family members – such as cases where someone has inherited property from an extended family member along with a concomitant duty to support certain family members.

**5.6** The following are **arguments in favour of the “accrual system”** as a default regime:

- Because the “accrual system” keeps the property of the spouses separate until the marriage is dissolved, it might work better in the customary law context – for example by making it simpler for one of the spouses to fulfil obligations in his or her kinship networks.
- The “accrual system” is in a sense a compromise between “in community of property” and “out of community of property” and thus carries some of the advantages of both – autonomy during the subsistence of the marriage combined with a fair division of the gains which take place during the existence of the relationship.
- The “accrual system” gives some protection to spouses against responsibility for debts of the other spouse, as only the separate property of the spouse who incurred the debts can be attached for their payment.
- The “accrual system” might be more appropriate where either spouse has children by another partner who must be maintained. Paying maintenance out of joint assets can be a source of friction if the marriage is “in community of property”.

### **5.7 Arguments against “accrual” as a default regime:**

- This system might perpetrate inequalities, as the man is more likely to bring assets of greater value into the marriage at the outset, given the gender-based economic inequalities currently persisting in Namibia. The woman would, upon dissolution of the marriage, have an entitlement only to her own separate property and to half of the value of the assets acquired by either spouse during the marriage. This might make it possible for men in society to retain their position as financially-stronger parties for a longer time period.
- This option is currently unfamiliar and might be hard to explain clearly, at least in the initial stages.

**5.8** In general, we feel that the use of a default regime encourages couples to marry without really understanding the property consequences of the marriage. Therefore, we would suggest that it would be useful to require all couples to indicate on their marriage certificates one of the standardised basic regimes, after a standardised explanation which all marriage officers are supplied with to communicate to marrying couples. More detailed or individually-tailored arrangements could still be made by way of ante-nuptial agreement.

**5.9 If a default regime is chosen, all married couples should have the possibility of making a simple ante-nuptial contract which adopts a different property system. However, if they want to choose one of the basic regimes, they should be able to do this simply by making an indication on their marriage certificate.**

**5.9.1** All couples should be able to choose any one of four basic regimes, or any variation of these basic systems which they would like to put together.

**5.9.2** However, upon dissolution of the marriage, courts should always have the discretion to depart from a strict application of any ante-nuptial agreement if

this is necessary to achieve fairness between the parties. This potential discretion is discussed in more detail below in Chapters 10, 12 and 13.

## Recommendation

### DEFAULT REGIME

To avoid confusion, we propose one rule for all marriages. We would suggest that there should be **no default regime**, but that couples should rather be required to indicate on their marriage certificates which of the four basic property regimes they are choosing to govern their marriage, after listening to a standardised explanation provided by the marriage officer. Marriage officers should be equipped to answer questions about the possible regimes, and to provide additional information. They should also be charged with the duty of ensuring that both spouses are making informed choices of their own free will.

If a default regime is chosen, there are arguments in favour of making it either “in community of property” or the “accrual system”. However, on balance, we feel that the weight of argument probably tips in favour of making the default regime “in community of property” (except for polygamous marriages).

If there is a default regime, marriage officers should be required to explain the basic choices to all couples. Furthermore, it should be possible for couples to indicate a choice of any of the four basic regimes by simply indicating this on the marriage certificate.

It is envisaged that in future there will be marriage officers who register customary marriages as well as marriage officers who register civil marriages, so the increased involvement of marriage officers in explaining property regimes could work in practice for both types of marriages.

Since marriage certificates are publicly witnessed, it seems appropriate to allow couples to choose one of the basic regimes by means of an indication on the certificate, rather than requiring preparation of an ante-nuptial contract by a lawyer. However, the use of a detailed ante-nuptial contract should be continue to be open to any couples who wish to choose this route.

Because of the recommendations made in Chapter 10 concerning the possibility of changing one’s marital property regime, we propose that any new approach to default regimes could be applied prospectively, with all couples already married at the time the law reform comes into force (in civil marriage or in customary marriage) having the option to change their property regimes as suggested in Chapter 10.

- certain life insurance policies in terms of the *Long-Term Insurance Act 5 of 1998*<sup>3</sup>
- benefits paid under the *Friendly Societies Act 25 of 1956*
- any order of costs imposed in a matrimonial action before the marriage is dissolved.

In addition, where any such separate property is replaced by other assets (such as property which is sold for cash), the substituted assets remain separate property.

**1.2** The treatment of assets and debts in marriages “in community of property” depends in some instances on whether they relate to “patrimonial loss” or “non-patrimonial loss”.

**1.2.1 Patrimonial loss** is a loss to a person’s estate. This can be in the form of a loss or reduction of value of an asset, or the creation or increase of a debt.

**1.2.2 Non-patrimonial loss** results from an injury to personality. This could arise from pain and suffering, disfigurement from a bodily injury, defamation, or injury to a person’s dignity.

**1.2.3** Patrimonial loss can be measured directly in money, whilst non-patrimonial loss is only indirectly measurable in monetary terms.

**1.2.4** Patrimonial loss is generally easier to quantify than non-patrimonial loss, as non-patrimonial loss is usually based on subjective injuries to feelings which are difficult to translate into monetary value.<sup>4</sup>

## **Assets: Damages for delicts committed against a spouse by a third party**

**1.3** At common law, damages recovered by one spouse for a delict (a wrong) committed against him or her (including damages for both patrimonial and non-patrimonial loss) become part of the joint estate, unless the court makes an express order that the damages awarded should be excluded from the estate.<sup>5</sup>

**1.4** In contrast, in South Africa, the common law position on this point has been changed by the *Matrimonial Property Act 88 of 1984*, which provides that any damages recovered by a spouse in respect of *non-patrimonial* loss are automatically *excluded* from the joint estate, becoming the separate property of the injured spouse.<sup>6</sup>

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<sup>3</sup> See section 43. Policy premiums paid out of a joint estate which is sequestered for insolvency may have to be refunded by the spouse who holds the right or interest in the policy in question. Section 44.

<sup>4</sup> See PJ Visser and JM Potgieter, *Law of Damages* (Juta’s, 1993) at 30-31, 42-ff, 85-ff. The finer points of the distinction between the two forms of damages are not relevant to this discussion.

<sup>5</sup> Hahlo (4<sup>th</sup> edition) (n 1) at 221, citing the leading case of *Strydom v Strydom* 1949 (2) SA 736 (T); Sonnnekus at 33, citing *Potgieter* 1959 (1) SA 194 (W).

<sup>6</sup> Section 18(a), *Matrimonial Property Act*:

**1.4.1** The South African change is a logical one – damages paid in respect of losses to the joint estate (patrimonial losses) become part of the joint estate, whilst damages based on an injury to personality (non-patrimonial losses) are automatically kept out of the joint estate since they relate only to the injured party. However, the less logical common law position remains the rule in Namibia.

## Recommendation

### DAMAGES PAID BY A THIRD PARTY IN RESPECT OF A DELICT COMMITTED AGAINST ONE SPOUSE

Namibia should implement a reform similar to that in South Africa on damages arising from a delict committed against a spouse by a third party, with the effect that damages paid for patrimonial loss become part of the joint estate, whilst damages paid for non-patrimonial loss become the separate property of the injured spouse.

## Debts: damages which must be paid to a third party for delicts committed by one spouse

**1.5** In a marriage “in community of property”, the ante-nuptial debts of both spouses become joint debts upon the marriage, to be paid out of the joint estate. This applies not only to contractual and delictual debts, but also to maintenance obligations toward parents, siblings, children from a previous marriage, and extra-marital children. It is not possible to stipulate in an ante-nuptial contract that there will be a community of assets but not of debts.

**1.6** Debts incurred after the marriage are also joint debts payable from the joint estate, subject to the provisions of the *Married Persons Equality Act*. However, there are some exceptions.

**1.6.1** One exception is criminal fines or confiscations, which affect only the half-share of the guilty spouse.<sup>7</sup>

**1.6.2** Another area of possible exception relates to situations where one spouse is liable for damages in respect of a delict (a wrong) committed by that spouse. Under common law, there is some doubt about the treatment of such

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*Notwithstanding the fact that a spouse is married in community of property, any amount recovered by him by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him, does not fall into the joint estate but becomes his separate property.*

See also *Van den Berg* 2003 (6) SA 229 (TPD) (benefits received from insurance policies for non-patrimonial damages resulting from shooting accident, excluded from joint estate in terms of section 18(a)).

<sup>7</sup> Hahlo (4<sup>th</sup> edition) (n 1) at 232.

debts. The case law does not agree on whether the joint estate can be made liable in full for such a debt.

**1.6.2.1** One view is that liability during the subsistence of the marriage is chargeable only against the half-interest in the joint estate of the spouse who committed the delict.<sup>8</sup>

**1.6.2.2** The other view is that during the subsistence of the marriage the joint estate can be made liable in full for damages payable in respect of delicts committed by either of the spouses.<sup>9</sup> The innocent spouse probably has a claim for adjustment in respect of such debts against the other spouse upon dissolution of the marriage, but this principle is not clearly established in modern case law.<sup>10</sup>

**1.6.3** There are two competing theories on the subject.

**1.6.3.1** One principle is that no one should be held liable for the wrongs of another, meaning that each spouse should bear sole responsibility for debts arising from their own wrongdoing.

**1.6.3.2** The countervailing argument is that community of property contemplates community of all debts and assets, meaning that there is no justification for making exceptions in respect of some particular kinds of debts but not others.<sup>11</sup> Some authorities suggest that the “innocent spouse” would be entitled to an adjustment in respect of the damages for the other spouse’s delict when the joint estate is dissolved, whilst other authorities have cast doubt on this point.<sup>12</sup>

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<sup>8</sup> See *Levy v Fleming* 1931 TPD 62; *Boezaart & Potgieter v Wenke* 1931 TPD 70 at 87. This view was stated in *Pretoria Municipality v Esterhuizen* 1928 TPD 678 (in dicta):

*The weight of authority seems to be in favour of the view that as between husband and wife the one is not liable for damages recovered by a third person for a delict by the other, except in special circumstances, for instance ... when the delict is committed in the interests of the joint estate. [citation omitted].*

<sup>9</sup> *Erikson Motors v Scholtz* 1960 (4) SA 791 stated that the joint estate of spouses married “in community of property” is liable in full for the independent and uninstigated delicts of the wife.

In *Oppermann v Opperman* 1962 (3) SA 40 (N), it was held that where a wife who is married “in community of property” has committed a delict, the person entitled to claim damages can claim from the joint estate. The innocent spouse’s request for an immediate dissolution of the community to protect his half-share of the estate was declined by the court, even though the existing assets of the entire estate were insufficient to cover the delict. The question of whether or not there could be an adjustment in favour of the innocent spouse at the time of dissolution was not decided, but the court indicated that this was doubtful.

<sup>10</sup> Hahlo (4<sup>th</sup> edition) (n 1) at 238.

<sup>11</sup> *Id* at 233-38.

<sup>12</sup> The authorities on both sides of the question are canvassed, for example, in *Oppermann v Opperman* 1962 (3) SA 40 (N), where the judge made no finding on the question of adjustment when the estate is divided, but noted that such adjustments do not seem to be made in practice (at 46).

**1.7** In South Africa this confusion has been laid to rest by the *Matrimonial Property Act 88 of 1984*. Section 19 of the act regulates the delictual liability of persons married “in community of property”. It reads as follows:

**19. Liability for delicts committed by spouses.** – *When a spouse is liable for the payment of damages, including damages for non-patrimonial loss, by reason of a delict committed by him or when a contribution is recoverable under the Apportionment of Damages Act, 1956 (Act No. 34 of 1956), such damages or contribution and any costs awarded against him are recoverable from the separate property, if any, of that spouse, and only in so far as he has no separate property, from the joint estate: Provided that in so far as such damages, contribution or costs have been recovered from the joint estate, an adjustment shall, upon the division of the joint estate, be effected in favour of the other spouse or his estate, as the case may be.*

## Recommendation

### DEBTS ARISING FROM DELICTS COMMITTED BY ONE SPOUSE

Namibia should adopt a similar policy as South Africa on damages arising from delicts committed by one spouse against a third party.

Whilst it is true that a marriage “in community of property” is a financial partnership which generally encompasses both debts and assets, it does not seem fair to assume that the intending spouses have contemplated equal sharing of acts which are found to be legally wrongful in any way. It makes sense to charge damages arising from civil liability against any separate property of the spouse who has committed the delict in the first instance, and to allow an adjustment in favour of the innocent spouse for any such damages taken out of the joint estate upon dissolution of the estate.

This approach does not prejudice the creditor in any way, but it also ultimately places responsibility for the delict (insofar as possible) only on the half-share of the estate which belongs to the spouse who committed the delict.

## Debt to one spouse, asset to the other: Damages arising from a delict committed against one spouse by the other spouse

**1.8** Can spouses sue each other for damages if they are married “in community of property”?

**1.9** At common law, a husband and wife were once viewed as a single legal entity and the legal existence of the wife, during marriage, was regarded as being

merged into that of the husband.<sup>13</sup> From this principle emerged the doctrine of interspousal immunity, in the sense that a delict committed by one spouse against the other could not be a source of liability. This was not only a matter of procedure (neither spouse could sue the other during marriage, as you cannot sue yourself), but was also a matter of substantive law in many jurisdictions. Unity of legal personality also had repercussions on actions with third parties. It led to the anomalous result that a wife could sue a third party for personal injuries sustained in an accident in which her husband was contributorily negligent, but she could not sue him.

**1.10** It appears that the common law still precludes spouses in Namibia who are married “in community of property” from suing each other in delict. The reasoning is that because there is only one estate, any damages which the injured spouse might recover would of necessity come out of this joint estate and then immediately fall back into it.<sup>14</sup>

**1.11** Situations where one spouse commits a wrong against the other spouse jointly with a third party are covered in part in Namibia by the *Apportionment of Damages Act 34 of 1956* (as amended in 1971).

**1.11.1** This act provides that an injured spouse can sue a third party and the other spouse as joint wrongdoers in the same action, for both patrimonial and non-patrimonial loss. The injured spouse can alternatively sue the third party alone, and the third party can then make a claim for contributory negligence against the guilty spouse. For the purposes of recovering the contribution payable by the guilty spouse, the damages awarded to the innocent spouse are not considered part of the joint estate unless they relate to an asset of the joint estate. In other words, damages awarded to the injured spouse in respect of non-patrimonial loss (such as damages for pain and suffering) are protected from being taken by a third party in a claim for contribution against the guilty spouse.<sup>15</sup>

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<sup>13</sup> See discussion in Law Reform Commission of British Columbia, *Report on Interspousal Immunity in Tort*, March 1983.

<sup>14</sup> *Delpont v Mutual and Federal Insurance Co. Ltd and Others* 1984 (3) SA 191 (Durban and Coast Local Division); see also *Tomlin v London & Lancashire Insurance Co. Ltd* 1962 (2) SA 30 (Durban and Coast Local Division).

Similarly, In the case of *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 31 (Witwatersrand Local Division), it was held that a wife married “in community of property” and profit of loss and subject to her husband’s marital power cannot at common law, or under the *Motor Vehicle Insurance Act 29 of 1942*, or the *Matrimonial Affairs Act 37 of 1953*, sue in her own name to recover medical and hospital expenses for which the husband is liable, incurred for the treatment of personal injuries sustained by her in a collision.

<sup>15</sup> Hahlo (4<sup>th</sup> edition) (n 1) at 222-23. Section 2, with the addition of section (1A) inserted in 1971, reads in relevant part:

(1) Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.

(1A) A person shall for the purposes of this section be regarded as a joint wrongdoer if he would have been a joint wrongdoer but for the fact that he is married in community of property to the plaintiff.

An accompanying proviso was also added to section 2(6)(a) in 1971, as follows:

**1.11.2** This protection is very limited, since it applies only to the context where a third party makes a claim for contribution. If the marriage is dissolved, the damages awarded to the innocent spouse are for this purpose considered part of the joint estate, meaning that the spouse who was involved in the wrongdoing *can benefit from his or her own wrongdoing* by receiving a half-share of the damages awarded to the other spouse for the wrong.

**1.11.3** The statute has also been very narrowly interpreted in the *Delport* case, apparently to apply only to situations where the third party who is a joint wrongdoer wishes to join the spouse to the action against him. The *Delport* case held that the 1971 amendments do not remove the general prohibition on claims for delicts between spouses married “in community of property”, regardless of whether the spouse who has committed the wrong is a sole or a joint wrongdoer.<sup>16</sup>

**1.12** Some of the problems created by the general prohibition on delictual actions between spouses are explained by Professor Boberg:

*If it be asked in what circumstances it would benefit a spouse married in community to sue his or her spouse for damages in delict, since the damages would come out of the joint estate and would forthwith fall back into the estate, the answer must surely be in circumstances where this is not the case, notably where the spouse is only the ‘nominal’ defendant and the ‘real’ defendant is an insurance company. Thus, in a successful action by a spouse against the other spouse’s registered insurer in terms of the Motor Vehicle Insurance Act 1942, the insurer’s liability depends on the insured spouse’s liability in delict to the injured spouse, but the damages do not come out of the joint estate although they fall into that estate. And even without the interposition of an insurance company there might be a purpose in the spouses’ suing each other if the innocent spouse has a right of recourse against the guilty upon dissolution of the community by death or divorce.*<sup>17</sup>

**1.13** South Africa has modified the general common law rule on delicts between spouses by statute. Section 18(b) of the South African *Matrimonial Property Act 88 of 1984* provides that a spouse may sue to recover damages from the other spouse, but only for damages “*other than damages for patrimonial loss in respect of bodily injuries suffered by the spouse and due wholly or in part to the fault of the other spouse*”.<sup>18</sup>

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*Provided that the amount of the damages recovered by the plaintiff referred to in ss (1A) from any joint wrongdoer against whom the judgment has been given shall, for the purpose of the recovery of a contribution from the person referred to in the last-mentioned subsection [a person married in community of property to the plaintiff], not be deemed to form part of the joint estate of such plaintiff and such person except in so far as such amount relates to an asset of the said joint estate.*

<sup>16</sup> See *Delport v Mutual and Federal Insurance* 1984 (3) SA 191 (Durban and Coast Local Division), which held that section 1A of the *Apportionment of Damages Act* (inserted by the 1971 amendments) was intended to work in the interests of the wrongdoer and not to confer a right of action on a plaintiff spouse against a husband to whom she is married “in community of property”. Thus, it was decided that a spouse had no right of action at common law for a delict committed against her by her spouse, and that the Act does not confer such a right whether her husband is a sole or joint wrongdoer.

<sup>17</sup> Professor Boberg, “Commentary on the Apportionment of Damages Act”, 88 SALJ 423 (1971).

<sup>18</sup> *Matrimonial Property Act*, section 18(b):

**1.13.1** This means that the injured spouse can hold the other spouse (or that spouse's insurer) liable for damages for pain and suffering stemming from a physical injury, but not for damages such as medical costs, hospitalisation, and loss of earnings. Any damages recovered from one spouse by the other would, in terms of section 19 of South Africa's *Matrimonial Property Act*, come from the separate property of the guilty spouse, or else form the basis for an adjustment of the joint estate at the time of division.

**1.13.2** It seems strange that the South African approach excludes from the joint estate only non-patrimonial losses arising from **bodily** injury – and not, for example, psychological damage from some form of domestic violence that did not involve bodily injury.

**1.13.3** The South African law has also been criticised for allowing claims in delict between spouses only for non-patrimonial damages, on the grounds that this narrow rule has resulted in grave discrimination, especially where the damages were suffered as a result of a joint delict by a spouse and a third party.<sup>19</sup>

**1.13.3.1** For example, in one case the parties were not yet married at the time the delict was committed. The woman sustained personal injuries in a motorcycle collision as a result of the combined negligence of her fiancé and a third party. However, the fact that the injured woman married her fiancé in the meantime was held to preclude her from making any claim against her fiancé or his insurer.<sup>20</sup>

**1.13.4** The *Apportionment of Damages Act 34 of 1956* as it applies in South Africa has been amended accordingly, but these amendments do not apply in Namibia.<sup>21</sup>

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*Notwithstanding the fact that a spouse is married in community of property, ... he may recover from the other spouse damages, other than damages for patrimonial loss, in respect of bodily injuries suffered by him and attributable either wholly or in part to the fault of that spouse.*

<sup>19</sup> JC Sonnekus, "Matrimonial Property" in Brigitte Clark, ed, *Family Law Service* (Butterworths, 1988 as updated to October 2000) at 35.

<sup>20</sup> Ibid.

<sup>21</sup> In South Africa, the *Apportionment of Damages Act 58 of 1971* was amended by section 33 of the *Matrimonial Property Act 88 of 1984*, which was not applicable to "South West Africa". See also section 18(a) of the Act.

In South Africa, *patrimonial damages* won from the third party who was a joint wrongdoer with the one spouse still become part of the joint estate. However, the damages paid by the third party for patrimonial loss reflect only that party's portion of responsibility for the loss to the estate, so the guilty spouse receives no unfair benefit from the wrong when the joint estate is ultimately split in half. It is only payment for *non-patrimonial loss to the injured spouse* which would unfairly benefit the guilty spouse if included in the joint estate.

It should be noted that further amendments to the South African *Apportionment of Damages Act* have been proposed by the South African Law Reform Commission. See Project 96: The Apportionment of Damages Act 34 of 1956 (July 2003), available at [wwwserver.law.wits.ac.za/salc/report/report.html](http://wwwserver.law.wits.ac.za/salc/report/report.html). The only proposed amendment which involves spouses explicitly is a suggestion that the following definition of joint wrongdoer be inserted in the statute:

**1.14** It is more difficult to make comparisons to other jurisdictions, which do not utilise property regimes analogous to “in community of property”. However, it may be useful to examine a few jurisdictions which provide for sharing of at least some categories of property upon dissolution of the marriage. In such jurisdictions, community of property is not seen as justification for departing from the principle of legal equality and independence of the spouses; where the property comes from is seen as a secondary issue.

**1.14.1** In Australia, the *Family Law Act 1975* provides that either party to a marriage may bring proceedings in tort (delict) or in contract against the other.<sup>22</sup>

**1.14.2** The *Family Law Act* in the province of Ontario, Canada has a similar provision, which gives the spouses the same right of action against each other “as if they were not married”.<sup>23</sup>

**1.15** In New Zealand, the *Property (Relationships) Act* takes a similar approach,<sup>24</sup> but adds a proviso saying that the court may at any stage of the proceedings, stay the

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“**joint wrongdoer**” means each of two or more wrongdoers whose wrongs gave rise to the same loss, and includes –

(a) a person who is vicariously liable for any act or omission of the wrongdoer;

**(b) a person who would have been a joint wrongdoer but for the fact that he or she is married in community of property to the plaintiff;**

(c) an injured person or the estate of a deceased person where it is alleged that the plaintiff has suffered loss as a result of the injury to or death of such person and such injury or death is attributed to a wrong committed partly by such injured or deceased person and partly by any other person. [emphasis added]

<sup>22</sup> Australia *Family Law Act 1975*, section 119 (entitled “Married persons may sue each other”) states: “Either party to a marriage may bring proceedings in contract or in tort against the other party.”

Australia has a separate property regime in which spouses keep whatever property they brought into the marriage, as well as anything acquired during the marriage under their separate names. However, those assets that are acquired jointly, for example purchased by way of a joint bank account, will be seen as property belonging equally to both spouses and therefore will be shared during the marriage and must be equally divided when the marriage dissolves. The courts have discretion to reallocate any or all of the property, depending on what is deemed to be fair. In deciding what is a just and fair division of the property the court will take into consideration many different factors, including the contributions each spouse has made to the marriage (including contributions not only to the property but also to the welfare of the family), and the needs of the spouses and their ability to fulfil those needs. *Family Law Act 1975*, sections 75(2) and 79.

<sup>23</sup> *Family Law Act*, Part VI, section 64(2): “A married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person and in particular has the same right of action in tort against his or her spouse as if they were not married.”

Ontario applies a separate property regime to marriages, but upon dissolution the value of the property held by each party is calculated (and referred to as “net family property”). The difference between the net family property of each spouse is then determined, and the party whose net family property is less is entitled to half of the difference. The payment of half the difference is provided in the form of an equalisation payment. Both spouses end up having assets of the same value once the equalisation payment is paid by the richer party to the poorer party. The court can order an equalisation payment that is less or more than half of the difference between the net family values if equalising the values would be “unconscionable”. The court must consider a number of factors to determine if such a payment would be unconscionable. Ontario *Family Law Act*; JD Payne & MA Payne, *Introduction to Canadian Family Law* (Carswell, 1994) at 151ff.

action if it appears that no substantial benefit, whether material or otherwise, would accrue to either party by the continuation of the proceedings; the proceedings are vexatious in character; or the question in issue could more conveniently be disposed of on an application made under the act.<sup>25</sup> The *Law Reform (Husband and Wife) Act 1962* of England and Scotland gave the court a similar discretion to stay an action between spouses.<sup>26</sup>

**1.15.1** In recommending that the court should have a discretion to stay actions for what are essentially petty squabbles, the UK Law Reform Committee said:

*We think that to allow complete freedom of action in tort would be undesirable as a matter of general social policy. The strains which are liable to be set up and the troubles which are liable to arise when two people are living together in the constant close proximity of marriage produce a situation that should not be regarded merely from a narrow legal point of view. If either spouse were able without let or hindrance to bring an action in tort against the other in respect of injuries of a personal nature, it might easily lead to harmful results. Litigation in respect of petty acts of negligence in the domestic sphere would certainly not be conducive to the continuance of the marriage and would, we think, do nothing but harm.*<sup>27</sup>

**1.15.2** The Committee elaborated on its rationale as follows:

*The reason for giving the court power to stay proceedings is that the law should not too readily lend its aid to the airing of petty grievances between husband and wife. This applies even though the parties may no longer be cohabiting, for there may even in these circumstances be some possibility of reconciliation*

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<sup>24</sup> New Zealand Property (Relationships) Act 166 of 1976, as amended, Part 7, section 51(1): "Subject to this section, each of the parties to a marriage or civil union shall have the like right of action in tort against the other as if they were not married or in a civil union."

<sup>25</sup> Section 51(2). New Zealand divides marital property into two categories: relationship property and separate property. Upon dissolution of the marriage, relationship property is split 50-50 unless extraordinary circumstances make such a division repugnant to justice. The court has the ability to transfer money or property from one spouse to the other, resulting in an unequal split, if the court finds that an economic disparity has resulted from the division of functions during the marriage – such as in cases where spouses who contribute to the relationship by caring for the home and children limit their career options.

<sup>26</sup> *Law Reform (Husband and Wife) Act 1962*. Section 1(1) states: "Subject to the provisions of this section, each of the parties to a marriage shall have the like right of action in tort against the other as if they were not married." A proviso similar to that applied in New Zealand is contained in section 1(2). The court has a discretion to stay an action in tort between husband and wife if no substantial benefit would accrue to either party from continuation of the proceedings, or if the issue could more conveniently be dealt with on an application under statutory provisions.

The UK legislation served as a model for reform in New Zealand, Tasmania, Queensland and South Australia.

<sup>27</sup> Ninth Report, Liability in Tort between Husband and Wife, (1961) Cmnd. 1268, quoted in Law Reform Commission of British Columbia, *Report on Interspousal Immunity in Tort*, LRC 62, March 1983 (hereinafter "LRCBC"), available at <http://www.bcli.org/pages/publications/lrcreports/reports/html/Lrc62text.html>.

*between them or, where there is not, litigation may serve only as an excuse for the airing of matrimonial grievances and bitterness. We think, therefore, that the power to stay should be exercisable in the case of torts committed after the parties have ceased to cohabit as well as in the case of torts committed during cohabitation, but should apply only to actions brought during the subsistence of the marriage. The power to stay should also apply in the case of an ante-nuptial tort, though it is most unlikely that there would ever be occasion to stay proceedings in these circumstances, for it is difficult to conceive that one spouse would wish to sue the other in respect of a tort committed before the marriage except where the claim was in substance one against the other spouse's insurance company.*

**1.15.3** However, the Scottish Law Commission recommended that the provision giving courts discretion to stay actions between spouses be repealed. Their argument was that it should be “for the petitioner to decide whether the litigation is worthwhile”. The Law Reform Commission also noted that a Lexis search of cases decided during the thirty years from 1962 to 1992 revealed no case where the discretion was actually used.<sup>28</sup>

**1.16** In some jurisdictions, the basis for the prohibition on civil cases between spouses was the fear that courts would be burdened by actions arising out of domestic squabbles and that such litigation would not be in the best interests of the spouses themselves.<sup>29</sup> A related argument is that allowing interspousal delicts would endanger the goals of preservation of the family unit and domestic harmony.<sup>30</sup>

**1.16.1** The Law Reform Commission of British Columbia answered this argument by saying that it does not believe that the immunity rule “is an appropriate or proper means of achieving that goal. The need to preserve domestic harmony has not led to the preclusion of suits between spouses in contract. Nor ... has the need to preserve domestic harmony been credited with sufficient weight to proscribe actions between parent and child. Indeed the commission of intentional wrongs is often proof enough that there is no domestic tranquillity left to be preserved.” [citations omitted]

**1.17** Another argument which has been advanced against allowing civil actions between spouses is a concern about possible collusion where insurance companies are involved.

**1.17.1** For example, one submission made to the Law Reform Commission of British Columbia expressed the possibility as follows:

*One spouse ... will not sue the other unless there is an advantage to both in doing so. In the usual case that advantage will be recovery under a policy of*

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<sup>28</sup> Scottish Law Commission, Report on Family Law, No 135, Part X Litigation between Spouses, available at [www.scotland.gov.uk/library2/doc11/](http://www.scotland.gov.uk/library2/doc11/).

<sup>29</sup> Id.

<sup>30</sup> LRCBC (n 27) at Chapter IV, section A1.

*third party liability insurance. In a law suit in relation to the liability there will not be a true adversary situation. The injured spouse will say that the other spouse was negligent. The non-injured spouse will concede the negligence. He or she will be eager to demonstrate how careless he or she was. We do not think that ... collusion is a problem in relation to the staging of artificial claims or the exaggeration of injuries. We believe that the problem lies in the fact that the spouse accused of negligence has no interest in denying the accusation and every interest in agreeing with the allegation.*<sup>31</sup>

**1.17.2** A counterargument was quoted by the Law Reform Commission of British Columbia as follows:

*... are we justified in being so distrustful of the inability of our judicial institutions to detect fraudulent or fancied claims that it is better to foreclose all redress even for the deserving? The immunity, under modern conditions, assures not freedom from harassing litigation to a spouse, but a windfall to his insurance company which may arrogate to itself all his personal privilege in order to duck its proper function of compensating casualties within the risk it assumed and foiling effective distribution of such losses.*<sup>32</sup>

**1.17.3** The Law Reform Commission of Saskatchewan has expressed the following view:

*Not only is this fear probably largely unwarranted but, in any event, to deal with it as a blanket exclusion from coverage is an example of legislative "overkill." It overcomes any problems of collusion at too great a price, namely, by barring insurance recovery in those cases where there is negligence and no collusion.*<sup>33</sup>

**1.17.4** The Law Reform Commission of British Columbia noted that others have pointed out that there are many other situations where there is potential for collusive actions – such as actions between engaged couples, parents and children, and close friends – but the possibility of collusion has not led to a corresponding immunity in these situations. It also felt that cases of collusion would be relatively rare, since they would occur only where a spouse was simultaneously insured, not in fact legally liable for the damage, dishonest and undeterred by the fear of criminal prosecution for perjury. It concluded that, whilst the possibility of collusion is very real, it does not by itself justify the retention of interspousal immunity in delict.<sup>34</sup>

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<sup>31</sup> Ibid, section A3.

<sup>32</sup> Id.

<sup>33</sup> Id, quoting Law Reform Commission of Saskatchewan, *Proposals for Reform of Law Affecting Liability Between Husband and Wife and Related Insurance Contracts* (1979).

<sup>34</sup> Id.

**1.18** The trend in common law jurisdictions clearly seems to be towards removing interspousal immunity in respect of actions in delict.<sup>35</sup> We believe that the arguments advanced in favour of allowing suits between spouses in delict outweigh the arguments against this approach. We recommend a more far-reaching reform on this point that that applied in South Africa.

**1.19** A further question which should be considered in this context is whether any special provision needs to be made for damages between spouses arising from domestic violence. Clearly, where spouses have a right of action in delict against each other, this necessarily extends to domestic violence. However, the question is whether this general inclusivity is sufficient to deal with domestic violence situations.

**1.19.1** In the Australian State of New South Wales, in a discussion of the *Property (Relationships) Act 1984*, the Law Reform Commission asserted that “torts law does not generally provide adequate relief for victims of domestic violence”:

*Traditionally, damages can only be awarded for separate provable incidents whereas in most cases of domestic violence the abuse is ongoing and it is difficult to isolate specific events that have caused the damage ... There are also statute of limitation issues where the violence has occurred over a long period of time. A further impediment is the frequently encountered lack of resources and/or insurance from which damages can be paid. [footnotes omitted].*<sup>36</sup>

In New South Wales, victims of domestic violence can claim in tort (delict) or alternatively seek an adjustment of the marital property based on the impact of the domestic violence.<sup>37</sup> For example, in the Australian decision *In the Marriage of Hack*, the judge made an adjustment for the future needs of the wife due to an assault by the husband which left her paraplegic.<sup>38</sup> Whilst the Law Reform Commission acknowledged the shortcomings of tort law for dealing with domestic violence, it proposed dealing with the problem through reforms to property division between the spouses rather than through reforms to the law on torts.

**1.19.2** Similarly, the Family Law Council of Australia recommended at one stage the introduction of a new matrimonial tort which would enable spouses to bring actions in the Family Court for damages for personal injuries suffered during a marriage.<sup>39</sup> Part of the purpose of the recommendation was to overcome certain technical difficulties in bringing such actions. However, upon reflection, the Family Law Council eventually recommended that reforms which made family violence a factor in property division would be more accessible and effective than reforms to the general tort law.<sup>40</sup>

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<sup>35</sup> Ibid, Chapter III, Section B.

<sup>36</sup> Law Reform Commission, New South Wales, *Discussion Paper 44 (2002) – Review of the Property (Relationships) Act 1984 (NSW)*, Chapter 5 at paras. 5.62ff.

<sup>37</sup> Id.

<sup>38</sup> (1977) 6 *FamLR* 425.

<sup>39</sup> Australian Government, Attorney-General's Department, Family Law Council, *Violence and the Family Law Act: Financial Remedies*, discussion paper, 1998.

<sup>40</sup> Australian Government, Attorney-General's Department, Family Law Council, *Letter of Advice: Violence and Property Proceedings*, August 2001, [www.ag.gov.au/agd/www/FIhome.nsf/Page/](http://www.ag.gov.au/agd/www/FIhome.nsf/Page/).

**1.19.3** We recommend similarly that it would be more effective in Namibia to ensure that damages resulting from domestic violence are taken into account in the division of marital property, than to attempt to reform the law on delict to cater for domestic violence.

**1.20** Where the domestic violence rises to the level of a criminal offence, the provisions on victim compensation in the *Criminal Procedure Act 125 of 2004* may also be of assistance to spouses who have suffered damages from domestic violence. Section 326 of this act (which was not yet in force as of August 2005) provides for the award of compensation for damages for “injury, damage or loss, whether patrimonial or otherwise”, arising from criminal offences to the victims of those crimes. Such compensation should be dealt with in the same way as damages awarded in delict for injury by one spouse to the other.

## Recommendation

### DAMAGES ARISING FROM A DELICT COMMITTED AGAINST ONE SPOUSE BY THE OTHER SPOUSE

Namibia should enact a law reform on delicts committed by one spouse by the other spouse which goes farther than the reforms in South Africa.

- It should be possible for a spouse to receive damages for a delict committed against him or her by the other spouse, even if the marriage is “in community of property”, for either patrimonial or non-patrimonial loss.
- The damages awarded should to be paid out of the separate property of the spouse who committed the wrong, if possible. If there is no separate property, then the damages should be provided by means of an adjustment to the joint estate in favour of the wronged spouse at the time of division of the joint estate.
- The damages awarded to the innocent spouse should not be considered as part of the joint estate for any purpose.
- Namibian reforms on this issue should also avoid one mistake made in South Africa, by specifying whether they apply to delicts committed prior to the date on which the reforms come into force.<sup>41</sup>
- The same rules should apply to compensation awarded under section 326 of the *Criminal Procedure Act 125 of 2004* in respect of a criminal offence committed by one spouse against the other.

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<sup>41</sup> See June D Sinclair and Felicity Kaganas, “Law of Persons” in *Annual Survey of South African Law*, 1984 at 94.

## Debts: Other exceptions to consider

**1.21** Some jurisdictions make exceptions to the sharing of debts between spouses which do not apply in Namibia or in South Africa at present. Although the jurisdictions examined do not all have marital property systems analogous to Namibia's "in community of property", they do have concepts of shared property which make their provisions on debts potentially relevant to the Namibian situation.

**1.22** For example, the Canadian province of Ontario applies a separate property regime to marriages, but upon dissolution the value of the property held by each party is calculated (and referred to as "net family property"). The difference between the net family property of each spouse is then determined, and the party whose net family property is less is entitled to half of the difference. The payment of half the difference is provided in the form of an equalisation payment. However, the court can order an equalisation payment that is less or more than half of the difference between the net family values if equalising the values would be "unconscionable". The court must consider a number of factors to determine if an equalisation payment would be unconscionable.

**1.22.1** Three of the eight factors enumerated in the statute relate to debts:

- (a) *a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;*
- (b) *the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;*
- (c) *the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family.*<sup>42</sup>

**1.23** New Zealand divides marital property into two categories: relationship property and separate property. Upon dissolution of the marriage, relationship property is split 50-50 unless extraordinary circumstances make such a division repugnant to justice.

**1.23.1** The *Property (Relationships) Act* of New Zealand makes a similar distinction between personal and relationship debts.<sup>43</sup> A "relationship debt" is a debt incurred jointly by the spouses; a debt incurred in the course of a common enterprise involving both spouses; a debt incurred for the purpose of acquiring, improving or maintaining relationship property; a debt for the benefit of both spouses in the course of managing the affairs of the household; or a debt incurred for the purpose of bringing up a child of the marriage. Other debts are personal debts.

**1.23.2** If a personal debt is satisfied out of relationship property, then there is a corresponding adjustment when the relationship property is split upon disso-

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<sup>42</sup> Ontario *Family Law Act*, section 5(6).

<sup>43</sup> New Zealand *Property (Relationships) Act 1976*, as amended, section 20(1).

lution of the marriage. Furthermore, each spouse has a protected half-interest in the family home which cannot be attached for an unsecured debt other than one which was undertaken jointly by the spouses, or for the purposes of acquiring, improving or repairing the home itself.<sup>44</sup>

**1.24** In the Netherlands, the only country in the European Community which has a marital property system similar to Namibia's "in community of property",<sup>45</sup> joint property can be subject to the claims of creditors, even though only one spouse was responsible for the debt.<sup>46</sup> However, the other spouse may save the joint property if he or she is able to show that the debtor spouse has separate property to cover the amount owed.<sup>47</sup>

**1.25** In Namibia at present, there is no general requirement that spouses consult each other before incurring debts which could affect the joint estate except in certain circumstances:

- where property which already forms part of the joint estate is pledged as security for the debt
- where credit is advanced in terms of an agreement covered by the *Credit Agreements Act 75 of 1980* (which covers specified agreements for receiving goods or services on credit) or the *Sale of Land on Instalments Act 72 of 1971*, or
- where one spouse binds himself or herself as surety.<sup>48</sup>

Thus, where none of these circumstances apply, it would be possible for one spouse to incur debts which could affect the joint estate without the knowledge or agreement of the other spouse.

**1.26** Instead of amending the law on the exclusion of debts from the joint estates, it would be more appropriate to close this loophole in the *Married Persons Equality Act* by making it impossible for one spouse to incur significant debt without the consent of the other spouse where the marriage is "in community of property". The reason is that even if no joint property is specifically pledged as security for the debt, default on the debt could still result in joint property being liquidated to satisfy the debt. This proposed change is discussed below in this chapter, in the section on administration of joint estates.

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<sup>44</sup> Ibid, sections 20-20F, and particularly 20B and 20E.

<sup>45</sup> The Netherlands has a general and automatic community of property regime for married spouses. Once married all property and debts of either spouse (whether acquired before or during the marriage) become the property of both spouses. Certain property is exempt from community of property under the civil code: (a) objects which the donor or testator designated as not becoming part of the community property and (b) goods and debts that are specifically attached to one spouse. Parties can opt out of the community of property system by contract before or during the marriage. Dutch Civil Code, First Book, Chapters 6-8; Paul Vlaardingerbroek, "Contracting on Family Law", <http://till.kub.nl/data/topic/contract.html>.

<sup>46</sup> Alain Verbeke *et al*, "European marital property law Survey 1988-1994" (1995) 3 *European Review of Private Law* 482, at 457.

<sup>47</sup> *Id.*

**1.27** It should be noted in this regard that we also recommend amendments to the enforcement mechanisms provided for under the *Married Persons Equality Act*, to protect innocent spouses against the consequences of transactions where the requisite consent was not obtained. This will be also discussed below in this chapter, in the section on administration of joint estates.

## B. ADMINISTRATION OF JOINT ESTATES

**1.28** Namibia has already reformed the common law on the administration of joint estates by means of the *Married Persons Equality Act 1 of 1996*, which is summarised in Chapter 4. The question is whether any additional reforms on this point are needed.

**1.29** In similar fashion as Namibia's *Married Persons Equality Act*, South Africa's *Matrimonial Property Act 88 of 1984* (as amended) requires spousal consent for major transactions affecting the joint estate. In South Africa, as in Namibia, lack of consent does not make the transaction void with respect to third parties if they did not know and could not reasonably have known of the lack of consent.<sup>49</sup> In both countries, where the unauthorised transaction has resulted in a loss to the joint estate, one remedy is an adjustment of the joint estate at the time it is divided.<sup>50</sup>

**1.30** However, there are some major differences between the South African approach and the Namibian approach to marriages "in community of property":

**1.30.1 The South African statute requires written consent for a much broader list of transactions than the Namibian statute.**<sup>51</sup> The Namibian *Married Persons Equality Act* requires written consent only for transactions involving deeds to land or any other documents which must be registered at a deeds office, transactions in which one spouse wishes to bind himself or herself as surety for a loan and the bringing or defending of litigation by one spouse (with a few exceptions). Written consent is required in South Africa for most major financial transactions.

**1.30.2 The South African law requires written consent where one spouse wishes to withdraw money held in the name of the other spouse at a bank or other savings institution.** This situation is not discussed at all in the Namibian law.<sup>52</sup>

**1.30.3 The South African law requires two witnesses for the written consent needed for a number of transactions.**<sup>53</sup> Witnesses are not required for any purposes under the Namibian law.

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<sup>49</sup> See section 15(9)(a).

<sup>50</sup> See section 15(9)(b).

<sup>51</sup> Section 15(2).

<sup>52</sup> Section 15(2)(e).

<sup>53</sup> Section 15(5).

**1.30.4 The Namibian law explicitly mentions “livestock” as an example of “assets forming part of the joint estate”, thus highlighting an asset which is particularly African in nature.** Livestock would probably be covered by the general phrasing in the South African law, but **livestock is not emphasised in South Africa** as it is in Namibia.<sup>54</sup>

**1.30.5 The South African law provides for the division of the joint estate during the subsistence of the marriage, if it is satisfied that there is danger of serious prejudice to one spouse because of the conduct or proposed conduct of the other spouse – provided that third parties will not be prejudiced by the division. The court can divide the joint estate in equal shares, or “on such other basis as the court may deem just”. The court may also substitute another matrimonial property system, subject to such conditions as it deems fit.**<sup>55</sup> Namibia’s statute does not provide such a remedy. The *Married Persons Equality Act* provides several remedies which can be invoked during the subsistence of a marriage “in community of property”, to prevent one spouse from squandering the joint estate or dealing unfairly with the other spouse. In terms of Namibia’s act, the High Court or a magistrate’s court has the power to dispense with consent by one spouse to a transaction where consent is being unreasonably withheld, and to suspend (temporarily or indefinitely) any power that one spouse has to deal with the joint estate, whether generally or in relation to particular acts. These statutory remedies are supplemented by common-law remedies which still apply to marriages “in community of property”. However, at common law, the court’s powers to act during the subsistence of the marriage are fairly limited. It may divide the joint estate in equal shares during the subsistence of the marriage to prevent prejudice to one spouse, but it does not have discretion to order another form of division which would be more just, or to substitute a different marital property regime.<sup>56</sup>

**1.30.6 The South African legislation has been interpreted to allow recovery of assets from third parties, in a case where there a transaction took place without the necessary consent of the other spouse, and the third party must reasonably have known that there was no consent.**<sup>57</sup> The Namibian *Married Persons Equality Act* is silent on this possibility, and there is as yet no case law on this point.<sup>58</sup>

**1.31** This analysis of the differences between the two similar laws highlights some of the weaknesses in the Namibian law which are in need of amendment.

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<sup>54</sup> Section 7(1)(d).

<sup>55</sup> Section 20.

<sup>56</sup> Sonnekus (n 19) at 11.

<sup>57</sup> *Bopape v Moloto* 1999 4 All SA 277 (T). In this case, the court held that donations made to the husband’s mistress without the consent of his wife could be recovered from the mistress even though this remedy is not specifically provided for in the legislation. The court’s reasoning was that the transaction, because it took place without the requisite consent, was void from the outset.

<sup>58</sup> Section 8 of the *Married Persons Equality Act* provides for an adjustment of the joint estate during the subsistence of the marriage, but not for action against the third party to the prohibited transaction.

**1.32** It should also be noted that it was recently held in Namibia that a husband can be convicted of the **common law crime of theft in respect of theft of joint property** where the marriage is “in community of property”. Previously a husband could not be convicted of theft of property of the joint estate because of the operation of marital power, which gave him full power to administer the estate as he saw fit. But the court held that there is no impediment to such a charge of theft now that marital power no longer exists in Namibia.<sup>59</sup>

**1.32.1** A barrier to effective action in this situation still exists in terms of section 195 of the *Criminal Procedure Act 51 of 1977*. In terms of this section, spouses are not generally competent to give evidence against each other in criminal proceedings, and the list of exceptions to the general rule does not encompass a charge of theft of joint property.<sup>60</sup>

**1.32.2** However, the new *Criminal Procedure Act 25 of 2004* (which has been passed by Parliament but had not yet come into force as of August 2005) appears to have revised the provisions on spousal evidence in a way which has removed this problem.<sup>61</sup>

**1.33** Another issue which should be considered is the context of **domestic violence**, which is widespread in Namibia. Is the common law approach to invalidating agreements made under undue influence sufficient to cover cases where agreement to a transaction is obtained in terms of the *Married Persons Equality Act* against a background of domestic violence?

**1.33.1** Referring to agreements between couples on financial issues, the Law Reform Commission of New South Wales, Australia, made these statements:

*4.88 Violence is, and should be, a relevant factor for a court when determining whether an agreement is enforceable under the [Property Relationships Act]. Currently, agreements where violence is a factor can be challenged under the [Contracts Review Act] as being unjust or on the common law grounds of duress, undue influence or unconscionability.*

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*4.91 [The courts are] increasingly likely to use general law principles to set aside an agreement made in fear of physical violence. However, obtaining relief from agreements made due to domestic violence in the form of threats*

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<sup>59</sup> *S v Gariseb* 2001 NR 62 (HC). Contrast the South African case of *S v Swiegelaar* 1979 (2) SA 238 (C), where the wife was unable to bring a criminal action against her husband, to whom she was married “in community of property”, when he had cut up her clothes. The reasons given were that the clothes were not the separate property of the wife, even though she had purchased them out of her own earnings, and that as a spouse she was not competent to give evidence against her husband. See also, for example, *S v Mgidi* 1989 (3) SA 524 (Tk).

<sup>60</sup> In the *Gariseb* case, the limitation on testimony by the wife imposed by the *Criminal Procedure Act* did not affect the outcome of the case. The husband pleaded guilty and was convicted of theft.

<sup>61</sup> *Criminal Procedure Act 25 of 2004*, sections 219-224.

of violence or emotional harassment may be more difficult to obtain under the general law. As stated above, the emotional and personal nature of financial agreements does not fall squarely within doctrines that have been developed in a more commercial context.

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4.93 ... domestic violence can affect the level of control one party has over another in a relationship even when there is no evidence of it at the time the contract was made. Domestic violence can be inflicted in varying forms over a period of time ...

4.94 Subsuming domestic violence into general law principles of when a contract can be set aside may further the risk that it will continue to go unnoticed in many cases. Domestic violence is a distinct issue, which raises factors specific to it. These issues include silencing of the victim, the fact that the violence generally occurs over a long period of time and may not always be in the form of separate instances of physical violence. By making domestic violence an express ground for relief, the law will be specifically recognising it as the serious issue that it is and will perhaps allow the court greater scope to develop an approach that takes account of its complexities.

4.95 The Commission therefore agrees that recourse to the ... principles at common law may not always be adequate to challenge agreements made under threat or fear of domestic violence. To the very limited extent that survivors of domestic violence will challenge agreements made with violent partners, there needs to be clear and explicit recognition in the [Property Relationships] Act of both the relevance and the impact of domestic violence on the fairness of the bargain and its enforceability. The [Property Relationships Act] should give the court express power to vary or set aside an agreement where it is satisfied that the applicant signed the agreement because of actual or threatened violence (either at the time of negotiations or at any time before the agreement was made) and that it would cause serious injustice to enforce the agreement or any of its terms. [footnotes omitted]<sup>62</sup>

**1.33.2** We would suggest that Namibia should adopt the same route recommended in respect of New South Wales, given the preponderance of domestic violence in our country.<sup>63</sup>

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<sup>62</sup> Law Reform Commission, New South Wales (n 36), Chapter 4.

<sup>63</sup> See *Ratane v Maharaj and Another* 1950 (2) SA 538 (D) for an example of pressure on a wife to enter into an ante-nuptial contract which did not reflect her true wishes. The court held that the evidence showed the relationship between husband and wife to be such that she was incapable of resisting his will and that she was entitled to relief even in the absence of a finding of undue influence.

## Recommendation

### STRENGTHENING PROVISIONS ON ADMINISTRATION OF THE JOINT ESTATE IN THE *MARRIED PERSONS EQUALITY ACT*

The Namibian statute seems to favour the protection of third parties to the extent that meaningful enforcement for married couples is not sufficiently provided for. We recommend that the Namibian statute be strengthened along the lines of the comparable South African law, to make it more effective in practice:

- Require *written* consent, with two witnesses, for all major financial transactions involving the joint estate, perhaps for all transactions involving cash or property in excess of N\$500.
- The requirement of written consent should also apply to all debts incurred in excess of the stated amount, even if no joint property is specifically pledged as security for the debt. If the debt is incurred without the consent of the other spouse, then only the portion of the estate which can be rightfully allocated to the spouse who incurred the debt should be available for satisfaction of the debt.
- Written consent should also be required for one spouse to withdraw money held in the name of the other spouse at a bank or any other banking or savings institution.
- Make statutory provision for the division of the joint estate during the subsistence of the marriage to avert serious prejudice to one spouse because of the conduct or proposed conduct of the other spouse, so long as no third parties will be prejudiced by the division. As in South Africa, give the court discretion to divide the joint estate in equal shares, or “on such other basis as the court may deem just”, and authorise the court to substitute another matrimonial property system, subject to such conditions as it deems fit.
- Make explicit provision for the recovery of assets from third parties, in a case where a transaction took place without the necessary consent of the other spouse, and the third party must reasonably have known that there was no consent, or else failed to exercise reasonable care to ensure that the necessary consent had been obtained.
- To improve accessibility, make the magistrate’s court the forum for as many procedures as possible, particularly for (a) requests for adjustment of the estate to rectify a transaction without the required spousal consent during the subsistence of the marriage; (b) procedures for the recovery of assets from third parties in appropriate

- cases and (c) division of the joint estate or substitution of another marital property regime during the subsistence of the marriage.
- Give the court express power to vary or set aside any agreement where it is satisfied that the agreement was influenced by actual or threatened violence (either at the time of negotiations or at any time before the agreement was made) and it would cause serious injustice to enforce the agreement or any of its terms. The court should have discretion to decide upon an appropriate remedy, which could involve recovery of assets from third parties or making an appropriate adjustment to the property of the spouses.

## C. INSOLVENCY AND SEQUESTRATION

### Duties of creditors towards the spouses

**1.34** Before the passage of the *Married Persons Equality Act* in Namibia, when husbands still controlled the joint estate by virtue of marital power, the husband had the power to bring applications for the surrender of the joint estate and applications for sequestration of the joint estate needed to be made only against the husband.

**1.35** Section 9(4)(a) of the *Married Persons Equality Act* now provides that an application for the surrender of the joint estate must be made by both spouses, and that an application for the sequestration of a joint estate shall be made against both spouses. However, there is some protection for debtors on this point in section 9(4)(b) – an application against one spouse alone will not be dismissed on the grounds that the estate is a joint estate if the debtor seeking sequestration has been unable to discover whether or not the marriage is “in community of property”, or unable to find out the name and address of the other spouse, despite taking reasonable steps to obtain this information.<sup>64</sup>

**1.36** The wording of Namibia’s section 9(4)(a) is identical to the current version of section 17(4) of the South African *Matrimonial Property Act*. However, the qualification to protect the creditor in Namibia’s section 9(4)(b) was originally absent in South Africa. Section 17(4) of the South African *Matrimonial Property Act 88 of 1984* initially provided that “an application for the surrender of a joint estate shall be made by both spouses, and an application for the sequestration of the joint estate shall be made against both spouses”. A qualification identical to that contained in Namibia’s section 9(4)(b)

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<sup>64</sup> Section 9(4), *Married Persons Equality Act*:

- (4) (a) An application for the surrender of a joint estate shall be made by both spouses.  
 (b) An application for the sequestration of a joint estate shall be made against both spouses: Provided that no application for the sequestration of the estate of a debtor shall be dismissed on the ground that such debtor’s estate is a joint estate if the application satisfies the court that despite reasonable steps taken by him or her he or she was unable to establish whether the debtor is married in community of property or the name and address of the spouse of the debtor.

was added to the South African *Matrimonial Property Act* by the *Insolvency Amendment Act 122 of 1993*.<sup>65</sup> Thus, the current law on voluntary surrender and involuntary sequestration is now virtually identical in the two countries.<sup>66</sup>

**1.37** In the 1998 South African *Absa Bank Ltd* case, the court made an interesting comment on the South African legislative provision:

*It seems rather incongruous to suggest that the Court might refuse an application for the sequestration of someone's estate on the ground that that person's estate is a joint one, in circumstances where the applicant is unable to state whether the estate is indeed a joint one or not. Nevertheless, I think the intention of the legislature is clear enough: it wanted to ensure that both spouses in a marriage in community of property received notice of an application for sequestration, unless this was practically not possible.*<sup>67</sup>

**1.38** In South Africa, several cases decided *before* the addition of the provision that is comparable to Namibia's section 9(4)(b) addressed the duty of the creditor to ascertain the marital status of the debtor and to notify the other spouse.

**1.38.1** The 1985 *Du Toit* case held that the creditor bears responsibility for finding out if the marriage is "in community of property", by taking steps such as obtaining a certified copy of the marriage certificate or perhaps by searching the records in the relevant deeds office. Relying solely on the word of one spouse would not constitute a reasonable step. The *Du Toit* case held that, unless the creditor furnishes information in his founding papers about the marital status of the respondent and in suitable cases, joins the respondent's spouse as co-respondent, no order can be made.<sup>68</sup> This holding reportedly created serious hardships for creditors.<sup>69</sup>

**1.38.2** A less onerous procedure was provided for creditors in the 1986 case of *Acar v Pierce*. Here the court said that a final order of sequestration could be served on the spouse not named in the application, who would have seven days within which to file a 'Statement of Affairs' with the Master. After that, the onus would fall on the trustee to establish the correct marital status. If the marriage was found to be "in community of property", then the application for sequestra-

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<sup>65</sup> The amended section 17(4) of the *Matrimonial Property Act* reads as follows:

(a) *An application for the surrender of a joint estate shall be made by both spouses.*

(b) *An application for the sequestration of the joint estate shall be made against both spouses: Provided that no application for the sequestration of the estate of a debtor shall be dismissed on the ground that such debtor's estate is a joint estate if the application satisfies the Court that despite reasonable steps taken by him he was unable to establish whether the debtor is married in community of property or the name and address of the spouse of the debtor.*

<sup>66</sup> In fact, Namibia's provision appears to have been modelled on the South African law, as amended.

<sup>67</sup> *ABSA Bank Ltd t/a Trust Bank v Goosen* 1998 (2) SA 550 (W) at 552A-B.

<sup>68</sup> *Du Toit v Du Toit* 1985 (3) SA 1007 (T).

<sup>69</sup> *Sonnekus* (n 19) at 29-30.

tion would have to be reinstated on the roll with both spouses joined as respondents.<sup>70</sup>

**1.38.3** Aspects of the *Acar* procedure were criticised in the 1990 case of *Trust Bank van Afrika v Meintjies*, on the grounds that a trustee is often not appointed in practice until after the granting of a final order, with the result that the other spouse who is affected does not receive notice of the sequestration until after the final order has been granted. This case suggested that the *Acar* procedure could be improved by requiring the deputy sheriff to ascertain the marital status of the spouse when the provisional order is served, and to cite any spouse who is married “in community of property” at that stage.<sup>71</sup>

**1.38.4** A stricter approach was taken by the 1991 case of *Detkor (Pty) Ltd v. Pienaar*, which addressed the issue of whether section 17(4) (as it stood before the 1993 amendments) contained substantive or procedural requirements. Here the court said that joinder of both spouses in sequestration proceedings in a marriage “in community of property” would be mandated by the fact that the spouses are now co-administrators of the joint estate, even without the specific provision on joinder contained in section 17(4): “That subsection does no more than to spell out expressly certain of the procedural consequences which flow from the changes in the substantive law.”<sup>72</sup> This case held that joinder was a strict requirement: “where the respondent is a married person the joinder of both spouses is essential in an application for the sequestration of the joint estate.”<sup>73</sup> The court here rejected the idea that the trustee or the deputy sheriff should be required to take on the role of “private detective and inquisitor”, placing the duty rather on the creditor who brings the application. The case suggested that it would be wise for a creditor to ascertain the matrimonial regime of the debtor and the full name of the spouse at the time of extending credit. The court suggested that where the papers are silent on marital status, the court might be entitled to assume that the respondent is single – but that the order would become a nullity if it later came to light that the respondent was in fact married “in community of property”. However, if the papers state that the marital status of the respondent is unknown (as in the case before the court), then such an inference is not possible and the court must then refuse to grant an order for sequestration.<sup>74</sup>

**1.39** The following cases illustrate the approach taken by the courts in South Africa following the introduction of the 1993 proviso, which gave creditors some relief from the strict approach recommended in the *Detkor* case. According to the court in the 1998 *Absa Bank Ltd* case, to a large extent the proviso gave effect to what the courts were in most cases doing anyway.<sup>75</sup>

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<sup>70</sup> *Acar v Pierce* 1986 (2) SA 827 (W); see also Sonnekus (n 19) at 29-30.

<sup>71</sup> *Trust Bank van Afrika v. Meintjies* 1990 (2) SA 268 (T).

<sup>72</sup> *Detkor (Pty) Ltd v. Pienaar* 1991 (3) SA 406 (W) at 410C.

<sup>73</sup> At 410G.

<sup>74</sup> At 411.

<sup>75</sup> *ABSA Bank Ltd t/a Trust Bank v Goosen* 1998 (2) SA 550 (W) at 552H.

**1.39.1** Significantly, the procedure mandated by *Acar* was followed even after this new proviso came into being in the 1995 decision of *Ratilal v Dos Santos*.<sup>76</sup> In this case, the applicant was granted a provisional sequestration order without service of the application on the respondent's wife, and the issue was whether a final sequestration order could be granted. The court ruled that the "respondent's wife has a real and substantial interest in the application and any order granted may prejudice her rights. She should therefore be joined as a respondent in the proceedings." The court held that the applicant (the creditor) may proceed against one spouse only if it can satisfy the court that there is only one interested party, which the creditor cannot do without positive evidence of the respondent's marital status.

**1.39.2** The 1998 *Absa Bank Ltd* case held that failure to comply with the requirements of section 17(4) does not necessarily make the sequestration order a nullity. Here, the court noted that the spouse who was not joined still has the remedy of approaching the court for an order setting aside the sequestration order made in his or her absence. However, the court refused to extend the sequestration order to the absent spouse without first giving her an opportunity to be heard. The court also stated that "*the intention of the Legislature is clear enough: it wanted to ensure that both spouses in a marriage in community of property received notice of an application for sequestration, unless this was practically not possible*".<sup>77</sup>

**1.39.3** There are cases in both Namibia and in South Africa which, whilst not dealing with the issue of sequestration and marriage, emphasise the importance of the principle of *audi alteram partem* (hearing the other side) in connection with sequestration.<sup>78</sup> The *Stride* case noted: "*The granting of a provisional sequestration order has the most drastic consequences. It involves a change in status; it divests the respondent of his assets and vests them in a provisional trustee as soon as the latter is appointed; it affects the ability of the respondent to conduct his business and trade; it affects his reputation as a person and as a trader. In my view, it is wholly wrong to cause this massive prejudice to a man who may, if given notice, be able to resist the application.*"<sup>79</sup>

**1.40** The question is whether Namibia's *Married Persons Equality Act* should be amended to mandate any further procedural details concerning sequestration of the estate of a married person. One option would be to mandate a specific procedure for compliance with the statutory requirements on sequestration. A second option would be to allow the statute to remain silent on the required procedure, leaving this point to judicial development.

**1.41** The amendments proposed previously in this chapter in respect of administration of joint estates should assist with this problem to some extent. If written consent

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<sup>76</sup> *Ratilal v Dos Santos* 1995 (4) SA 117(W).

<sup>77</sup> *ABSA Bank Ltd t/a Trust Bank v Goosen* 1998 (2) SA 550 (W) at 552B.

<sup>78</sup> *T & H Shapiro (Pty) Ltd t/a Victory Trading Co v Prins t/a Adele Promotions* 1982 93 SA 41 (SWA); *Stride v Castelein* 2000 93 SA 662 (WLD).

<sup>79</sup> *Stride* at 667I-668A.

is required from a spouse for all debts in cases where the debtor is married “in community of property”, creditors who are not provided with such consent would presumably bear some responsibility for confirming that the applicant is either unmarried or married in terms of some other property regime. However, this will clearly not resolve the problem in all cases.

## Recommendation

### APPLICATION OF STATUTORY PROVISIONS ON INSOLVENCY TO MARRIAGES “IN COMMUNITY OF PROPERTY”

South Africa’s version of the *Insolvency Act* (which contains pre-independence amendments which were not applicable to Namibia and amendments which took place after Namibia became independent) requires in section 9(3)(a)(ii) that a petition for the sequestration of an estate shall include “the marital status of the debtor and, if he is married, the full names and date of birth of his spouse and, if an identity number has been assigned to his spouse, the identity number of such spouse”, as well as the full names and date of birth of the debtor and, if an identity number has been assigned to him, his identity number”. These requirements are not present in Namibia’s version of the *Insolvency Act*, where the creditor requesting sequestration is required by section 9(4) to set forth only “the amount, cause and nature of the claim in question”, “whether the claim is or is not secured and, if it is, the nature and value of the security”.

To give best effect to section 9(4)(b) of the *Married Persons Equality Act*, we recommend that Namibia’s *Insolvency Act* be amended to match South Africa’s on these points.

Creditors should be expected to either join the spouse or to provide evidence that the debtor is not married “in community of property”. If there is any doubt about the marital property regime, then the other spouse should be joined – or at least notified and given an opportunity to participate in the proceedings. If the applicant creditor can show that it was not possible to locate the other spouse or to ascertain the debtor’s marital status after reasonable efforts, then the court could exercise its discretion in terms of section 9(4)(b) to allow the application to proceed against the one spouse alone.

## Creditors’ access to property excluded from the joint estate

**1.42** The 2003 South African Supreme Court of Appeal case of *Du Plessis v Pienaar NO & Others* examined the question of whether joint creditors can proceed against separate property excluded from the joint estate when the spouses are insolvent. In this case, the wife (who had inherited property subject to a stipulation that it was not to form part of the joint estate) argued that the debts which gave rise to the claims

against the insolvent estate were debts incurred by the joint estate and therefore recoverable only from the property of the joint estate and not from her separate property that remained outside the joint estate. The court rejected this argument, holding that debts are incurred by persons, not by estates. The court stated:

*When the estate is sequestrated for recovery of the joint debts of the spouses, both spouses become 'insolvent debtors' for purposes of the Insolvency Act, with the consequence that the property of both of them (comprising their undivided interests in the joint estate as well as separately owned property) is available to meet the claims of creditors.<sup>80</sup>*

## Recommendation

### CREDITORS' ACCESS TO PROPERTY EXCLUDED FROM THE JOINT ESTATE

The South African *Du Plessis* case clarified the position of separate property in light of conflicting holdings by lower courts.<sup>81</sup> It could be similarly left to the Namibian courts to give clarity on this issue. Alternatively, statutory adjustments to marital property regimes could clarify the situation. We recommend stating the principle of the *Du Plessis* case clearly in statute law, so as to leave no doubt. We understand that principle to be that joint debts of spouses married “in community of property” can be recovered from the joint estate, and from any separate property of either spouse which has been excluded from the estate.

However, in order for this principle to be a fair one, we believe that it is necessary that all significant debts incurred by spouses married “in community of property” should be true joint debts. Thus, we recommend that the separate property of a spouse married “in community of property” should be available to a creditor of the other spouse only where the debt was incurred with the written consent of that spouse. Recommendations on this point are discussed above in the section on administration of joint estates.

## 2. TRANSFORMING “OUT OF COMMUNITY OF PROPERTY” INTO “ACCRUAL”

**2.1** Law reform was inspired in South Africa with respect to marriages “out of community of property” because of concerns about the most common version of “out of community of property” used in ante-nuptial contracts in South Africa prior to the enactment of the *Matrimonial Property Act 88 of 1984*. The most common form of “out

<sup>80</sup> 2003 (1) SA 671 (SCA) at 676C.

<sup>81</sup> *Ex Parte Oberholzer* 1967 (1) PH C7 (GW); *Van Wyk v Groch en Andere* 1968 (3) SA 240 (E).

of community of property” involves the exclusion of *both* community of property and community of profit and loss.

**2.2** This regime severely disadvantaged women who left the workforce after their marriage to care for the home and the children, and whose separate estates therefore did not increase in value during the marriage whilst the separate estates of their working husbands did. Under the regime of “out of community of property without community of profit and loss”, wives in these circumstances had no legal claim upon dissolution of the marriage to share the growth in their husbands’ estates.<sup>82</sup>

**2.3** South Africa’s *Matrimonial Property Act 88 of 1984* now provides that the “accrual system” applies to every marriage entered into after commencement of the act where the ante-nuptial contract excludes community of property and community of profit and loss, unless the “accrual system” is *expressly excluded* by the ante-nuptial contract.<sup>83</sup> Therefore, if the parties to an ante-nuptial contract wish to exclude the “accrual system”, they must do so explicitly and unequivocally in the contract.

**2.4** The “accrual system” has been called a type of deferred community of property, although this description is not really accurate. During the existence of the marriage, each spouse retains and controls his or her own separate estate, and everything that each spouse acquires during the marriage goes into his or her separate estate. However, upon dissolution of the marriage, the spouses share equally in the increase of the estates of both spouses during the marriage.

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<sup>82</sup> See *Beira v Beira* 1990 (3) SA 802 (W) at 804I-805H: “*Before proceeding further, a word or two must be said about the mischief against which the main provisions, relevant to present consideration, of the Matrimonial Property Act were aimed. Over many years cases have been encountered where spouses have been married out of community of property and on dissolution of the marriage the husband, who invariably started married life with no estate, has accumulated vast assets by virtue of his efforts in trade or business, often with a substantial contribution, in other forms, from his wife. From her side she will have contributed secretarial services, perhaps assisted in the promotion of the business by working in the shop, store, factory or whatever it was, and by her endeavours brought stability to home and family, reared the husband’s children, entertained his business associates and promoted generally the advancement of his business.*

*But, although she has put substantial effort into promotion of family affairs, the keeping of the house and the advancement of the husband’s business, thereby having made a substantial contribution of the assets accumulated by him, on dissolution of the marriage her assets would consist of little more than the clothing, furniture and jewellery she had acquired through the generosity of the husband in earlier times when his mood had been to seek her favour.*

*Dissolution would therefore leave the wife in penurious circumstances, while the husband would emerge from the proceedings vested with substantial assets, the spoils of what was in reality the joint efforts of the parties during the subsistence of the marriage. The hardship thus experienced by the wife resulted in many actions where she sought to establish a universal partnership between herself and her husband, the purpose being to obtain a share in the assets accumulated by him. Mostly such actions failed. The law reports cite many instances where the Court in each instance was simply unable to accept that the parties had either expressly or impliedly agreed to enter into a universal partnership.*

*Furthermore, the law prohibited donations between spouses ...*

*... It was this imbalance in the respective wealth of the spouses on dissolution of the marriage which the Legislature set out to redress.”*

<sup>83</sup> *Matrimonial Property Act*, section 2. This point was reinforced by the *Odendaal* case, which makes it clear the “accrual system” will apply to every marriage which is by ante-nuptial contract “out of community of property” unless expressly excluded. In this case the husband’s ignorance of the “accrual system” at the time the contract was made confirmed the fact that he could not have intended to exclude it. *Odendaal v Odendaal* 2002 (1) SA 763 (WLD).

**2.5** To protect the spouse's right to share in the accrual upon dissolution of the marriage, the *Matrimonial Property Act* allows the court to order immediate division of the accrual during the marriage, to prevent a spouse from managing his or her separate property in a way that seriously prejudices the other spouse's accrual right.<sup>84</sup>

**2.6** Under the "accrual system", upon dissolution of a marriage, the increase in the estate of each spouse during the marriage is determined. The spouse whose estate has the smaller increase or no increase is entitled to share in the increase of the other spouse's estate. Specifically, the spouse whose estate grew less or not at all will receive half of the difference between the increase of his or her estate and the increase of the other spouse's estate.

**2.7** The *Matrimonial Property Act* contains explicit instructions on how to calculate the increase in assets. The value of the accrual is determined by comparing net value (assets minus outstanding debts) at the end of the marriage and at the beginning. Each spouse can declare the commencement value of his or her estate in the ante-nuptial contract, or in a separate statement executed within six months after the marriage. This separate statement must be signed by the other spouse, notarised, and filed together with a copy of the ante-nuptial contract by the notary before whom the ante-nuptial contract was executed.

**2.8** If such a declaration (in either the ante-nuptial contract or a separate statement) is not made, the net commencement value of the estate will be deemed to be nil, unless the contrary is proved. The net commencement value is also deemed to be nil if a spouse's liabilities exceed his or her assets at the time of the marriage.

**2.9** In the calculation of the value of the accrual, however, certain things are excluded. Specifically, the accrual, or increase, in the spouses' estates will not include:

- any amount of damages received by either spouse during the marriage, except damages for patrimonial loss
- the value of any asset specifically excluded from the accrual in the ante-nuptial contract, or any asset replacing such an excluded asset or which is acquired with the proceeds of such an asset
- the value of an inheritance, legacy or donation received by one of the spouses from a third party during the marriage, as well as the value of any asset replacing such an asset or acquired with the proceeds of such an asset (although these items can form part of the accrual if the testator or donor, or the spouses in the ante-nuptial contract, expressly agree that they will be included in the value of the accrual) and
- the value of any donations between the spouses which take place during the lifetime of the donor.

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<sup>84</sup> *Matrimonial Property Act*, section 8(1).

**2.10** The basic principle is that assets are included in the accrual calculations only if they have come to the spouses by their own efforts.<sup>85</sup>

**2.11** The spouse who is liable for payment of a share of the accrual may approach the court to ask that the payment be deferred.<sup>86</sup> The court may grant such deferment on whatever conditions it deems just, such as the furnishing of security, the payment of instalments, the payment of interest, and/or the delivery or transfer of certain specific assets.<sup>87</sup>

**2.12** It has been argued that South Africa's *Matrimonial Property Act* should be strengthened to require that *all* marriages "out of community of property" must conform to the "accrual system" – in other words, to restrict the contractual freedom of intending spouses on this point by absolutely prohibiting all ante-nuptial contracts which directly or indirectly exclude accrual sharing. The basic argument is that the exclusion of accrual sharing is "contrary to the partnership spirit of marriage".<sup>88</sup>

*The Matrimonial Property Act is defective and unfair in affording the parties the right to exclude accrual sharing from the ante-nuptial contract. If the standard ante-nuptial contract concluded prior to 1 November 1984 [the date the act came into force] was iniquitous and unfair in that it failed to give due recognition to the contributions made by the wife in her capacity as wife, mother and manageress of the domestic household, then why should the right to exclude accrual sharing be treated any differently?*<sup>89</sup>

**2.13** Couples married before the new law came into force under an ante-nuptial contract which provided for a strict "out of community" system (excluding community of property and community of profit and loss) had a grace period of two years from the date of commencement of the act to change their marital property regime to the "accrual system" by registering a notarial contract similar to an ante-nuptial contract. In other words, the grace period gave couples whose marriages were governed by the harshest sort of "out of community of property" a chance to adopt the more equitable "accrual system" by means of a simple notarial procedure.<sup>90</sup> Any other post-marital changes in South Africa must proceed by way of court application, which will be discussed in Chapter 10.

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<sup>85</sup> *Beira* 1990 (3) SA 802 (W) at 807 H-I.

<sup>86</sup> *Matrimonial Property Act*, section 10.

<sup>87</sup> Other cases dealing with the application of South Africa's "accrual system" include *Olivier* 1998 (1) SA 550 (D); *Barnard* 2000 (3) SA 741 (C); *Reeder v Softline Ltd and Another* 2001 (2) SA 844 (W) and *Bezuidenhout* 2005 (2) SA 187 (SCA).

<sup>88</sup> Alick Costa, "A plea for enlightened reform", *De Rebus*, May 2003 at 29-32.

<sup>89</sup> *Id* at 31.

<sup>90</sup> *Matrimonial Property Act*, section 21.

## Recommendation

### STATUTORY RESTRICTION ON STRICT “OUT OF COMMUNITY OF PROPERTY”

We recommend reforms mirroring those of South Africa on this point in Namibia, to ameliorate the harsher consequences of the typical “out of community of property” regime, without removing the ability of couples to apply strict “out of community of property and without community of profit and loss” to their marriages by ante-nuptial contract – if it is clear that they both understand the consequences of this choice and still wish to apply it.

As in South Africa, we also recommend that Namibia allow a grace period for couples to change strict “out of community” into accrual by means of a simple and inexpensive procedure. The question of ante-nuptial contracts and their variation is discussed below in Chapter 10. (In Chapter 10, we recommend over-arching changes to the law on post-nuptial contracts and post-nuptial changes to ante-nuptial contracts. If this entire recommendation is not adopted, there should at least be a more limited option for change of strict “out of community” as in South Africa.)

## Recommendation

### STATUTORY MODIFICATION OF “OUT OF COMMUNITY OF PROPERTY” WITH RESPECT TO MATRIMONIAL HOME

As discussed below in Chapter 14, we recommend that the “out of community of property”, regime, like all other marital property regimes, should be also modified by law to require consent of other spouse for transactions involving the marital home, regardless of who actually holds the right to it. This could be done by way of amendment to the *Married Persons Equality Act*.

## 3. “ACCRUAL SYSTEM”

**3.1** It is recommended that the basic framework for the “accrual system” be set by statute, as in South Africa, and (as discussed above) that “out of community of property” be interpreted to mean the “accrual system” unless there is a clear intention to the contrary.

**3.2** In general, the “accrual system” is considered to be one of the fairest approaches to property in marriage, but it is rarely used in Namibia. A survey carried

out by the Legal Assistance Centre which examined a random sample of 434 divorce cases heard by the High Court over the period 1990-1995 found that over 70% of the marriages in these cases were “in community of property, with most of the remainder being “out of community of property”. The “accrual system” applied to less than 1% of these marriages.<sup>91</sup>

**3.3** In South Africa, in contrast, law reforms have provided that every marriage entered into after 1 November 1984 which is “out of community of property” will be *automatically* understood to be subject to the “accrual system”, unless an ante-nuptial contract specifically excludes the “accrual system”.<sup>92</sup> Interestingly, after the enactment of the *Matrimonial Property Act*, significant numbers of couples in South Africa continued to use ante-nuptial agreements to explicitly exclude the “accrual system” in favour of a more complete separation of profit and loss. For the period July 1985-June 1986, 4 364 out of 17 322 registered ante-nuptial contracts expressly excluded the “accrual system” (25%), whilst from July 1986-June 1987, 7 948 out of 22 437 registered ante-nuptial contracts expressly excluded the “accrual system” (35%).<sup>93</sup>

## Recommendation

### STATUTORY ESTABLISHMENT OF “ACCRUAL SYSTEM”

We recommend a statutory framework for the “accrual system” like that adopted in South Africa. Even though the “accrual system” can be applied in Namibia by means of an ante-nuptial contract, a clear statutory framework for this regime would encourage its use. Also, as discussed above, we recommend following South Africa by interpreting all agreements establishing strict “out of community of property” as referring to the “accrual system”, unless accrual is expressly excluded by the couple in question.

As discussed below in Chapter 14, we also recommend that the “accrual system”, like all other marital property regimes should be also mandated by statute to require the consent of the other spouse for transactions involving the marital home, regardless of who actually holds the right to it.

## 4. “MODIFIED CUSTOMARY LAW SYSTEM”

**4.1** The proposal for this new system is outlined in the previous chapter. This suggested system would need to be established by statute, as it is a modification of “in community of property” which attempts to cater for aspects of customary law without

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<sup>91</sup> See Legal Assistance Centre, *Proposals for Divorce Law Reform in Namibia* (2000) at 47-ff. Note that there is a mathematical error in Table 20A, where the percentages should read, respectively, 71.6%, 27.4%, 0.5% and 0.5%.

<sup>92</sup> In comparison, see section 2, *Matrimonial Property Act 88 of 1984*.

<sup>93</sup> Sinclair at 199-200. Sinclair notes that it “seems likely too that it is amongst whites that exclusion of the accrual system is considered desirable”, although this assumption is not explained.

prejudicing the interests of women who have in some communities traditionally been considered incapable of owning and controlling property.

## **Recommendation**

### **“MODIFIED CUSTOMARY LAW SYSTEM”**

This new system would need to be created by statute, as outlined in Chapter 6. It would technically be a variant of “in community of property”, in the sense that it would work in the same way as “in community of property” but would exclude certain property from the joint estate by statutory definition, without the need for registration of an ante-nuptial contract detailing the excluded property.

## **5. OVERARCHING REFORMS**

### **A. DONATIONS BETWEEN SPOUSES**

**5.1** Spouses who are married “in community of property” cannot make donations to each other during the marriage because their property is all owned jointly. Even if they have retained some separate property outside the community, donations are still forbidden.

**5.1.1** One effect of this rule is that donations cannot be used as a way to get around the rule that the marital property regime cannot be changed after the marriage takes place – for example, an agreement that one spouse would “donate” a portion of his or her separate property to the other spouse would not be honoured in law.

**5.2** The common law also makes donations between spouses who are married “out of community of property” voidable, meaning that the donation can be revoked at any time by the spouse who was the giver of the gift. Similarly, a promise by one spouse to donate something to the other spouse is not an enforceable agreement. Since the effect of the prohibition is that ownership of the donated item does not really pass from one spouse to the other, the creditors of the donor spouse can still attach the money or property in question.

**5.3** These common law prohibitions exclude ordinary gifts such as those given on birthdays, anniversaries and similar occasions, as well as trivial donations. Life insurance policies where one spouse is the beneficiary of a policy on the other spouse are also not considered to be prohibited donations. There are other exceptions which need not be detailed here.

**5.4** The legal rules prohibiting donations between husband and wife apparently arose from a desire to protect spouses from their own generosity – the concern was that a besotted spouse might foolishly give things to the other spouse to the point of excess.<sup>94</sup>

**5.5** The common law rule is considered to be outdated and unnecessary, and it has already been altered by statute in South Africa to allow donations between spouses who are married “out of community of property”.<sup>95</sup> However, this is subject to the provisions of the *Insolvency Act 24 of 1936* which deal with fraudulent transactions between any parties shortly before sequestration, where “donations” might be utilised in an attempt to protect property from creditors.<sup>96</sup>

**5.6** In Namibia, the Divorce Bill proposed by the Law Reform and Development Commission includes the following provision on donations between spouses:

**7. Donations between spouses**

*Subject to the provisions of the Insolvency Act, 1936 (Act No. 24 of 1936) –*

- (a) *no transaction effected before or after the commencement of this Act is void or voidable merely because it amounts to a donation between spouses;*
- (b) *any gift given in anticipation of a marriage becomes the property of the recipient, notwithstanding the subsequent dissolution of the marriage.*

**5.7** The explanatory note explains that clause 7(a) is adapted from the South African *Matrimonial Property Act 88 of 1984*, and that it is intended to rectify the old Roman relic which previously rendered donations between spouses revocable. This position worked unfairly to the donee in that the donation could always be claimed back, thereby diminishing the true meaning of what constitutes a donation. Clause 7(b) is aimed at dealing with the situation where in certain ethnic groups, gifts given to the potential spouse or the spouse’s family are subsequently returned in the event of failure of the marriage. This situation is untenable because gifts then lose their true meaning as they are seen as some form of security.<sup>97</sup>

**5.8** This provision, if enacted in the Divorce Bill, would adequately address the issue of donations between spouses.

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<sup>94</sup> Sonnekus (n 19) at 36; Hahlo (4<sup>th</sup> edition) (n 1) at 128-ff.

<sup>95</sup> *Matrimonial Property Act*, section 22; Sonnekus (n 19) at 36.

<sup>96</sup> See sections 26 and 31 of the *Insolvency Act 24 of 1936*.

<sup>97</sup> Law Reform and Development Commission, *Report on Divorce*, Project 8, LRDC 13, November 2004, Annexure A.

## Recommendation

### DONATIONS BETWEEN SPOUSES

If clause 7 on donations between spouses proposed by the Law Reform and Development Commission as part of the Divorce Bill is for any reason not enacted in that law, it should be included in the law reforms on marital property.

## B. INSURANCE

**5.9** The *Long-term Insurance Act 5 of 1998* deals with several issues concerning insurance policies and married persons. The act does not define “marriage” or “spouse”, but it seems to deal primarily with issues which are (at least currently) only of relevance to civil marriages.

**5.10** Section 43 allows married persons to obtain long-term insurance on the same basis as single persons, and authorises them to make their spouses beneficiaries in life insurance policies, regardless of the common-law prohibition on gifts between spouses. Assets obtained in this manner are excluded from the joint estate of couples married “in community of property”, regardless of whether the policy or the assets in question were acquired before or during the marriage.

**5.11** Section 44 deals with the relationship between life policies and insolvency where a couple is married “in community of property”:

*If a premium paid under a life policy effected by a spouse married in community of property, or under a life policy in which that spouse holds any right or interest, was paid out of moneys which belonged to the joint estate of both spouses, and the liabilities of both spouses continuously exceeded the value of their assets from the time of the payment of any such premium until their joint estate was sequestrated, the spouse by whom the life policy was effected or by whom the right or interest is held, shall be liable to pay into the insolvent estate the amount of every such premium in so far as its payment created or increased the excess of liabilities over assets.*

**5.12** In the case of insolvency or the attachment of assets to satisfy a debt, the life policy of any person, married or single, on his or her own life is protected from creditors up to a realisable value of N\$50 000 whilst the holder of the policy is still alive.<sup>98</sup> In the case where the holder of the life policy dies and the estate is insolvent, a total of N\$50 000 is protected from creditors in order to devolve upon a surviving spouse, child or parent either in terms of the deceased person’s will or by right of intestate

<sup>98</sup> Section 45. This applies only to policies which have been in place for at least three years.

succession.<sup>99</sup> Similarly, if a life policy is ceded to a spouse or a child, or if a spouse or a child is the beneficiary of the policy, a maximum of N\$50 000 is protected from creditors. The total amount of protection in the case of life policies of deceased persons affected by more than one of these rules may not exceed a total of N\$50 000.<sup>100</sup>

**5.13** In a case where a life policy has been ceded to a spouse or a child, or the spouse or child are beneficiaries of the policy, and the premiums have lapsed, a range of mechanisms are provided for preserving or reviving the policy.<sup>101</sup>

**5.14** The previous legislation which covered insurance in Namibia, the South Africa *Insurance Act 27 of 1943*, had similar provisions which dealt only with insurance policies taken out by husbands. In South Africa, the distinction between husbands and wives for this purpose was found to be unconstitutional.<sup>102</sup>

**5.15** The new Namibian legislation takes a completely gender-neutral approach, and thus raises no discrimination issues. Thus, the only question for consideration would be whether or not the approach taken and the amount reserved from attachment by creditors is sufficient to protect the interests of spouses and children.

**5.16** We do not recommend any reforms on this issue at present.

## C. PENSION FUND BENEFITS

**5.17** The *Pension Funds Act 24 of 1956* has an admirably broad definition of “dependant” which would appear to include all “spouses”:

“dependant”, in relation to a member, means –

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person –
  - (i) was, in the opinion of the person managing the business of the fund, upon the death of the member in fact dependent on the member for maintenance;

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<sup>99</sup> Section 46. This applies only to policies which have been in place for at least three years. If there is no surviving spouse, child or parent, then the entire value of the policy will be applied toward the debts of the deceased.

<sup>100</sup> Section 47. The three-year time period which applies to the other provisions discussed here does not apply in this circumstance.

<sup>101</sup> Section 50.

<sup>102</sup> *Brink v Kitshoff* NO 1996 BCLR 752 (CC), opinion of O'Regan, J at 770 [47]-[48]: “There is no question that protecting creditors is a valid and important public purpose. There can be no dispute either that the close relationship between spouses may sometimes lead to collusion or fraud. However, I am not persuaded that the distinction drawn between married men and married women, which is the nub of the constitutional complaint in this case, can be said to be reasonable or justifiable ... There seems to be no reason why fraud or collusion does not occur when husbands, rather than wives, are the beneficiaries of insurance policies. Avoiding fraud or collusion does not suggest a reason as to why a distinction should be drawn between married men and married women.”

- (ii) is the spouse of the member, including a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion;
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.<sup>103</sup>

**5.18** However, it must also be noted that “dependant” is defined primarily in accordance with maintenance. Aside from spouses including customary law spouses and spouses in marriages concluded under the tenets of “any Asiatic religion”, a “dependant” must be dependent on the member either in fact or in law. This could create problems for persons living together in a cohabitation relationship based on mutual contributions to the partnership. This issue should be examined in connection with a broader look at legal protection for informal cohabitation relationships.

**5.19** There is a mechanism in the *Pension Funds Act* for the protection of pension benefits against insolvency in section 37B, and a provision for the distribution of pension benefits upon the death of a pension fund members in section 37C which stipulates that benefits shall be paid directly to dependants of the deceased rather than forming part of the deceased’s estate.

**5.20** We do not recommend any reforms on this issue at present.

## **D. CHOICE OF LAW FOR PROPRIETARY CONSEQUENCES OF MARRIAGE**

**5.21** As noted in Chapter 4, the proprietary consequences of the marriage are determined by the matrimonial domicile (*lex domicilii matrimonii*), which is the domicile of the husband at the time of marriage.<sup>104</sup>

**5.22** The Hague Convention on the Law Applicable to Matrimonial Property Regimes, concluded on 14 March 1978, deals with choice of law questions pertaining to marital property.<sup>105</sup> This Convention entered into force internationally on 1 September 1992. As of 2005, however, only nine nations had ratified it: Austria, France, Luxem-

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<sup>103</sup> Section 1. This act applies in Namibia as amended in South Africa up to the date of Namibian independence. According to Jutastat, the definition of “dependant” was inserted by sec 21(a) of Act 101 of 1976, substituted by sec 10 of Act 80 of 1978, amended by sec 38 of Act 99 of 1980, and substituted by section 3 of Act 51 of 1988 (date of commencement never proclaimed) and by section 20 of Act 54 of 1989.

<sup>104</sup> Although the *Married Persons Equality Act* gives married women domicile independent of the domicile of their husbands, this common law rule was not affected by the statute. See *Frankel’s Estate and Another v The Master and Another* 1950 (1) SA 220 (A); *Esterhuizen* 1999 (1) SA 492 (C). A couple can, however, make an ante-nuptial agreement which chooses a law other than that of the husband’s domicile as the law governing the proprietary consequences of their marriage. The court commented in the *Esterhuizen* case that “the Legislature must decide whether it wishes the *lex domicilii matrimonii* principle to remain intact, even if it does produce anomalous results in some circumstances.” At 504E.

<sup>105</sup> The Hague Conference on Private International Law works towards the progressive unification of the rules of private international law. It has formulated several conventions pertaining to family law. The Hague Convention on the Law Applicable to Matrimonial Property Regimes is available online at <http://hcch.e-vision.nl/>.

bourg, the Netherlands and Portugal. Namibia is not a party to the Convention, nor is any African nation as yet.

**5.23** The matrimonial property regime can be governed by the internal law designated by the spouses before marriage in a marriage contract.

**5.23.1** The spouses may designate only one of the following:

- (1) the law of any state of which either spouse is a national at the time of designation;
- (2) the law of the state in which either spouse has his habitual residence at the time of designation;
- (3) the law of the first state where one of the spouses establishes a new habitual residence after marriage.

**5.23.2** The law designated by the spouses before marriage applies to the whole of their property. However, they may designate with respect to all or some of their immovable property, the law of the place where these immovables are situated.<sup>106</sup>

**5.24** If the spouses, before marriage, have not designated the applicable law, their matrimonial property regime (with some exceptions) is governed by the internal law of the state in which both spouses establish their first habitual residence after marriage.<sup>107</sup>

**5.24.1** Habitual residence is meant to be different from domicile in that the element of *mens rea* is meant to be weaker. It is the regular physical presence in a country that constitutes the concept, thus making it easier to apply than the principle of domicile with its subjective element of intention.

**5.24.2** The concept of habitual residence also has the advantage of treating the spouses equally with respect to the choice of law question if they do not agree on this question.

**5.24.3** One possible disadvantage is that the concept of habitual residence could possibly leave a lacuna in the case of a gypsy-like couple who did not immediately establish any habitual residence after their marriage – a situation which would surely be rare.

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<sup>106</sup> Article 3.

<sup>107</sup> Article 4.

## **Recommendation**

### **CHOICE OF LAW ON MARITAL PROPERTY**

Even though Namibia is not bound by the Hague Convention on the Law Applicable to Matrimonial Property Regimes, it is recommended that the common law rule which makes the husband's domicile the guiding rule for choice of law on marital property regimes should be replaced by the Hague Convention's approach.

This would mean that (a) spouses domiciled in different countries could make an express agreement stating which law on marital property would apply to their marriage; and (b) in the absence of such an agreement, the applicable law would be that of the country where both spouses establish their first habitual residence after marriage.

This change would remove the last remaining vestige of differential legal treatment of husband and wife.

# Chapter 8

## THE DEFAULT REGIME

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The previous two chapters have made recommendations on a spectrum of marital property regimes for Namibia. This chapter asks (a) whether there should be a default regime for marriages in Namibia where couples do not make a specific agreement on this point, (b) if so, what the default regime should be and (c) whether there should be one default regime for both civil and customary marriages.

### 1. SUMMARY OF CURRENT NAMIBIAN POSITION

**1.1** As explained in Chapter 4, the default matrimonial property regime applicable to most civil marriages in Namibia is “**in community of property**”. Couples subject to this default position can enter into an ante-nuptial contract prior to the wedding to adopt a different property regime.

**1.2** As a vestige of Namibia’s apartheid history, the default regime applicable to civil marriages between blacks in certain parts of northern Namibia is “**out of community of property**”, by virtue of section 17(6) of the *Native Administration Proclamation 15 of 1928*. Couples subject to this default position can change their marital property regime by making a declaration before a magistrate anytime within one month before the wedding.

**1.3** The property regimes currently applicable to **customary marriages** cannot be labelled so neatly. However, as Chapter 5 explains, there seems to be more emphasis on separate property than on joint property in most Namibian communities, even though many people say that joint property expresses their cultural values most adequately.

### 2. PROPOSED REFORMS

**2.1** The Law Reform and Development Commission has proposed the following reforms which pertain to the default position:

- Section 17(6) of the *Native Administration Proclamation* should be repealed as a matter of urgency, so that the default regime for all civil marriages in Namibia is “in community of property”.<sup>1</sup>
- “In community of property” should be the default regime for all future customary law marriages, unless the couple make an ante-nuptial agreement or a declaration which changes the default regime.<sup>2</sup>

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<sup>1</sup> Law Reform & Development Commission, *Report on Uniform Default Matrimonial Consequences of Common Law Marriages: Repeal of section 17(6) of Native Administration Proclamation, 1928 (Proclamation 15 of 1928)*, LRDC 11, Project 6, July 2003 (hereinafter “LRDC 11”).

- The property arrangements of customary marriages entered into *before* the proposed law comes into force should continue to be governed by customary law. But these couples can use a simple procedure to change their property regime to “in community of property” – as long as the husband is not married to any other women in polygamous marriages. Couples will be allowed to make this change for a period of at least two years after the new law comes into force, and maybe even longer.<sup>3</sup>

**2.2** The question of modification of the basic default position has not yet been addressed by the Law Reform and Development Commission.<sup>4</sup>

### **3. SOUTH AFRICAN POSITION**

#### **One default regime: “in community of property”**

**3.1** Under the *Matrimonial Property Act 88 of 1984*, South Africa has three marital property regimes: “in community of property”, “out of community of property”, and the “accrual system”.

**3.2** The default regime for both civil marriages and customary marriages is “in community of property”.<sup>5</sup> As in Namibia, this means that each spouse owns an undivided half share of the joint estate and the spouses administer the estate jointly.<sup>6</sup>

#### **Repeal of the apartheid dispensation**

**3.3** Until 1988, the position for black people who entered into civil marriages in South Africa was similar to that which applies to blacks in some northern parts of Namibia.

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<sup>2</sup> Law Reform and Development Commission, *Report on Customary law Marriages*, Project 7, LRDC 12, October 2004 (hereinafter “LRDC 12”).

<sup>3</sup> LRDC 12.

<sup>4</sup> LRDC 11 at 3.2.

<sup>5</sup> As discussed in more detail below, the proprietary consequences of customary marriages are governed by the *Recognition of Customary Marriages Act 120 of 1998*. In terms of this act, the proprietary consequences of customary marriages entered into before the commencement of the act are governed by customary law. However, non-polygamous customary marriages that are entered into after the act’s commencement are, like civil marriages, “in community of property and community of profit and loss” unless the spouses specifically exclude such consequences in an ante-nuptial contract. With respect to polygamous customary marriages entered into after the commencement of the act, the court must approve a written contract regulating the matrimonial property system that will apply to the marriage.

<sup>6</sup> The “marital power,” under which the husband had the sole power to administer the joint estate, was abolished in South Africa by the *Matrimonial Property Act* (with respect to white, coloured and Indian marriages, but prospectively only), the *Marriage and Matrimonial Property Law Amendment Act 3 of 1988* (with respect to black marriages, but prospectively only), and the *General Law Fourth Amendment Act 132 of 1993* (with respect to all marriages, retrospectively).

**3.3.1** In terms of section 22 of the *Black Administration Act 38 of 1927*, civil marriages between blacks were deemed to be “out of community of property”, unless both spouses signed a declaration in front of a magistrate, commissioner or marriage officer. This declaration had to be signed within one month prior to the marriage, and had to indicate the intending spouses’ wish to marry “in community of property” and “in community of profit and loss”.<sup>7</sup>

**3.4** This situation was changed by the *Marriage and Matrimonial Property Law Amendment Act 3 of 1988* (which came into operation on 2 December 1988). This act had the effect of bringing civil marriages between blacks in line with all other civil marriages.

**3.4.1** A civil marriage entered into between blacks after this act came into operation is, like all other civil marriages, governed by the *Matrimonial Property Act* which provides that the default system for all marriages is “in community of property”.

**3.5** The changeover was accomplished by way of allowing black people who were already married a “grace period” of two years in which to register changes to their matrimonial property regime. Blacks who married before the commencement of *Act 3 of 1988* could change their matrimonial regime by executing and registering a notarial contract to that effect in a deeds registry within two years after the commencement of the act.<sup>8</sup>

**3.5.1** This method was introduced by the South African government in order to help black people avoid the expense of going through a court proceeding as a result of a past discriminatory law which had affected them. It was unnecessary for such couples to approach a court for the relief required, as the act provided a method of changing one’s matrimonial property regime easily and directly.

**3.5.2** The period given for recording the change by way of notarial deed ended on 2 December 1990, and now any couple who would like to change their matrimonial regime can do so only by way of formal application to court.

**3.6** The temporary notarial option was a limited one in terms of options. Black couples affected by the apartheid-era law could use this technique *only* to change their marriages from being totally “out of community of property” to being under the “accrual system” – they could not change their marriages to “in community of property” in this manner.

**3.7** Any other change of regime required a joint application to court for leave to make the change, and the court had authority to “authorise them to enter into a

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<sup>7</sup> DSP Cronje, *The South African Law of Persons and Family Law* (3<sup>rd</sup> Edition), 1994 at 203. The *Matrimonial Property Act*, which came into operation on 1 November 1984, provided that chapters II and III of the act did not apply to marriages in respect of which the matrimonial system was governed by section 22 of the *Black Administration Act 38 of 1927*.

<sup>8</sup> Id at 204.

notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit”.<sup>9</sup>

**3.7.1** The court procedure for post-nuptial changes is available to all married couples, not just to those affected by the racially-based laws of the past. It is discussed more fully in Chapter 10.

## Transitional mechanisms

**3.8** Two questions arise concerning the transitional mechanisms which accompanied the South African reforms.

**3.9** Firstly, **why was the temporary ability to change matrimonial property regimes by the simpler procedure of notarial contracts limited to changes from “out of community of property” to the “accrual system”?** In other words, why did sections 21 and 25 of South Africa’s *Matrimonial Property Act* allow changes by notarial contract (for blacks and for certain other couples) only from “out of community of property” into the “accrual system”, and not changes from “out of community of property” to “in community of property”?

**3.9.1** One possible reason might be concern about potential prejudice to other wives at customary law – but this reason obviously applies only to couples where the husbands are black and not to other couples, whilst the statutory limitation applied to *all* couples married under strict “out of community of property” before the new system came into force.

**3.9.2** The limitation could not validly be motivated by concerns about the rights of creditors. For example, there is no corresponding obligation on a single person who plans to marry “in community of property” to notify creditors of this intention. Furthermore, a change from “out of community of property” to “in community of property” could actually be advantageous to creditors, as the estate available to secure the debt of one spouse would normally be enlarged by a conversion to an “in community of property” system.

**3.9.3** The limitation seems to have been motivated primarily by a general reluctance to allow changes in matrimonial property regimes without requiring persuasive justification of the desire for the changes. The notarial approach could be used by couples only to make the most limited form of change, to bring their marriages in line with the new norm for “out of community of property” marriages after the enactment of the *Matrimonial Property Act*. (As discussed in more detail in the previous chapter, this act transformed “out of community of property” into the less harsh separation of the “accrual system”, except in cases where couples make an ante-nuptial agreement that specifically rejects accrual.) Any more far-reaching changes require a court application, as will be discussed below in Chapter 10.

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<sup>9</sup> *Matrimonial Property Act*, section 25(2).

**3.10** The second question is **why was the notarial system for changes limited to such a brief time period?** As one South African law professor observes:

*If the notarial contract was considered to be an effective and inexpensive method for modernizing one's matrimonial property system, there appears to be no good reason why the dispensation should not have been allowed to remain operative permanently.*<sup>10</sup>

**3.11** The reasons behind these aspects of the South African legislation are not discussed in the Report of the South Africa Law Commission which preceded them,<sup>11</sup> and enquires to a range of South African academics and jurists have yielded no answers.

## **Applying the default regime to customary marriages**

**3.12** The proprietary consequences of customary marriages in South Africa are governed by the *Recognition of Customary Marriages Act 120 of 1998*, which came into operation on 15 November 2000.<sup>12</sup>

**3.12.1** This law reform was preceded by the publication of an Issue Paper and a Discussion Paper by the South African Law Commission. These documents were disseminated and discussed at a total of 23 provincial and national workshops that involved non-government organisations, women's groups, traditional leaders, the legal profession, state departments, and the religious community.<sup>13</sup>

**3.13** In general, the act extends full legal recognition to all customary marriages, whether or not they are registered in terms of the act.

**3.13.1** Any customary marriage entered into before or after the act is "for all purposes recognised as a marriage", provided that marriages entered into *after* the commencement of the act comply with the requirement that both

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<sup>10</sup> June Sinclair, *The Law of Marriage, Volume 1* at 234, footnote 79.

<sup>11</sup> South African Law Commission, *Report on matrimonial property law with special reference to the Matrimonial Affairs Act, 1953, the status of the married women and the law of succession in so far as it affects the spouses*, 1982.

<sup>12</sup> Section 2. Several laws were specifically repealed or amended to bring them in line with the new act. Amongst these were marital power sections of the *Black Administration Act 38 of 1927*, "repealed to remove South Africa's most notorious reason for the 'perpetual minority' of African women." *Memorandum on the Objects of the Recognition of Customary Marriages Bill*, attached to the Recognition of Customary Marriages Bill, B-110B-98.

Section 11(3) of the *Black Administration Act 38 of 1927* read, in pertinent part, "a Black woman ... who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian." The Transkei, KwaZulu and Natal marriage regulations were amended to remove the concept of marital power.

The act has been supplemented by the *Deeds Registries Amendment Act 9 of 2003*, which provides for the registration of immovable property in the names of persons married under the new property dispensations which now apply to customary marriage.

<sup>13</sup> "Launch of the Recognition of Customary Marriages Act No. 120 of 1998", Speech by Deputy Minister of Justice & Constitutional Development, Ms Cheryl Gillwald, 15 November 2000.

spouses are above the age of 18 (or have obtained state permission to marry at a younger age), and have given their free consent to the marriage.<sup>14</sup>

**3.14** In terms of the act, the proprietary consequences of customary marriages entered into *before* the commencement of the act are governed by customary law.<sup>15</sup> However, non-polygamous customary marriages entered into *after* the act's commencement are, like civil marriages, "in community of property and community of profit and loss", unless the spouses specifically exclude such consequences in an ante-nuptial contract.<sup>16</sup>

**3.14.1** The law did not make the change in property consequences retroactive because of concerns about the impact of this approach on existing polygamous marriages, as well as worries that other dependants (such as widows dependent on their deceased husband's heirs) would not be adequately protected under such an approach.<sup>17</sup>

**3.15** The South African Law Commission (SALC) initially recommended that customary marriages should be automatically "out of community of property" (in contrast to civil marriages which are automatically "in community of property"), unless the parties enter into an ante-nuptial agreement specifying a different system.

**3.15.1** This proposal met with strong public opposition, however, primarily on the basis that a default regime of "in community of property" would be more consonant with existing customary norms. The SALC then altered its recommendation accordingly.<sup>18</sup>

**3.16** Most of the provisions of the *Matrimonial Property Act* which apply to civil marriages that are "in community of property" apply equally to customary marriages that are "in community of property".

**3.16.1** This means, for example, that spouses married "in community of property" must obtain each other's consent for all major financial transactions involving the joint estate.<sup>19</sup>

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<sup>14</sup> For a general analysis of the act, see Victoria Bronstein, "Confronting Custom in the New South African State: An Analysis of the Recognition of Customary Marriages Act 120 of 1998", 16 SAJHR 558 (2000); AJ Kerr, 'Customary Family Law' in Brigitte Clark, ed, *Family Law Service* (Butterworths, 1988 as updated to October 2000).

<sup>15</sup> Section 7(1): "The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law."

<sup>16</sup> Section 7(2): "A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an ante-nuptial contract which regulates the matrimonial property system of their marriage."

<sup>17</sup> Bronstein (n 14) at 565.

<sup>18</sup> South African Law Commission, Project 90 – The Harmonisation of the Common Law and the Indigenous Law, *Report on Customary Marriages* (1998) at paragraphs 6.3.4.11-6.3.4.13.

<sup>19</sup> Only the provisions authorising donations between spouses and the liability of spouses for household necessities are not made applicable to customary marriages. See *Recognition of Customary Marriages*

**3.17** The *Recognition of Customary Marriages Act* provides for “equal status and capacity” of spouses in customary marriages, but this depends on the property regime applicable to the marriage:

*A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.*<sup>20</sup>

**3.18** Under South African customary law, the husband as head of household is the owner of all marital assets (although the wife may have certain rights in respect of some items) – so for customary marriages concluded *before* the act came into force, for which customary law determines the property consequences, this grant of “equal capacity” appears to be meaningless.<sup>21</sup>

**3.19** The act’s failure to make its property clauses retrospective has been criticised on the grounds that this discriminates on the basis of date of marriage and thus “produces an underclass of consistently disadvantaged people who are unable to improve their position by lawful means”.<sup>22</sup> The National Association of Democratic Lawyers (NADEL) warned that the approach taken by the law to customary marriages concluded before the commencement of the act was quite likely unconstitutional:

*Generally, customary law marriages have the effect of vesting ownership of all marital property in the husband. This includes property that the wife brings into the marriage. This allows for a situation which manifestly discriminates against women.*<sup>23</sup>

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Act, section 7(3). The issues in question are covered by section 22 and 23 of the *Matrimonial Property Act*, which are not made applicable to customary marriages.

The prohibition on donations to spouses was a common-law restriction that applied to civil marriages – therefore there was presumably no need to change it in respect of customary marriages. As for the failure to apply the provision on liability for household necessities to customary marriages, the reason for this decision has not been located.

<sup>20</sup> *Recognition of Customary Marriages Act*, section 6. As noted above, the act abolishes section 11(3) of the *Black Administration Act 38 of 1927*, which placed customary law wives in the position of minors. The act also states that the age of majority of any person will be determined by the *Age of Majority Act 57 of 1972*. *Recognition of Customary Marriages Act*, section 9.

<sup>21</sup> See AJ Kerr (n 14) at 28-ff. See also, for example, *PM v EM*, Central Divorce Court, Johannesburg, Case No I70/97, 29 November 2000. In dissolving a customary marriage concluded before the commencement of the *Recognition of Customary Marriages Act*, the divorce court found that the marriage could not in terms of section 7(1) be viewed as a marriage ‘in community of property’ for the following reason: “According to customary law a wife is a perpetual minor and cannot own, or alienate property and is subject to authority of her husband. Only husbands can own and alienate property.” The wife received only maintenance of R200/month in respect of each of the six children of whom she was given custody, as well as 50% of her husband’s pension interest, which he offered.

<sup>22</sup> See, for example, Sharita Samuel. “Women married in customary law: no longer minors”, 40 *Agenda* 23 (1999) at 27-28.

<sup>23</sup> NADEL, *Submissions on the Recognition of Customary Marriages Bill (1998)*, as quoted in Bronstein (n 14) at 566.

**3.20** A further difficulty with the approach taken to marriages concluded *before* the commencement of the act is that it is not clear what the matrimonial property system governing such marriages actually is. For example, there is debate about whether or not married women can in fact own and control any forms of property under customary law.<sup>24</sup>

**3.21** Couples who entered into a customary marriage *before* the date of the act may apply to the court for leave to change their marital property system.<sup>25</sup> The court may grant permission for a change of property regime if it is satisfied that there are sound reasons for the change, that sufficient written notice of the change has been given to all creditors, and that no other person will be prejudiced by the change.<sup>26</sup>

**3.21.1** This option for change is unlikely to assist many women since the spouses must act jointly to request the change. Few husbands married under customary law are likely to be eager to relinquish any of their sole rights over property. As one commentator notes, “*it can be confidently predicted that there will be very few applications of this type*”.<sup>27</sup>

## **Implementation of the *Recognition of Customary Marriages Act***

**3.22** The Centre for Applied Legal Studies (CALS) is conducting ongoing monitoring of the implementation of South Africa’s *Recognition of Customary Marriages Act*. They have found that whilst women are eager to register their customary marriages, men are more reluctant to do so.

**3.23** Registering officers have been reluctant to register marriages unless the application is made by both spouses, even though the act provides for registration by an individual spouse or even an interested third party, because of their fear of registering a non-existent marriage on the basis of fraudulent identity documents. According to CALS, men have a greater incentive not to register their customary marriages unless forced to do so “*because of the patriarchal system that assumes that all property in the man’s possession belongs to him alone*”.<sup>28</sup>

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<sup>24</sup> See Bronstein (n 14) at 568-70. Bronstein asserts that court should develop interpretations of customary law in accordance with living customary law (as opposed to static official versions of customary law) and with the letter and spirit of the South African Bill of Rights.

<sup>25</sup> If the marriage is polygamous, all of the spouses (and all other persons with a sufficient interest in the matter) must be joined in the proceeding.

<sup>26</sup> See *Recognition of Customary Marriages Act*, section 7(4). Compare section 21(1) of the *Matrimonial Property Act*.

One other difference is that section 21(1) of the *Matrimonial Property Act* requires sufficient notice of the proposed change to “all the creditors of the spouses”, whilst section 7(4) of the *Recognition of Customary Marriages Act* requires sufficient written notice of the proposed changes to “all creditors of the spouse for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the *Gazette*”.

<sup>27</sup> Bronstein (n 14) at 568.

<sup>28</sup> CALS *Gender Research Project Bulletin*, Vol 6, Spring 2001; CALS *Gender Research Project Bulletin*, Vol 7, 2002.

**3.24** CALS also found that community attitudes are far from accepting the concept of joint decision-making by husband and wife. Some women feel unable to make domestic decisions alone, even when their husbands are absent or have deserted the family. Many men, on the other hand, feel that it is unnecessary to involve their wives in financial decisions (such as the sale of cattle), and are not willing to give their wives information about their wages.

**3.25** CALS concludes that “*male dominance in the domestic sphere continues unaltered despite the legal provision requiring women and men in customary marriage to share decision-making*”. They suggested that efforts should be directed at convincing men to share power within the family, and at changing negative attitudes on the part of both women and men which have the potential to frustrate the legal provisions.<sup>29</sup>

## **4. DEFAULT PROPERTY REGIMES IN OTHER AFRICAN COUNTRIES**

**4.1** It does not seem useful to attempt a general survey of default systems in countries around the world. Instead, we have collected here only information on a few other African approaches.

### **Botswana: “out of community of property” or customary law**

**4.2** As explained in Chapter 6, in Botswana, the default system for non-African couples is “out of community of property”, and the default system for African couples in both civil and customary marriages is that imposed by customary law.

**4.3** A non-African couple married in a civil marriage will automatically be married “out of community of property”, unless they make an ante-nuptial agreement which applies a property regime of “in community of property”. An African couple can opt into the common law system by filling out a form prior to the marriage ceremony, in the presence of two witnesses, stating that they wish their marriage to be subject to civil law. They can choose between the civil law systems of “out of community of property” and “in community of property”.<sup>30</sup>

**4.3.1** Some of the problematic aspects of this approach were discussed in Chapter 6.

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<sup>29</sup> CALS Gender Research Project Bulletin, October 2002.

<sup>30</sup> Centre on Housing Rights and Evictions (COHRE), *Bringing Equality Home, Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa*, 2004 at 42 (hereinafter “COHRE”); A Griffiths, “The Problem of Informal Justice: Family Dispute Processing Among the Bakwena – a Case Study” (1986) 14 *International Journal of the Sociology of Law* 359, at 363; A Molokomme, “Disseminating Family Law Reforms: Some Lessons from Botswana” [1990-91] *Journal of Legal Pluralism* 303, at 310.

## Zimbabwe, Kenya and Tanzania: “out of community of property” with judicial discretion to re-distribute

**4.4 Zimbabwe’s** *Married Person’s Property Act* provides a presumption that all marriages are “out of community of property”. The parties are permitted, however, to contract out of this system, into an “in community of property” regime, if they enter an agreement. However, as explained in more detail in Chapter 6, the *Matrimonial Causes Act* gives courts the power to re-distribute property on divorce in both statutory and customary marriages which are “out of community of property” (provided that the customary marriage is registered).<sup>31</sup>

**4.5 In Kenya**, marital property is divided with reference to the English *Married Women’s Property Act 1882*, which is a vestige of British colonial occupation. Marital property is essentially separate property – which means that each spouse retains whatever she or he owned before marriage, as well as what he or she acquired during marriage. However, despite this underlying concept of separate property, the courts have recently moved towards a fair (although not always equal) division of property based on the financial and non-financial contributions made by both spouses. This approach has been applied to marriages under both customary law and Islamic law, as well as to civil marriages.<sup>32</sup>

**4.6 In Tanzania**, the *Law of Marriage 1971* integrated the law on marital property for all forms of marriage. This law established a system of separation of property. Section 114(2)B provides that the “contribution made by each party in money, or work towards acquiring of assets” will be considered by the courts, which have reportedly begun to “incline towards equality of division.”<sup>33</sup> As in Kenya, caring for the children and home has also been recognised by the courts as a relevant contribution.<sup>34</sup>

## Senegal: “in community of property” default for monogamous marriages

**4.7 In Senegal**, there are three possible types of marriages: monogamy, limited polygamy (with a maximum of two wives) and polygamy (with a maximum of four wives). The default property regime for all monogamous marriages is “in community

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<sup>31</sup> Welshman Ncube “Underprivilege & Inequality: the Matrimonial Property Rights of Women in Zimbabwe” in Alice K Armstrong, ed, *Women & Law in Southern Africa* (Harare: Zim Publishing House 1987) 3, at 6.

<sup>32</sup> Celestine Nyamu Musembi, “‘Sitting on her husband’s back with her hands in his pockets’: Commentary on Judicial Decision-Making in Marital Property cases in Kenya”, *International Survey of Family Law* 2002 at 229-ff. *Kivuitu v Kivuitu* [1991] 2 *Kenyan Appeal Review* 241 was the seminal case on non-financial contributions. The *Nderitu* case (Civil Appeal No 203 of 1997, Nairobi) held that child-bearing counts as a contribution to family welfare and creates an entitlement to marital assets.

<sup>33</sup> JS Read, “Milestone in the integration of personal laws: the new law of marriage and divorce in Tanzania” [1972] 16 (1) *J.A.L.* 19.

<sup>34</sup> A Armstrong, “Uncovering Reality: Excavating Women’s Rights in African Family Law” (1993) 7 *International Journal of Law and the Family* at 345. See the discussion of the case of *Bi Hava Mohamed v. Ally Sefu*.

of property”, whilst polygamous marriages may be “separate property” (analogous to “out of community of property”) or a system known as the “dote regime” (discussed in more detail in Chapter 9 on polygamy).<sup>35</sup>

## **Ethiopia: “in community of property” mandatory for all civil marriages**

**4.8** In Ethiopia, couples who are married in terms of civil law have no choice at all regarding their marital property regime. The *Family Code 2000* provides that, as a requirement for registration and legal recognition, “*all income derived by personal efforts of the spouse and from their common or personal property shall be common property*”. When the marriage is dissolved, each spouse has a right to his or her own property plus a half share in the common property. This has the effect of an “in community of property regime” (although it also appears to bear some similarity to the “accrual system”).<sup>36</sup> However, the protection which this mandatory common property regime might provide for women is to a great extent undermined by the husband’s continuing ‘marital power’:

*[T]he Code codifies certain customary practices: it designates the husband as the head of the family and gives him the authority to administer household property. The husband is given the right to control and manage common property and to make all decisions regarding such property. Whereas the Code requires that the husband act judiciously and not alienate property without the consent of his wife, strong traditional and cultural beliefs discourage women from enforcing this requirement.*<sup>37</sup>

**4.9** Customary marriages are not recognised under civil law, and property in such marriages still follows customary law.<sup>38</sup>

## **Overview of default systems in other African countries**

**4.10** While “out of community of property” seems to be the default option in many African countries, there is a recognition that this approach can lead to unfairness which requires rectification by judicial re-distribution. However, in a country like Namibia where such a high proportion of the population is rural-based, it makes sense to try to minimise court cases and the need for judicial involvement in property re-distribution. Thus, “out of community of property” does not appear to be a good choice for a default regime in Namibia.

**4.11** “In community of property”, or variations of this, are also used in other African countries as the default regime for at least some types of marriages. Given the strong community preference for this system reported in Chapter 5, it should be considered as the Namibian default option.

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<sup>35</sup> COHRE (n 30) at 102-3.

<sup>36</sup> Ibid at 51-52.

<sup>37</sup> Ibid at 52.

<sup>38</sup> Ibid at 52-53.

**4.12** We also assert that the “accrual system” would also have a number of advantages as the choice for a default regime, even though this system does not appear to be well-known in Namibia or in other African countries.

## 5. ISSUES TO CONSIDER IN NAMIBIA

**5.1** The first question to consider is: Should there be a default regime, or should the law provide **no default** so that all couples are forced to choose from a given set of options and record their choice on the marriage certificate?

**5.1.1** We suggest that government should give consideration to the option of **no default system, whereby couples entering into a marriage are forced to choose a property regime** after a standardised explanation by the civil or customary marriage officer. As discussed in Chapter 6, we would suggest that the choices should be the following:

- (a) **“in community of property”**
- (b) **“accrual system”**
- (c) **“out of community of property”**
- (d) **a modified customary law system**, whereby certain forms of property are automatically excluded from the joint estate (as proposed in Chapter 6).

**5.1.2** However, should this option be chosen, care must be taken to ensure that couples have the information they need to make a fully-informed choice, and that both intending spouses participate freely in the decision-making process:

*In Botswana, Rwanda, Zimbabwe and Swaziland, for example, laws often allow a choice of different regimes: “in community of property” or “out of community of property”; and separate or joint ownership of marital property. Frequently, the choice itself, or at least the consequences thereof, are not made clear to the couple to be married, especially not to the woman, thereby leaving her with little or no actual decision-making power over the kind of regime to be entered into... WLSA Swaziland points out that in Swaziland, most women “at the time of contracting the marriage, were not aware of the consequences of the very marriage they were entering into, let alone that there were other options available to them”. While a choice between marital property regimes may seem to be the best solution, education on their details and consequences is badly needed to make the choice and the regimes effective. Also, administrative systems for registration of the marriage regime must ensure that women and men engage equally in the decision-making process, with their full knowledge of the regimes and their consequences.<sup>39</sup>*

**5.2** Alternatively, if a default regime is chosen, what should be the **default system for civil marriages**, and what should be the **default system for customary marriages**?

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<sup>39</sup> Ibid at 176.

**5.2.1** If a default regime is to be applied, it would be simplest to **apply one default regime to all marriages**, particularly in light of the fact that many of the other basic minimum requirements for the two types of marriages (such as the minimum age for marriage) are in the process of being harmonised. Having a single default regime would facilitate public education, and hopefully avoid confusion of the sort experienced in Botswana (as described in Chapter 6). Another point in favour of a single default regime would be to ensure that customary marriages are no longer seen as having “second-class status” as in the apartheid past. A single default system would avoid the perception that there are different laws for different races, whilst still providing a full range of choices for married couples.

**5.3 If a single default regime is chosen, we recommend that the government consider one of the following two possibilities as the default regime for both civil and customary marriages: “in community of property” OR the “accrual system”.**

**5.4** The following are **arguments in favour of “in community of property”** as the default regime:

- “In community of property” is the most familiar and popular property regime at present, as the research reported in Chapter 5 shows.
- This system fits well with concepts of marriage advanced by churches.
- This system is also conceptually easy to understand.
- This system can be of particular benefit to a spouse (usually the wife) who takes care of the home or tills the fields instead of earning a cash income.
- The application of the *Married Persons Equality Act* to “in community of property” marriages gives husbands and wives greater equality in decision-making powers.

**5.5** The following are **arguments against “in community of property”** as a default regime:

- The *Married Persons Equality Act* is not easy to enforce in practice, particularly given the absence of requirements for prior written consent. This means that in practice, husbands may retain greater control over joint property despite the good intentions of the *Married Persons Equality Act*. Even if the act is strengthened as recommended, enforcement may still be difficult, particularly in rural areas and amongst people who are not well-informed about their rights.
- “In community of property” appears to be a relatively radical departure from customary law, which may mean that couples in customary marriages will be reluctant to apply it in practice.
- “In community of property” is not well-suited to take into account claims on property from extended family members – such as cases where someone has inherited property from an extended family member along with a concomitant duty to support certain family members.

**5.6** The following are **arguments in favour of the “accrual system”** as a default regime:

- Because the “accrual system” keeps the property of the spouses separate until the marriage is dissolved, it might work better in the customary law context – for example by making it simpler for one of the spouses to fulfil obligations in his or her kinship networks.
- The “accrual system” is in a sense a compromise between “in community of property” and “out of community of property” and thus carries some of the advantages of both – autonomy during the subsistence of the marriage combined with a fair division of the gains which take place during the existence of the relationship.
- The “accrual system” gives some protection to spouses against responsibility for debts of the other spouse, as only the separate property of the spouse who incurred the debts can be attached for their payment.
- The “accrual system” might be more appropriate where either spouse has children by another partner who must be maintained. Paying maintenance out of joint assets can be a source of friction if the marriage is “in community of property”.

### **5.7 Arguments against “accrual” as a default regime:**

- This system might perpetrate inequalities, as the man is more likely to bring assets of greater value into the marriage at the outset, given the gender-based economic inequalities currently persisting in Namibia. The woman would, upon dissolution of the marriage, have an entitlement only to her own separate property and to half of the value of the assets acquired by either spouse during the marriage. This might make it possible for men in society to retain their position as financially-stronger parties for a longer time period.
- This option is currently unfamiliar and might be hard to explain clearly, at least in the initial stages.

**5.8** In general, we feel that the use of a default regime encourages couples to marry without really understanding the property consequences of the marriage. Therefore, we would suggest that it would be useful to require all couples to indicate on their marriage certificates one of the standardised basic regimes, after a standardised explanation which all marriage officers are supplied with to communicate to marrying couples. More detailed or individually-tailored arrangements could still be made by way of ante-nuptial agreement.

**5.9 If a default regime is chosen, all married couples should have the possibility of making a simple ante-nuptial contract which adopts a different property system. However, if they want to choose one of the basic regimes, they should be able to do this simply by making an indication on their marriage certificate.**

**5.9.1** All couples should be able to choose any one of four basic regimes, or any variation of these basic systems which they would like to put together.

**5.9.2** However, upon dissolution of the marriage, courts should always have the discretion to depart from a strict application of any ante-nuptial agreement if

this is necessary to achieve fairness between the parties. This potential discretion is discussed in more detail below in Chapters 10, 12 and 13.

## Recommendation

### DEFAULT REGIME

To avoid confusion, we propose one rule for all marriages. We would suggest that there should be **no default regime**, but that couples should rather be required to indicate on their marriage certificates which of the four basic property regimes they are choosing to govern their marriage, after listening to a standardised explanation provided by the marriage officer. Marriage officers should be equipped to answer questions about the possible regimes, and to provide additional information. They should also be charged with the duty of ensuring that both spouses are making informed choices of their own free will.

If a default regime is chosen, there are arguments in favour of making it either “in community of property” or the “accrual system”. However, on balance, we feel that the weight of argument probably tips in favour of making the default regime “in community of property” (except for polygamous marriages).

If there is a default regime, marriage officers should be required to explain the basic choices to all couples. Furthermore, it should be possible for couples to indicate a choice of any of the four basic regimes by simply indicating this on the marriage certificate.

It is envisaged that in future there will be marriage officers who register customary marriages as well as marriage officers who register civil marriages, so the increased involvement of marriage officers in explaining property regimes could work in practice for both types of marriages.

Since marriage certificates are publicly witnessed, it seems appropriate to allow couples to choose one of the basic regimes by means of an indication on the certificate, rather than requiring preparation of an ante-nuptial contract by a lawyer. However, the use of a detailed ante-nuptial contract should be continue to be open to any couples who wish to choose this route.

Because of the recommendations made in Chapter 10 concerning the possibility of changing one’s marital property regime, we propose that any new approach to default regimes could be applied prospectively, with all couples already married at the time the law reform comes into force (in civil marriage or in customary marriage) having the option to change their property regimes as suggested in Chapter 10.

# Chapter 9

## MARITAL PROPERTY IN POLYGAMOUS AND “HYBRID MARRIAGES”

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As discussed in Chapter 4, customary marriages in most Namibian communities are potentially polygamous. Although different studies come up with different statistics, the percentage of married women who are spouses in polygamous marriages in Namibia could be as high as 12%. Polygamy is most prevalent in Caprivi, Ohangwena, Kavango and Omusati Regions. This chapter examines the implications of polygamy for the proposed marital property regimes.

“Hybrid marriages”, as discussed in Chapter 4, refer to the situation where the same two spouses conclude a marriage in terms of both civil and customary law, either simultaneously or successively. The problem raised by this situation is that civil marriages are monogamous whereas customary marriages are, at least at present, potentially polygamous.

Because both of these situations involve issues raised by polygamy, they will be discussed together in this chapter.

### 1. SUMMARY OF CURRENT NAMIBIAN POSITION

**1.1** Polygyny is the main form of polygamy practiced in Africa.<sup>1</sup> The origin of the practice is based on social and economic premises. Upon the establishment of polygyny as a legal form of marriage, the ratio of women to men in Africa was approximately 10 to 1 and the main activity was subsistence farming. Polygyny created a social structure which provided an equal distribution of social, material, security and economic benefits to both men and women despite the disparity in ratio.<sup>2</sup>

**1.2** Although several Namibian statutes make explicit reference to customary marriage, none refer explicitly to polygamy or the possibility of multiple spouses.<sup>3</sup>

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<sup>1</sup> Many scholars use the term “polygyny” as opposed to “polygamy” to emphasise that only men have the right under customary law to marry multiple spouses. The corresponding term for women with multiple husbands is “polyandry”. The term “polygamy” can include multiple spouses for either husband or wife. Technically, it is only polygyny – the right of a husband to take more than one wife – which takes place in Namibia (and in South Africa). Women in Namibia (and in South Africa) have never had the right to take multiple husbands under customary law. Nevertheless, this paper refers to “polygamy”, as the term which is in more common use.

<sup>2</sup> Siahnyonkron Nyanseor, “Issues in Perspective: Polygyny (Polygamy) is already a practice” (with reference to polygamy in Liberia), *The Perspective* (Atlanta, Georgia), undated, available online at [www.theperspective.org/polygyny.html](http://www.theperspective.org/polygyny.html)

<sup>3</sup> See Legal Assistance Centre, *Proposals for Law Reform on the Recognition of Customary Marriages*, 1999 at para 8.13.

**1.3** At present, property arrangements for polygamous marriages in Namibia are covered solely by customary law. However, it appears that the distinction between the default regimes for civil marriages between blacks inside the old Police Zone and outside the old Police Zone (explained in detail in Chapter 4) may have been designed to protect spouses in the north in situations where a black man was simultaneously married to different women under customary law and under civil law.

**1.3.1** This intent becomes evident if one examines section 17 of the *Native Administration Proclamation 15 of 1928* in its entirety, even though only section 17(6) came into force in northern Namibia. Section 17 read as a whole envisages that marriage officers must take a declaration from any “native male person” who is intending to enter a civil marriage, to ascertain whether or not he is already married to another woman in a “customary union”. The declaration was to include the names of all customary wives, their children and the “nature and amount of the moveable property (if any) allotted by him to each such woman or house under native custom”. It was to be a crime to enter into a civil marriage without making the required declaration. The option to choose “in community of property” over the default regime of “out of community of property” was limited to situations where there no existing customary union between the intending groom and any woman other than the prospective civil-marriage wife.

**1.3.2** The intent of the provision read as a whole was summed up in section 17(7):

*No marriage contracted after the commencement of this Proclamation during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and any issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union.*

**1.3.3** Although the wording of the proclamation and the means by which it sought to achieve its objective are both objectionably race-based, the intention to protect the property rights of women in polygamous marriages was laudable. Some more acceptable mechanism to provide the same protection is clearly still needed.

**1.4** Hybrid marriages have not been specifically addressed in statute or case law, but informants interviewed indicate that people sometimes move between civil and customary law systems, depending on which legal framework they believe will best serve their own interests.

## 2. PROPOSED REFORMS

**2.1** The Law Reform and Development Commission (LRDC) has proposed the following reforms on polygamy and “hybrid marriages”:

- Future polygamous marriages will not be allowed, but polygamous marriages which already exist when the new law comes into force will remain unchanged. The primary reason given for this stance by the LRDC is that “*since polygamy is becoming less a feature in Namibian society, a system along monogamous lines should be adopted as this would lead to more certainty in the marital system*”. Customary marriages concluded before the proposed law comes into force, including polygamous ones, would be regulated by the applicable customary law.
- With respect to “hybrid marriages”, couples will be bound by the first form of marriage that takes place between them. They cannot change their minds later about whether they want a customary marriage or a civil marriage. They must choose one type of marriage and stick to it. The motivation for this rule is that allowing conversions would strengthen the perception that customary law marriages are not equal in status to civil law marriages, and that conversions might complicate property matters. (The LRDC report notes that this rule will not serve as a bar to traditional ceremonies where couples have actually chosen to marry under civil rites; the traditional ceremonies may be observed, but will have no legal effect in this case.)<sup>4</sup>

## 3. THE SOUTH AFRICAN POSITION

### Polygamy

**3.1** Polygamy has survived the recent South African law reforms on customary marriage. The recommendation to preserve polygamy was based on several factors:

- (a) Polygamy does not clearly constitute unfair discrimination against women, as there are widely divergent opinions on its impact on women.
- (b) A ban on polygamy would be impossible to enforce and would encourage informal unions which give less protection to women and children.
- (c) The majority of public opinion seemed to be in favour of allowing the practice to die of its own accord or encouraging its decline by means of education and economic empowerment for women.

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<sup>4</sup> Law Reform and Development Commission, *Report on Customary Law Marriages*, Project 7, LRDC 12, October 2004. See Annexure B at 4-5, 11.

**3.2** Instead of outlawing polygamy, the South African Law Commission proposed rules concerning marital property which it believed would provide equitable protection for the rights of all spouses.<sup>5</sup>

**3.3** The issue of polygamy was hotly debated. A survey of one area in South Africa found that 80% of women were opposed to polygamy, while 70% of men were in favour of it.<sup>6</sup>

**3.3.1** Whilst some groups and individuals argued that polygamy should be abolished because it violates the fundamental right of women to equality in marriage, concerns were also expressed about women who could be thereby left in unregistered partnerships without any legal protection. The potential dangers of outlawing polygamy outright are illustrated by the 1997 case of *Makholiso and Others v Makholiso and Others*, where children of an illegal polygamous marriage would have been disinherited had the court not protected their interests by holding that the marriage could be recognised as a “putative marriage”.<sup>7</sup>

**3.4** The approach taken by South Africa’s *Recognition of Customary Marriages Act 120 of 1998* is to recognise polygamous marriages entered into after the commencement of the act only if the previous wife or wives consent to a property settlement which is acceptable to all of the parties involved.

**3.4.1** The property consequences of polygamous marriages concluded *before* the commencement of the act are governed solely by customary law.<sup>8</sup>

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<sup>5</sup> South African Law Commission (SALC), Project 90: The Harmonisation of the Common Law and the Indigenous Law, *Report on Customary Marriages*, Discussion Paper 74, (August 1997) at paras 6.1-ff.

<sup>6</sup> Id at para 6.1.3, referring to a survey of Empangeni conducted by the National Human Rights Trust.

<sup>7</sup> 1997 (4) SA 509 (Tk). A putative marriage occurs when one or both of the parties are ignorant at the time of contracting the marriage of some impediment to the marriage and thus believes in good faith that they were lawfully married. It has some, but not all, of the consequences of a valid marriage. See *Wille’s Principles of South African Law (Eighth Edition)*, 1991 at 175-77. See also Harry Barker, “Polygyny versus Equality”, *De Rebus* (April 1998), available at <http://www.derebus.org.za/current/update/equality.htm>.

This case concerned a polygamous marriage which followed upon a monogamous civil marriage, but similar problems could arise in cases involving multiple customary marriages if polygamy were outlawed.

See also Legal Assistance Centre, *Proposals for Law Reform on the Recognition of Customary Marriages*, 1999 at footnote 126.

<sup>8</sup> This approach departed from the recommendation of the SALC that there should be “a clear legislative statement” that “everyone be deemed capable of owning and possessing property and that full ownership in individual acquisitions be recognised”.

The SALC also suggested that the common law rule presently applicable only to civil marriages, which allows one spouse to bind the other’s estate for household necessities, be extended to customary marriages, on the grounds that this would, for example, give wives clear authority to deal with day-to-day household administration in their husband’s absence, without the requirement of consulting other extended family members. SALC (n 5) at para 6.3-6.4.

**3.4.2** After the commencement of the act, a husband who is already in a customary marriage and wishes to enter another customary marriage, must make an application to the court to approve a written contract which will regulate the future matrimonial property systems of the marriages in an equitable manner.<sup>9</sup>

**3.4.3** The relevant provisions read as follows:

(6) *A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.*

(7) *When considering the application in terms of subsection 6 –*

(a) *the court must –*

(i) *in the case of a marriage which is in community of property or which is subject to the accrual system –*

(aa) *terminate the matrimonial property system which is applicable to the marriage : and*

(bb) *effect a division of the matrimonial property:*

(ii) *ensure an equitable distribution of the property; and*

(iii) *take into account all the relevant circumstances of the family groups which would be affected if the application is granted;*

(b) *the court may –*

(i) *allow further amendments to the terms of the contract;*

(ii) *grant the order subject to any condition it may deem just: or*

(iii) *refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.*

(8) *All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6).*

(9) *If a court grants an application contemplated in subsection (4) or (6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated.<sup>10</sup>*

**3.5** It is noteworthy that all the spouses must be joined in the proceedings (section 7(8)), and that the court is obliged to ensure an equitable distribution of the property and to take into account all the relevant circumstances of the family groups which would be affected if the application is granted ((section 7(7)(a)).

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<sup>9</sup> Recognition of Customary Marriages Act 120 of 1998, section 7(6)-(9).

<sup>10</sup> Id.

**3.6** The effect of the provision is that polygamous marriages may not be subject to "in community of property" or the "accrual system". If either of these systems was in place when there was only one wife, the court must terminate the matrimonial property system and effect a division of the matrimonial property, to clear the way for a new written contract which can equitably divide property amongst the various polygamous marriages.

**3.7** Because the existing spouse or spouses must be joined in the proceedings, technically an additional marriage cannot proceed without their consent. However, some have argued that the concept of consent in this context is problematic, asserting that this will in practice amount to no more than a right to be *informed* of the additional marriage – since to refuse consent would be to risk divorce or marital discord. There is also a danger that women might be influenced to give their agreement by misinformation about the true economic position of their husbands, or by their position of economic dependency.<sup>11</sup>

**3.8** Another critique of this approach reads as follows:

*The legislature has decided to entrust the courts with the task of protecting the interests of women in polygamous customary unions. In ideal circumstances this would be an elegant solution with the potential to safeguard women from many of the material difficulties inherent in polygamy. But in today's South Africa there is a real risk that the provisions will remain a paper solution. The sub-sections primarily affect a sector of our society that has the least access to courts and the least expertise in dealing with them. There is a good chance that parties entering into polygamous marriages will simply ignore the Act.*<sup>12</sup>

**3.9** The Centre for Applied Legal Studies suggested that the law should give limited legal recognition to polygamy, as a way to provide a degree of protection to women within these unions. It suggested that the law should define the financial and other consequences of these arrangements, but without allowing them to be registered as full marriages, dealing with them in the same way as other cohabitation arrangements which are in need of legal protection.<sup>13</sup>

## Hybrid marriages

**3.10** As in Namibia, couples in South African often marry in terms of both customary and civil procedures. The South African Law Commission (SALC) suggested initially that the consequences of the marriage should be determined by the law

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<sup>11</sup> SALC (n 5) at para 6.1.8, summarising submissions to the Commission from various parties.

<sup>12</sup> Bronstein, "Confronting Custom in the New South African State: An Analysis of the Recognition of Customary Marriages Act 120 of 1998", 16 SAJHR 558 (2000) at 562. Bronstein asserts further that if subsequent polygamous marriages are treated as being invalid for want of compliance with the legislation, this will create numerous legal and practical problems for the wives involved. At 562-63.

<sup>13</sup> Centre for Applied Legal Studies, *Response by the Gender Research Project, Centre for Applied Legal Studies, University of the Witwatersrand, to the South African Law Commission's Report on the Harmonisation of the Common Law and the Indigenous Law (Customary Marriages)*, 1996, at section 21.

expressly chosen by the parties to the marriage. If no choice was expressed, then it was suggested that the courts should apply the law which was consonant with the lifestyles of the parties. The SALC also recommended that the law should discourage the “mixing” of the two systems of marriage.<sup>14</sup> This recommendation was not followed, apparently because of the potential polygamous nature of customary marriage.

**3.11** The *Recognition of Customary Marriages Act* allows a man and a woman who are already married under customary law to convert their marriage to a civil marriage by means of a subsequent ceremony (if neither is a party to any other subsisting customary marriage), but they may not convert a civil marriage into a customary law one in this manner. The theory is that while a potentially polygamous marriage can be converted into a monogamous one, it would not be fair to the wife for a monogamous marriage to be converted into a potentially polygamous one.<sup>15</sup>

**3.11.1** If a couple already married under customary law subsequently marry under civil law, the civil marriage is “in community of property and of profit and loss” unless another system is applied by means of an ante-nuptial contract. In other words, the couple’s civil marriage takes place in terms of the same property consequences as any other civil marriage, regardless of the fact that they were previously married under customary law.<sup>16</sup>

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<sup>14</sup> SALC (n 5) at para 3.2.11 and 3.3-ff. See also *Ngake v Mahahle* 1984 (2) SA 216 (O), where it was held that the customary law procedure of *phutuma* (which allows a wife to return with her children to her parents’ home and obligates the husband to negotiate with the wife’s family for the children’s return by paying extra *lobola* or making certain undertakings) could not be applied to spouses who concluded a civil marriage in a Christian church and lived according to a western lifestyle. See Elsie Bonthuys, “Accommodating Gender, Race, Culture and Religion: Outside Legal Subjectivity”, 18 *SAJHR* 41 (2002) at 49-ff. According to Bonthuys, this approach unwisely ignores the reality that most Africans who concluded civil marriages in fact adhere to some form of custom relating to marriage, by requiring allegiance to a monolithic system of civil law which strives to keep itself free from ‘foreign’ cultural elements.

However, compare *Prior v Battle* 1999(2) SA 850 (TkD) at 861C-E, which seems to envisage the possibility of civil and customary law on marriage operating side by side, albeit separately: “A civil marriage, irrespective of who enters into such a marriage, is not inextricably intertwined with customary law. By contracting a marriage by civil rites the spouses assume a nuptial status under civil law. The fact that it is not uncommon for parties entering into a civil marriage to adhere to the customary law relating to the payment of *lobola* does not result in a civil marriage where *lobola* has been paid becoming a customary marriage. The *lobola* agreement is entirely ancillary to the civil marriage ... Any legal effect that the payment of *lobola* may have on the relationship between the husband, the wife and her guardian will therefore arise through the customary law relating to the payment of dowry and will not be a consequence of the civil marriage itself.”

<sup>15</sup> “Launch of the Recognition of Customary Marriages Act No 120 of 1998”, Speech by Deputy Minister of Justice & Constitutional Development, Ms Cheryl Gillwald, 15 November 2000: “A couple in a subsisting customary marriage may therefore remarry under the Marriage Act of 1961 but if they are already parties to a civil marriage they may not validly contract a subsequent customary marriage. These provisions assume that a potentially polygamous marriage may be converted into a monogamous marriage. For obvious reasons, the reverse is not allowed, as that would seriously prejudice the position of the wife. This does not at all imply that a customary marriage is superseded by a civil marriage when parties have contracted both. The parties are merely seen as converting from one set of consequences to another.”

<sup>16</sup> *Recognition of Customary Marriages Act*, section 10.

## 4. MARITAL PROPERTY AND POLYGAMY IN OTHER AFRICAN COUNTRIES

**4.1** Many jurisdictions simply do not address the issue of polygamous marriages, either as regards recognition or the applicable marital property regime. One such example is **Ghana**, where despite limited recognition of polygamy in the *Mohammedans Ordinance*, the *Intestate Succession Ordinance* refers to “spouse” in the singular and provides no avenue for devolution to multiple wives. This is a problem, as more than one-third of women in Ghana are reportedly partners in marriages which are formally polygamous, and most of the women who complain of being denied inheritance rights are second or third wives in polygamous marriages.<sup>17</sup>

**4.2** Where addressed in law, the property system for polygamous marriages is usually “out of community of property”. This is only logical. For example, in South Africa, while human rights groups objected to the suggestion that Africans were culturally predisposed to having separate estates, it was observed that “separation of estates would be the regime most compatible with a compound household”.<sup>18</sup>

**4.3** Similarly, in **Burkina Faso**, the *Persons and Family Code 1990* promulgates a system of “out of community of property” for polygamous marriages, but “in community of property” for monogamous marriages.<sup>19</sup>

**4.4** In **Papua New Guinea**, under the *Family Law Act 1978*, marriages are divided into customary and non-customary and both are equally valid. Polygamous marriages are valid upon consent of all parties.<sup>20</sup> Any party to a marriage claiming a share in the property of the marriage has a right to make an application to the court for the settlement of property interests during the subsistence or dissolution of the marriage.<sup>21</sup> The court is required to consider financial and non financial contributions including contributions as a home maker and parent. Factors to be considered by the court in exercising its discretion include:

- the earnings and property of the applicant and defendant and children of the marriage
- the wishes of the applicant
- any hardship likely to be suffered by the applicant
- the obligations of the defendant or applicant to support any person other than the spouse and children, whether by custom, by order of court, through family obligations or otherwise

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<sup>17</sup> Centre on Housing Rights and Evictions (COHRE), *Bringing Equality Home, Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub Saharan Africa*, 2004 (hereinafter “COHRE”) at 62, 69 and 175.

<sup>18</sup> SALC (n 5) at para 6.4.13.

<sup>19</sup> Lorenzo Cotula, “Chapter II Women’s Right’s to Land and Other Natural Resources”, *Gender and law: women's rights in agriculture*, FAO Legislative Studies, 2002, at 2.4.3, available online at <http://www.fao.org/documents/>.

<sup>20</sup> *Family Law Act 1978*, section 10(3).

<sup>21</sup> *Family Law Act 1978*, section 38.

- any entitlement of the defendant or applicant or children of the marriage to receive support, payments, allowances of compensation by custom, order of a court, inheritance, worker’s compensation or otherwise;
- the number and needs of the children of the marriage
- where the applicant is co-habiting with another person, the financial circumstances of the co-habitation
- any other matters the court thinks relevant.<sup>22</sup>

**4.5 Tanzania** is an example of a highly unified system of marriage law. While there are two types of marriage – monogamous and polygamous – both have the same general consequences in terms of property and dissolution. The *Law of Marriage Act 1971* establishes a system of “separation of property” for all forms of marriage.<sup>23</sup> According to the South African Law Commission, this reform has not been successfully observed in practice (although details are not provided).<sup>24</sup>

**4.6** In **Senegal**, the *Family Code 1972* provides for three types of marriage: monogamy, limited polygamy (with a maximum of two wives) and polygamy (with a maximum of four wives). The male spouse has the right to decide whether the marriage will be polygamous, with the female spouse(s) having no say in the matter. The *Family Code* also establishes three different marital property systems. For monogamous marriages, the default property system is “in community of property”. However, parties to a polygamous marriage may choose between the “dote” regime and a “separation of property” system.<sup>25</sup>

**4.6.1** Under the “dote” regime the husband is the sole owner and administrator of the marriage property, and the only property at a wife’s personal disposal for the duration of the marriage is her dowry.

**4.6.2** Under the “separation of property” system, each spouse maintains ownership of the property he or she brought into the marriage or acquires during the subsistence of the marriage. However, the husband may designate personal property acquired by him during the marriage (and thus considered his) as belonging to a particular spouse; the designated property then becomes that spouse’s property – an option which does offer some protection to specific wives.

**4.6.3** In the case of polygamous marriages, different property regimes may apply to different wives. However, the law requires that all wives in polygamous marriages must be treated equally.<sup>26</sup>

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<sup>22</sup> Ibid, section 34.

<sup>23</sup> *Law of Marriage Act 1971*.

<sup>24</sup> SALC (n 5) at paras 2.2.7-2.2.9.

<sup>25</sup> COHRE (n 17) at 102-03.

<sup>26</sup> Id.

## 5. HYBRID MARRIAGES IN OTHER COUNTRIES

**5.1** In **Swaziland**, many black couples marry under both civil and customary law, creating what is known as a “dual marriage”. In such a case, the marriage is governed by two parallel legal systems, leading in some cases to manipulation of the differing norms to the disadvantage of women.<sup>27</sup> According to a study of women’s inheritance rights by the Centre on Housing Rights and Evictions:

*As elsewhere, the dual legal system complicates and confuses the issue of women’s rights. Whether and to what extent Swazi women realize their rights depends largely on how and by whom those rights are interpreted. Unfortunately, Swazi customary and civil law generally agree that women’s subordinate status should be maintained and enforced.*<sup>28</sup>

**5.2** In **Rwanda**, it is possible for a couple to marry under both civil law and customary law, but only civil law marriages are recognised by law.<sup>29</sup>

**5.3** In **Zambia**, a couple must choose one form of marriage or another; they may not be married under both civil and customary systems simultaneously.<sup>30</sup>

### Recommendation

#### POLYGAMOUS MARRIAGES

As stated in the COHRE report, “*In sheer terms of property and wealth distribution, polygamous systems disadvantage women.*”<sup>31</sup> This is inevitable, where resources must be shared amongst a larger pool of people. It was similarly noted in South Africa that “*women of polygynous marriages tended to suffer material prejudice. While subsequent unions redounded to the benefit of the first wife (who gained in status and extra hands to do domestic chores), the junior wives had less status, more work and their children fewer entitlements to property on inheritance.*”<sup>32</sup>

We submit that the ideal situation would be for the state to refuse to recognise polygamous marriages as valid – BUT this should be done only AFTER financial protections for cohabitation are in place, so that there would be protection for spouses and children in unrecognised polygamous relationships which may continue despite the legal dispensation.

<sup>27</sup> Ibid at 135, 142.

<sup>28</sup> Ibid at 128.

<sup>29</sup> Ibid at 175.

<sup>30</sup> Id.

<sup>31</sup> Id at 26.

<sup>32</sup> SALC (n 5) at para 6.1.6.

In the meantime, we suggest that Namibia adopt the same approach taken by South Africa on property dispensations for polygamous marriages (despite its acknowledged flaws), with one distinction. We would suggest that all parties involved in polygamous marriages concluded *before* the new law comes into force be given an option to enter into a written agreement specifying property arrangements. Any party to the polygamous marriage should be able to initiate this process, but all parties would have to agree to any post-marital property arrangements adopted by contract.

## **Recommendation**

### **HYBRID MARRIAGES**

As noted above, the Law Reform and Development Commission (LRDC) has recommended that couples be bound by the form of marriage which they register initially – whether that is civil or customary – and that the law should make no provision for converting one into the other.

If a couple should simultaneously fulfil the requirements for registering their marriage as either a civil or a customary marriage, the law should require them to choose one form or other at the time of registration, after the marriage officer(s) have explained the implications of both choices.

If the recommendations for altering ante-nuptial agreements proposed below are accepted, than one possible motivation for changing the form of the marriage would fall away. The LRDC proposals for customary marriage would also make the administration of “in community of property” similar for customary marriages as for civil marriages, thus removing another property-based motivation for transforming one type of marriage into another.

If these policies on property are incorporated into the law, then we would support the proposed prohibition on allowing couples to change customary marriages into civil ones, or vice versa. If polygamy is outlawed in Namibia, as proposed, then this motivation for prohibiting conversions falls away. However, other law reforms proposed by the Law Reform and Development Commission and in this paper would have the effect of moving civil and customary marriages closer together. Thus, there would appear to be no compelling reason why couples should be assisted to change their minds about the form of their marriage, with considerations of certainty and clarity arguing more strongly in favour of prohibiting changes in the type of marriage.

However, if spouses in one type of marriage are subject to any disabilities with respect to property as compared to spouses in the other type of marriage, then we would assert that transforming one type of marriage into another should be permitted, if both spouses are in agreement about this.

# Chapter 10

## ANTE-NUPTIAL AGREEMENTS AND POST-NUPTIAL CHANGES

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*Ante-nuptial contracts are written agreements which are concluded before a civil marriage takes place, usually to regulate how property will be dealt with during the subsistence of the marriage, and how it will be divided in the event of a divorce or on the death of one of the spouses.*

*The current law on ante-nuptial contracts was described in detail in Chapter 4. This chapter addresses the following questions: (a) should the procedure for making ante-nuptial agreements be changed? and (b) what rules should apply to making changes after marriage? The discussion of changes after marriage will cover the following questions:*

- *should it be easier to change ante-nuptial agreements after marriage?*
- *should there be broader grounds for registering post-nuptial agreements?*
- *should a couple be allowed to change their marital property regime during the subsistence of the marriage?*

*The chapter also looks at the questions of the enforceability of nuptial agreements. Should courts be bound to apply validly-concluded ante-nuptial agreements strictly, or should they have discretion to depart from such agreements in order to achieve fairness and equity between the parties?*

### 1. THE RATIONALE FOR NUPTIAL CONTRACTS

**1.1** There are various public policy arguments for and against the use of nuptial contracts. For example, these were considered by two academics when looking at the impact of new legislation that introduced binding nuptial contracts in Australia.<sup>1</sup>

**1.1.1** The advantages of legal recognition of nuptial contracts include:

- greater choice and control of financial arrangements
- greater financial security
- reduced legal costs and conflict upon marriage breakdown
- protection of the children of first marriages.

**1.1.2** The disadvantages of recognising nuptial agreements include:

- such agreements simply shift the point of dispute to the interpretation of the agreements

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<sup>1</sup> Belinda Fehlberg and Bruce Smyth, "Binding Pre Nuptial Agreements in Australia: The First Year" in *International Journal of Law, Policy and the Family* 16 (2002) at 127 -140.

- they may offer men rather than women increased control and choice of how property is divided, due to women's weaker economic position (which places them at a disadvantage in property negotiations).

**1.2** More traditional arguments against ante-nuptial agreements are illustrated by a Missouri (USA) case.<sup>2</sup> These arguments are that nuptial contracts denigrate the status of marital relations, and tend to facilitate and provide an inducement for divorce.

**1.3** Ante-nuptial and post-nuptial agreements are given legal recognition in many countries, including Australia, Canada, the Netherlands, New Zealand, South Africa and Sweden. However, nuptial agreements are not enforceable by the courts in the jurisdictions of England and Wales and the Republic of Ireland.<sup>3</sup>

**1.4** The enforceability of ante-nuptial agreements also differs between jurisdictions. For example, in some jurisdictions, ante-nuptial contracts can be set aside at the discretion of the courts if the agreement would cause significant injustice. The degree of enforceability of such contracts can be partially explained by the contrasting approaches to marital property in different jurisdictions. For example, in Ireland the courts have complete discretion to divide property upon dissolution of marriage, whereas in South Africa there are historically a small range of established property regimes which determine the consequences of dissolution leaving a much smaller scope for judicial discretion.

**1.5** However, in jurisdictions which recognise nuptial contracts (or specified property regimes), there appears to be a trend towards more flexibility in respect of their enforcement – an approach which arguably threads a path between the advantages and disadvantages of recognising nuptial agreements.<sup>4</sup>

## 2. EFFECT OF THE HAGUE CONVENTION

**2.1** The Hague Convention on the Law Applicable to Matrimonial Property Regimes (discussed briefly in Chapter 7) assumes that marriage contracts between couples can be recognised, as Article 11 of this Convention provides that spouses can designate the law applicable to their marriage by way of marriage contract.<sup>5</sup>

**2.2** Article 12 provides that a marriage contract must be in writing, dated and signed by both spouses.

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<sup>2</sup> *Ferry v Ferry* 586 S W 2d 782 (1979).

<sup>3</sup> For a more comprehensive overview, see Jeremy D Morley, "Prenuptial Agreements Around the World", International Divorce Law Office at Morley & Trager, [www.international-divorce.com/around-world.htm](http://www.international-divorce.com/around-world.htm).

<sup>4</sup> For example, judicial re-distribution is possible under certain circumstances in South Africa, Zimbabwe, Kenya and Tanzania.

<sup>5</sup> Article 11: "The designation of the applicable law shall be by express stipulation, or arise by necessary implication from the provisions of a marriage contract."

**2.3** Article 6 of the Convention provides that spouses may change their designation of the applicable law during the course of the marriage, thus implicitly requiring that changes to marriage contracts must be allowed, at least for this purpose.

**2.4** Article 9 states that the law of a contracting state may provide that the law applicable to the matrimonial property regime may not be relied upon by a spouse against a third party unless any requirements of publicity or registration specified by that law have been complied with.

**2.5** This Convention thus provides some guidance on the topic of ante-nuptial and post-nuptial contracts. However, as noted in Chapter 7, it has not been widely adopted and Namibia is not a party.<sup>6</sup>

### **3. ANTE-NUPTIAL AND POST-NUPTIAL AGREEMENTS IN OTHER JURISDICTIONS**

**3.1** The following is an overview of the treatment of nuptial contracts (both ante-nuptial and post-nuptial) in a range of jurisdictions. The South African position is considered in more detail in subsequent sections, as it has particular relevance for Namibia.

#### **Australia**

**3.2** In Australia, parties can decide how their property will be divided upon divorce or separation by entering ante-nuptial or post-nuptial agreements. Such agreements can cover property and financial resources (both present and future), the payment of spousal maintenance and “incidental and ancillary matters”.

**3.3** Australia’s *Family Law Act 1975* was amended in 2000 to allow for the enforcement of nuptial agreements.<sup>7</sup>

**3.4** Couples can make a financial agreement in anticipation of getting married, during marriage, or upon dissolution of marriage.<sup>8</sup> To qualify as a “financial agreement”, there cannot be any other agreement in force between the parties dealing with the issues in the financial agreement, and the agreement must state that it is made pursuant to the financial agreement provisions of the *Family Law Act 1975*.

**3.5** In order for the financial agreement to be binding, the contract must be signed by both parties. Each party to the agreement must have received independent legal advice before the agreement is entered, and the contract must be certified by

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<sup>6</sup> The *Hague Convention on the Law Applicable to Matrimonial Property Regimes* is available at <http://hcch.e-vision.nl/>.

<sup>7</sup> Part VIIIA of the *Family Act 1975* covers financial agreements.

<sup>8</sup> *Family Law Act 1975*, sections 90B, 90C, and 90D, respectively.

lawyers who attest that they have provided independent legal advice.<sup>9</sup> Also, one party must be given the original financial agreement, and the other a copy. There is no court supervision or registration of financial agreements.

**3.6** If the financial agreement does not fulfil these statutory requirements, it is not completely binding and the court has the discretion to make any order it feels is “just and equitable” with respect to the property dealt with under the agreement.<sup>10</sup> The court is also empowered to set aside the financial agreement in certain circumstances – for example, if there was fraud or non-disclosure, or if there has been a material change in circumstances involving children of the marriage.<sup>11</sup>

**3.7** Financial agreements can be terminated by the parties by a written agreement.<sup>12</sup> Termination can be done in subsequent financial agreements. For example, a financial agreement executed after dissolution of marriage can terminate an earlier

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<sup>9</sup> Ibid, section 90G. This section reads as follows:

90G *When financial agreements are binding*

- (1) *A financial agreement is binding on the parties to the agreement if, and only if:*
- (a) *the agreement is signed by both parties; and*
  - (b) *the agreement contains, in relation to each party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:*
    - (i) *the effect of the agreement on the rights of that party;*
    - (ii) *the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and*
  - (c) *the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and*
  - (d) *the agreement has not been terminated and has not been set aside by a court; and*
  - (e) *after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the other.*
- (2) *A court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary.*

<sup>10</sup> The *Family Law Act 1975* states in section 85A(1): “The court may, in proceeding under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage.” However, section 85A(3) states: “A court cannot make an order under this section in respect of matters that are included in a financial agreement.”

<sup>11</sup> Under subsection 90K(1) a court will be able to set aside a financial agreement if the court is satisfied that –

- (a) the agreement was obtained by fraud (including non-disclosure of a material matter);
- (b) the agreement is void, voidable or unenforceable;
- (c) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out;
- (d) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to care, welfare and development of a child of the marriage) which mean that the child or the person caring for the child will suffer hardship if the court does not set the agreement aside;
- (e) in respect of the making of a financial agreement, a party to the agreement engaged in conduct that was unconscionable.

<sup>12</sup> *Family Law Act 1975*, section 90J.

financial agreement made in anticipation of marriage. Or, a termination agreement can be entered which simply puts an end to the earlier financial agreement. Similar requirements to those which make the financial agreements binding apply to termination agreements (ie independent legal advice, etc).

**3.8** If one party dies, the financial agreement continues to bind the legal representative of the deceased.<sup>13</sup>

**3.9** In general, the legislature felt that the new amendments would encourage people to take control of their financial affairs by enabling them to make binding financial agreements with respect to their property. The statutory requirement of requiring independent legal advice also ensures that people do not make agreements that are not in their best interests. It was suggested by the legislature that any extra costs endured by choosing this process are preferable to the costs associated with litigating disputes over property.

## Canada

**3.10** Pre-nuptial contracts were unenforceable as against public policy up until the *Family Law Reform of 1978*. The Canadian provinces have since legislated to enforce pre-nuptial contracts.

**3.10.1** For example, the *Family Relations Act of 1996* of the province of British Columbia defines marriage agreements in section 61. They may be executed before or during marriage and must be in writing and witnessed by one or more persons.<sup>14</sup>

**3.10.2** Part IV of the *Family Law Act 1990* of Ontario deals with domestic contracts. This includes both marriage<sup>15</sup> and cohabitation<sup>16</sup> agreements and has similar requirements for their execution as in British Columbia. However the Ontario act lists certain provisions which will be set aside – namely contracts subject to the best interests of the child, contracts subject to child support guidelines and clauses requiring chastity.<sup>17</sup> The *Family Law Act* also provides that a court may set aside a provision for support or a waiver of the right to support in a marriage contract, and may determine and order support even though the contract contains an express provision excluding the application of the relevant section of the law –

- (a) if the provision for support or the waiver of the right to support results in unconscionable circumstances;

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<sup>13</sup> Id, section 90H.

<sup>14</sup> *Family Relations Act 1996* (British Columbia), section 61(3).

<sup>15</sup> *Family Law Act 1990* (Ontario), section 52.

<sup>16</sup> Id, section 53.

<sup>17</sup> Id, section 56.

- (b) if the provision for support is in favour of, or the waiver is by or on behalf of, a dependant who qualifies for allowance for support out of public money; or
- (c) if there is default in the payment of support under the contract or agreement at the time the application is made.

As a result, a provision in the marriage contract either limiting or precluding a claim for future support is subject to the discretion of the court at the time an application for support is made.

**3.11** The Supreme Court of Canada has recently affirmed the binding status of pre-nuptial contracts. In overturning a lower court decision in British Columbia<sup>18</sup> the Supreme Court held that when a couple obtains legal advice before they sign such a contract, judges “*should be reluctant to second guess their initiative and arrangement*” and that a pre-nuptial contract cannot be set aside simply because one spouse thought that it was unfair when he or she signed it.<sup>19</sup>

## The Netherlands

**3.12** In The Netherlands, couples can opt out of the universal property regime of “in community of property” by agreement, although most couples do not do so in practice.<sup>20</sup>

**3.13** In a nuptial agreement, couples are permitted to determine how their assets and debts will be dealt with during the marriage, and upon dissolution. Certain limitations are imposed on the terms of the contract – namely that the terms of ante-nuptial agreements may not infringe good morals, public order and the mandatory rules of law.<sup>21</sup>

**3.14** These contracts can be made before marriage, or during marriage. The agreement must take the form of a notarial deed and be entered in a matrimonial property register.<sup>22</sup> Thus creditors are provided with notice of which party owns particular assets.<sup>23</sup>

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<sup>18</sup> The lower court refused to enforce a pre-nuptial contract on the basis that it was unfair, as it gave the wife only twenty per cent of the family assets. The lower court raised the wife’s entitlement to forty-six per cent.

<sup>19</sup> “Supreme Court upholds prenuptial contracts”, *CBC News*, 26 March 2004 (*Hartshorne v. Hartshorne*).

<sup>20</sup> JMJ Chorus (ed), *Introduction to Dutch Law*, (The Hague: Kluwer), 1999 at 47. The author notes that over 80% of couples do not contract out of the “community of property” regime.

<sup>21</sup> “Civil Code” (Title 7 of Book 1), Art. 1:121.

<sup>22</sup> Masha Antokolskaia and Katharina Boele-Woelki, “Dutch Family Law in the 21<sup>st</sup> century: Trend-Setting and Stragglng Behind at the Same Time”, Vol 6.4 *Electronic Journal Of Comparative Law* (Dec. 2002).

<sup>23</sup> “Matrimonial Property Law and the Hague Convention”, available online at <http://www.xs4all.nl/~advocare/folders57.htm>.

**3.15** If the contract is drawn up during marriage, the couple must have been married at least one year.<sup>24</sup> Furthermore, the court must grant permission for an agreement made during the marriage, or for amendment of an existing agreement.<sup>25</sup> The court can deny the request if there “is no reasonable ground for making (or changing) the marriage settlement, or if there is a danger of injuring the creditors”.<sup>26</sup>

**3.16** Examples of the benefits of being able to enter an agreement both before or during the marriage are provided in the following examples:

*You are going to marry a person who has his or her own business. You have saved a considerable amount of money and you will probably inherit more from your parents. You draw up a marriage contract to prevent your spouse’s creditors making claims on your property should his business fail.*<sup>27</sup>

*When you married neither you nor your spouse had many possessions and a marriage contract did not seem necessary. However, after six years of marriage, you have two children and your own home and both of you have jobs. Your spouse is not very satisfied with his or her job and wants to start a business. In order to minimise the risk, you draw up a contract with the permission of the court, stipulating that the house is placed in your name and that your spouse has sole liability for any debts incurred by the business.*<sup>28</sup>

**3.17** If a couple contracts into a separation of property regime, then each is free to handle their own assets as they see fit.<sup>29</sup> However, even if they chose separation of property, safeguards are still provided with respect to the matrimonial home.<sup>30</sup> Despite this ability to contract “out of community of property”, if the home is owned by one party under an agreed-upon separation of property system, that party cannot sell or mortgage the home without the consent of the other spouse. A court can nullify the transaction if the required consent was not obtained.<sup>31</sup>

**3.18** A press release from the Ministry of Justice of the Netherlands, has indicated that changes will be coming to the relationship property laws for married couples

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<sup>24</sup> Id.

<sup>25</sup> Chorus (n 20) at 47.

<sup>26</sup> Id.

<sup>27</sup> “Matrimonial Property Law and the Hague Convention” (n 23).

<sup>28</sup> Id.

<sup>29</sup> K Bright provides a discussion of the implications of choosing a separation of property regime under Dutch law in “The Distribution of Matrimonial Assets on Divorce in the English Situation of Separate Property and the Dutch Regime of Cold Exclusion” (University Utrecht/ University of Cambridge, 1990) starting at 70.

<sup>30</sup> AVM Struycken and WCE Hammerstein-Schoonderwoerd, “Family Law in the Netherlands” in Caroline Hamilton and Kate Standley, *Family Law in Europe* (Butterworth’s, 1995) at 307.

<sup>31</sup> Id.

and registered common law couples. Amongst the proposed reforms is simplification of the process of amending marriage contracts.<sup>32</sup>

## New Zealand

**3.19** The *Property (Relationships) Act of 1978* permits any two persons “in contemplation of entering into a marriage or de facto relationship” to make “any agreement they think fit with respect to the status, ownership and division of their property (including future property).”<sup>33</sup> Such an agreement is subject to certain conditions, namely that it be in writing and signed by both parties, that each party have independent legal advice before the signing of the agreement, that the signature of each party must be witnessed by a lawyer who certifies that he or she explained the effect and implications of the agreement before that party signed.<sup>34</sup> The court has discretion to set aside such an agreement if it would cause serious injustice.<sup>35</sup>

## Sweden

**3.20** Under Sweden’s *Marriage Code*, a marital property agreement can be an ante-nuptial or a post-nuptial agreement – in other words, the agreement can be made before or during the marriage. The Code provides for the registration of the agreement with the court.<sup>36</sup>

## England and Wales

**3.21** Traditionally prenuptial agreements were not enforceable in the courts of England and Wales on the grounds of public policy.<sup>37</sup> However, this view is shifting. More recently, courts have taken pre-nuptial agreements into material consideration when considering property adjustment.<sup>38</sup> English courts are increasingly likely to uphold the terms of a pre-nuptial agreement where there is no duress, the parties have received independent legal advice, the relevant facts have been disclosed and the agreement is not manifestly unfair.<sup>39</sup>

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<sup>32</sup> Ministry of Justice, “Bill to simplify marital rights and duties laid before Parliament”, Press Release, available online at [http://www.minjust.nl:8080/C\\_ACTUAL/PERSBER/PB0588.HTM](http://www.minjust.nl:8080/C_ACTUAL/PERSBER/PB0588.HTM).

<sup>33</sup> Part 6 Contracting Out Section 21.

<sup>34</sup> Section 21F.

<sup>35</sup> Section 21J.

<sup>36</sup> Swedish *Marriage Code*, Chapter 7, section 3.

<sup>37</sup> *F v F* 1995 2 FLR 45, *N v N* 1999 2 FLR 745.

<sup>38</sup> In *M v M* (Pre-nuptial Agreement) (2002) 1 FLR 654, the court was prepared to take the couple’s pre-nuptial agreement into account as a factor tending to reduce the final award to the wife. Most significantly, in *K v K* (2003) 1 FLR 120, the court held that the wife was limited to the terms on capital distribution that she had agreed to in a pre-nuptial agreement. The court set forth the factors to be considered in determining the weight to attach to a pre-nuptial agreement.

<sup>39</sup> Morley (n 3). Similarly, according to the head of one of London’s top family law firms “the courts are beginning to give prenups more evidential weight, provided the parties have had independent legal advice,

## Ireland

**3.22** The courts in Ireland are not obligated to enforce pre-nuptial agreements. The *Family Law (Divorce) Act 1996* gives the Irish courts extremely wide discretion over the distribution of assets in a divorce. There is little guidance on the extent to which an Irish court will take a pre-nuptial agreement into consideration in its distribution of assets. Thus, it is assumed that Irish courts will not consider – and will almost certainly refuse to automatically enforce – a pre-nuptial agreement.<sup>40</sup>

## 4. PROCEDURE FOR MAKING NUPTIAL AGREEMENTS

**4.1** As explained in detail in Chapter 4, any Namibian couple who marry in a civil marriage are currently entitled to make an ante-nuptial contract. In order for these agreements to be binding in respect of third parties, they must be registered at the Office of the Registrar of Deeds in terms of the *Deeds Registries Act 47 of 1937*. The ante-nuptial contract must be signed before a notary, and registered within three months of the date on which it was made. The assistance of a lawyer is generally required for an ante-nuptial contract, and few couples register such contracts in Namibia. Unregistered ante-nuptial agreements can be binding only between the spouses, and not with respect to third parties.

**4.2** The position in South Africa is similar to the current position in Namibia. It is also the case that relatively few South African couples register such agreements – only about 26 000 couples per year at present.<sup>41</sup>

**4.3** The procedural requirements for legal recognition of nuptial contracts differ from jurisdiction to jurisdiction. In most jurisdictions, nuptial contracts will be set aside for non-compliance with the procedural requirements. Such requirements generally include that the agreement be enforceable under the general law of contract, that both parties receive independent legal advice and full disclosure of assets before entering the agreement.

**4.4 Is there any need to alter the requirements for concluding an ante-nuptial agreements in Namibia?** Field research indicates that the current requirements put ante-nuptial contracts out of reach of most Namibians. Whilst the Namibian requirement that the contract be notarised and registered has the benefit of giving legal certainty, there are other ways to accomplish this (as in Canada). The requirement in

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*exchanged full financial disclosure and that it's not entered into under duress and is not unfair*". Sandra Haurant, "Support for prenuptial agreement grows", *The Guardian*, 30 April 2004.

<sup>40</sup> Morley (n 3), citing Geoffrey Shannon, "Pre-Nuptial Agreements in Ireland", 2003 *I.F.L.* 132.

<sup>41</sup> According to the South African Deeds Registration Annual Report 2003/2004, 26 429 ante-nuptial contracts were registered nationwide in 2003/2004, compared to 25 825 in 2002/2003. The overall number of officially recorded marriages in South Africa for 2003 was 178 689 (Marriages and Divorces 2003, Statistics South Africa, [www.statssa.gov.za/](http://www.statssa.gov.za/)), meaning that about 15% of these marriages made use of an ante-nuptial contract.

other countries that each party take independent legal advice is a good one, but not really practical at this stage in Namibia.<sup>42</sup>

## Recommendation

### PROCEDURAL REQUIREMENTS FOR ANTE-NUPTIAL AGREEMENTS

All marrying couples in Namibia should be able to make ante-nuptial agreements governing the property consequences of the marriage, regardless of whether the marriage is civil or customary.

We recommend that the requirements for making binding ante-nuptial agreements be relaxed so that such agreements are not out of reach for most people in Namibia as at present.

We suggest that marriage officers (both civil marriage officers and customary marriage officers contemplated in the reforms on recognition of customary marriage proposed by the Law Reform and Development Commission) should be trained and authorised to facilitate the conclusion of ante-nuptial agreements. Marriage officers should give a clear and standardised explanation of the basic regimes *before* the wedding ceremony, to allow each prospective spouse time to consider the options and to obtain advice from family members or a lawyer. Simple forms could be developed for choosing any one of the basic regimes, with blanks to be filled in on issues such as the starting value of each spouse's estate in the case of the "accrual system".

An ante-nuptial agreement made in this manner should be signed by the spouses and by two witnesses (in the same way as the marriage certificate). Each spouse should receive a copy, with the marriage officer having the duty to ensure that the original is registered at the deeds registry. This would advance the requirement of certainty and the interests of creditors. Since marriage officers are already entrusted with handling marriage certificates, this would seem to be a logical extension of their duties.

Although there is some risk under this approach that parties may enter an agreement without a full and clear understanding of its implications, this would be no greater drawback than under the current situation where many people marry under default regimes which they do not understand or even know about.

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<sup>42</sup> Contrasting opinions on the role of notaries and attorneys in supervising ante-nuptial agreements are discussed in *Ex parte Moodley and Another*; *Ex parte Iroabuchi and Another* 2004(1) SA 109 and *Ex parte Cheng and Another*; *Ex parte Cheng and Another*; *Ex parte Yang and Another* 2004 (1) SA 118 (W). Assistance by both notary and attorney is clearly the ideal, but in Namibia such requirements at present simply make it impossible for most couples to make use of ante-nuptial contracts.

Couples with more complex property matters to agree about would still be free to consult lawyers before concluding ante-nuptial agreements.

## 5. MAKING CHANGES DURING THE MARRIAGE

**5.1** As explained in detail in Chapter 4, there are only limited grounds for changing an ante-nuptial contract, or for registering a post-nuptial agreement (which is treated as an ante-nuptial agreement registered after the marriage has taken place).

**5.2** However, as the comparative law section above indicates, many countries allow post-nuptial contracts and amendments to existing contracts with less onerous requirements. The field research described in Chapter 4 also indicated that the public would like to see more flexibility in this area.

**5.3** South Africa provides a particularly relevant point of comparison on this issue, having such a similar legal background to Namibia.

### South Africa: Post-nuptial changes

**5.4** According to section 21(1) of South Africa's *Matrimonial Property Act*, any husband and wife, irrespective of when they were married, may apply jointly to court for leave to change their matrimonial property regime.<sup>43</sup> The couple has to lay down the proposed new system in a notarial contract, which has to be approved by the court. The court will approve this new contract only if the couple can show sound reasons for requesting the change. Notice must be given to all creditors of the spouses and to any other person who could be prejudiced in some way by the new matrimonial regime.

**5.4.1** The relevant section of the act reads as follows:

*(1) A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a Court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the Court may, if satisfied that:*

- (a) there are sound reasons for the proposed change;*
- (b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and*
- (c) no other person will be prejudiced by the proposed change order that such matrimonial property system shall no longer apply to their marriage and authorize them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the Court may think fit.*

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<sup>43</sup> JC Bekker, *Family Law: An Introduction*, 1990 at 60.

**5.5** In the case of *Ex Parte Lourens*<sup>44</sup> the court was faced with five similar applications in terms of section 21(1) of the *Matrimonial Property Act*.<sup>45</sup> The court set forth the following guidelines for dealing with applications for changes in terms of section 21(1):

- (1) The *rule nisi* issued by the court should be served on the Registrar of Deeds and the Minister of the Interior, and published in the *Government Gazette* and in a local newspaper at least two weeks prior to the return date.
- (2) A copy of the *rule nisi* should be sent by certified post to all creditors of the applicants at least two weeks prior to the return date. A list of all creditors should be contained in the founding affidavit, and the couple must provide proof that the *rule nisi* was posted to all of their creditors in the form of an affidavit to which the certificates of the posting are annexed.
- (3) In addition to giving sound reasons for bringing the application, the couple must give sufficient information regarding their assets and liabilities to enable the court to determine whether or not any person will be prejudiced by the change.
- (4) The applicants must satisfy the court that no one will be prejudiced by the change, and the order authorising the change must contain a provision which preserved the rights of pre-existing creditors.
- (5) The couple must specify whether or not there are any pending legal proceedings in which any creditor is seeking to recover payments owing from either spouse.
- (6) The applications papers must establish that the parties are domiciled within the court's jurisdiction.<sup>46</sup>

**5.6** Regarding sound reasons, the court said the following: "*Sound reasons cannot be defined exhaustively and in advance. However, care must be taken to motivate fully the proposed change in the existing matrimonial property system.*"<sup>47</sup>

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<sup>44</sup> *Ex Parte Lourens and Four Other Similar Cases* 1986 (2) SA 291(C).

<sup>45</sup> In all of the applications before the court, there was some kind of defect in the application, in that the correct procedure was not followed. For example, in one of the applications notice was not given to the Registrar of Deeds, and in another notice was not given to two newspapers and the *Government Gazette* as required.

<sup>46</sup> *Ex Parte Lourens and Four Other Similar Cases* 1986 (2) SA 291(C). These procedural guidelines were endorsed in *Ex parte Le Roux et Uxor; Ex parte Von Berg et Uxor* 1990 (2) SA 70 (O).

On procedures to protect the rights of creditors, see also *Ex parte Coertzen et Uxor* 1986 (2) SA 108 (O), where the creditors did not receive notice of the date of the application or all the relevant particulars. In this case, the application was not granted, but a *rule nisi* was issued with directions for publication.

<sup>47</sup> At 293H.

**5.7** In deciding what sound reasons are, courts have looked at the facts and surrounding circumstances in each case. In the case of *Ex Parte Engelbrecht*<sup>48</sup> the court held that “sound reasons” means facts which are convincing, valid and anchored to reality. Evidence as to the parties’ intention and agreement concerning the matrimonial property regime reached before their marriage is relevant and admissible. According to the court, not to admit such evidence would amount to preventing a party from furnishing sound reasons to the court as to why the matrimonial property regime should be altered.<sup>49</sup>

**5.8** In the case of *Ex Parte Kros*<sup>50</sup> the court found that the reasons advanced by the parties were sufficient to allow a change of the matrimonial property regime. In this case, the reason advanced by the applicants was that they had been ignorant about the consequences of marriage “in community of property” when they entered into marriage. It was only after the conclusion of the marriage that the parties realised that marriage “out of community of property” better suited their needs. Significantly, the court accepted a substantial change in the couple’s financial position as a factor in a showing of sound reasons.<sup>51</sup>

**5.9** Creditors who wish to oppose applications for changes in the marital property regime would have standing to oppose the application.<sup>52</sup>

**5.10** In *Ex Parte Kros*, the court allowed the variation with retrospective effect. In contrast, in the case of *Ex Parte Oosthuizen*,<sup>53</sup> the court held that it does not have the authority to alter a marital regime retrospectively.

**5.11** It has also been held that courts have the power to authorise a change in a matrimonial property regime under section 21(1) even where the marriage was solemnised in a foreign country.<sup>54</sup>

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<sup>48</sup> 1986 (2) SA 158 (NC).

<sup>49</sup> In this particular case, the spouses were married “in community of property”, and made an application to have their marriage changed to one excluding community of property, and the marital power. Before the marriage, the parties had agreed to marry “out of community of property”, but did not conclude an ante-nuptial contract to that effect, as they thought that they only had to inform the marriage officer of their intention. The parties produced evidence to show that the wife was being hampered by her limited contractual capacity in the administration of the assets bequeathed to her and her children by her deceased husband, and both applicants had kept and administered their assets separately. The court granted the request to change the matrimonial regime under these circumstances.

<sup>50</sup> *Ex Parte Kros* 1986 (1) SA 642 (NC).

<sup>51</sup> The court here quotes Hahlo, saying that a sound reason would be for example where one of the spouses starts a business. In the event of liquidation of the company, especially if it were a sole proprietorship, the spouses’ joint assets would be at stake.

<sup>52</sup> *Ex parte Madikiza et Uxor* 1995 (4) SA 437 (TSC). The parties in this case applied for rectification of their marriage certificate, but the case drew analogies with proceedings under section 21(1) of the *Matrimonial Property Act*.

<sup>53</sup> *Ex Parte Oosthuizen* 1990 (4) SA 15 (E).

<sup>54</sup> *Ex parte Senekal et Uxor* 1989 (1) SA 38 (T).

## South Africa: Transitional provisions

**5.12** A simpler transitional procedure was provided in South Africa for (a) couples married under the *Black Administration Act 38 of 1927* (which, like Namibia's *Native Administration Proclamation*, sets the default property regime for black couples as "out of community of property" in contrast to the civil marriage default regime of "in community of property" which applies to other couples)<sup>55</sup> and (b) couples married under a strict "out of community" system (excluding "community of property and community of profit and loss") before the *Matrimonial Property Act 88 of 1984* provided that all "out of community of property" regimes would be automatically interpreted as meaning the "accrual system" unless the ante-nuptial contract specifically rejected this.<sup>56</sup> In both these situations, couples had a grace period of two years to alter their matrimonial property regime from "out of community of property" to the "accrual system", by simply registering a notarial deed. This avoided the costly procedure of going to court. The simpler transitional arrangement also applied to (c) couples married "in community of property" before marital power was replaced by a system of joint decision-making. These couples also had two years to apply the new rules on administration of joint property to their marriages.<sup>57</sup>

**5.12.1** As discussed in Chapter 8, some legal commentators have questioned why the time period and the options for change by way of notarial contract were so strictly limited.

**5.13** With respect to customary marriage, the *Recognition of Customary Marriages Act 120 of 1998* changed the default regime for customary marriages from customary law to "in community of property". As noted in Chapter 8, couples who entered into a customary marriage *before* the date of the act may apply to the court for leave to change their marital property system.<sup>58</sup> The court may grant permission for a change of property regime if it is satisfied that there are sound reasons for the change, that sufficient written notice of the change has been given to all creditors, and that no other person will be prejudiced by the change.<sup>59</sup> In this case, there was no notarial option, even for a limited time period.

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<sup>55</sup> This is discussed in Chapter 8.

<sup>56</sup> This is discussed in Chapter 7.

<sup>57</sup> See sections 21(2) and 25(2) of the *Matrimonial Property Act 88 of 1984*.

<sup>58</sup> If the marriage is polygamous, all of the spouses (and all other persons with a sufficient interest in the matter) must be joined in the proceeding.

<sup>59</sup> See *Recognition of Customary Marriages Act*, section 7(4). Compare section 21(1) of the *Matrimonial Property Act*. As noted above, one difference is that section 21(1) of the *Matrimonial Property Act* requires sufficient notice of the proposed change to "all the creditors of the spouses", whilst section 7(4) of the *Recognition of Customary Marriages Act* requires sufficient written notice of the proposed changes to "all creditors of the spouse for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the *Gazette*".

## Recommendations for Namibia

**5.14 Is there any need to liberalise the possibilities for altering ante-nuptial agreements or making post-nuptial agreements in Namibia?** Persons interviewed for the field research expressed a strong desire for change in this area.

**5.15** It is clear from the comparative overview in this chapter that many countries allow post-nuptial agreements as long as there is no prejudice to creditors.

**5.15.1** It is not clear in any event that allowing post-nuptial alterations would be detrimental to creditors, unless the spouses were attempting to engineer their property regime to avoid the repayment of debts. People who marry have no obligation to notify their creditors of this intention. Marriage could serve to the benefit or detriment of a creditor. For example, marriage “in community of property” to a spouse with a large debt burden could reduce the assets available for the creditors of the other spouse, whilst marriage “in community of property” to a spouse with substantial assets could increase the assets available for the creditors of the other spouse. Similarly, changes in marital property regimes could work to the advantage or disadvantage of creditors of one or the other spouse, depending on the circumstances.

**5.15.2** To avoid abuse of a scheme which allows for post-nuptial contracts and post-nuptial alterations of existing ante-nuptial contracts, we suggest that spouses should have to list all outstanding debts owed by either at the time of the change and give notice of the change to all such creditors. Failure to do so should result in the agreement between the spouses not being honoured in respect of the creditor(s) in question.

**5.16** As long as safeguards against fraud and unfair dealing are in place, we see no reason for placing such stringent requirements on post-nuptial agreements. Couples should be able to make a reasonable response to changed circumstances without the necessity of bringing an expensive court application. It would also be helpful to clarify the requirements for this in statute, instead of leaving it to the somewhat inconsistent development of case law.

### Recommendation

#### POST-NUPTIAL AGREEMENTS

We propose that all married couples should be able to make post-nuptial contracts affecting their marital property regime, as well as post-nuptial changes to ante-nuptial contracts. It should be possible for couples to change their entire marital property regimes by such means if they wish. Such agreements should be allowed at any stage after the marriage.

We suggest that such post-nuptial agreements be concluded by a notary, since the marriage officer is not involved in the marriage at this stage.

Such agreements should be registered in the same way as ante-nuptial agreements.

The requirements for allowing post-nuptial agreements should be as follows:

- the couple should be required to list all of their creditors and show that they have given notice of the proposed change to all the creditors;
- notice of the proposed change should be published in the *Government Gazette* and in at least one local newspaper
- husband and wife should be questioned separately by the notary to ascertain if each understands the import of the agreement and is entering the agreement of his or her own free will
- no changes which would prejudice the rights of children of the marriage, or of either spouse, should be authorised
- both parties should be required to submit affidavits affirming that all creditors have been notified of the proposed change (with documentary proof of this), that the change is desired by that party of his or her own free will, that no third parties or children will be prejudiced by the proposed changes, and that there are no pending legal proceedings by or against either spouse which could have an impact on their marital property.<sup>60</sup>

We would argue that it should not be necessary for the couple to demonstrate “sound reasons” for the change, if both are in agreement about the desired change, and if no third parties or children of either spouse will be prejudiced by it. The procedural requirements should be sufficient to discourage frequent or trivial changes.

If application to the High Court is required for the change, this would put the procedure out of reach of most couples. We suggest rather, that where no objection is received from a creditor or any other interested party, applications should be able to be concluded by a notary. If any objection is filed, then the change should be approved only after a court application in which all interested parties are given a right to be heard.

The procedural guidelines set forth by case law in South Africa could be used as guidelines for more detailed regulations on procedure and methods for protecting the rights of creditors.

A post-nuptial agreement where creditors were not properly notified would not be honoured in respect of such creditors. Failure to disclose a pending court action which could involve the spouses’ property would also be grounds for invalidating the agreement.

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<sup>60</sup> See *Ratanev v Maharaj and Another* 1949 (4) SA 1047 (D) for an example of pressure on a wife to enter into an ante-nuptial contract which did not reflect her true wishes.

Also, a post-nuptial agreement which appears to have been made in anticipation of a divorce (if made within one year or less prior to the commencement of the divorce proceedings) should not be honoured by the court granting the divorce if there is any indication that the intent or the result of the change was to unfairly prejudice one of the spouses in property division at the time of the divorce.

This more liberal system should replace the limited basis for change authorised by section 88 of the *Deeds Registries Act 47 of 1937*.

## 6. ENFORCEMENT OF NUPTIAL AGREEMENTS

**6.1** The overview of nuptial contracts in this chapter shows that courts in many jurisdictions have the discretion to override such agreements if they would cause serious injustice in general, or on specific points.

**6.2** Another example of this approach can be seen in Germany, where ante-nuptial agreements are generally enforceable. However, Germany's Federal Court of Justice recently ruled that ante-nuptial agreements which seriously disadvantage one party in a marriage could be deemed invalid. The judges stated that whilst, in principle, a contract may state that one of the partners has renounced his or her right to receive a divorce settlement, if the agreement is one-sided it would be morally unacceptable and could therefore be challenged. The court also ruled that a spouse is free to contest the ante-nuptial contract in instances of imbalance, such as where one spouse's income has risen dramatically during the marriage whilst the other spouse was home caring for children.<sup>61</sup>

### Recommendation

#### ENFORCEMENT OF NUPTIAL AGREEMENTS

We would recommend for Namibia that ante-nuptial and post-nuptial agreements should be generally enforceable, but that courts should be empowered to adjust property distribution in terms of such agreements in any cases where –

- there is evidence of fraud, misrepresentation or non-disclosure of assets, debts, liabilities or other material information concerning the financial position of either spouse;
- adjustment is necessary to protect the best interests of children of the marriage; or

<sup>61</sup> Morley (n 3).

- strict enforcement of the agreement would result in serious injustice to either spouse, in light of the contributions made by both spouses to the marriage in terms of both finances and labour expended in tasks such as housekeeping and child care.

# Chapter 11

## **LOBOLA**

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*In Namibia, the payment of lobola is governed solely by customary law. It relates to the issue of marital property, because some feel that the exchange of lobola affects property rights. For example, the UNAM study found that people in some communities felt that because lobola has been paid, any property a married woman brings into the relationship rightfully belongs to her husband. In extreme cases, a husband may feel that the payment of lobola makes his wife into a form of “marital property”.*

*The debate about whether the exchange of lobola constitutes discrimination against women could fill volumes in its own right. However, the narrower question for consideration in this chapter is whether the customary law on lobola should be modified in any way by statute as part of marital property reforms.*

### **1. THE CURRENT SITUATION IN NAMIBIA**

**1.1** The recent UNAM study cited throughout this report examined marital property in six regions which included Damara, Herero, Kavango, Lozi, Nama and Owambo communities.<sup>1</sup> It contains extensive descriptions of the practice of exchanging *lobola* and so provides a good overview of the current situation. There is a more extensive discussion of *lobola* in Namibia in Chapter 5. By way of summary, the key findings of the UNAM study on *lobola* are as follows:

**1.1.1** In most Namibian communities under study (with the exception of the Ovambalantu), as in other African countries, *lobola* is paid, which in most cases is considered necessary for the couple to be considered customarily married. The *lobola* is paid by the groom’s family to the bride’s family. In addition, in Owambo (for those communities that pay *lobola*), Kavango, Herero and Lozi if *lobola* was paid and the wife dies, the widower may be inherited by another female relative of the deceased wife.

**1.1.2** The *lobola* is paid by the groom’s family to the bride’s family. In Namibian communities where *lobola* is customarily paid, there may be specific situations where it is forgone, usually described as when the groom’s family is too poor to pay *lobola*. However, people from these communities view not paying *lobola* as a shame on the groom’s family and some people go so far as to say that if *lobola* was not paid, then the couple is not really married. In the Kavango, the giving of *lobola* is a relatively new phenomenon because in traditional Kavango societies, the groom is expected to move to his in-laws’ homestead and work for

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<sup>1</sup> Debie LeBeau, Eunice Iipinge and Michael Conte, *Women’s Property and Inheritance Rights in Namibia*. University of Namibia, Windhoek, 2004 (hereinafter “UNAM study”).

his in-laws for a specified period of time. Indeed, many people say that it is preferred that the groom work for the bride's family.<sup>2</sup>

**1.1.3** Although the amount of *lobola* differs both within and between the various communities that have the practice, it appears that *lobola* prices have steadily increased. *Lobola* can be any number of things but most often tends to be a mix of cattle and/or cash (Herero, some Owambo and Lozi), small stock (Nama) and exchange items such as blankets and food (Nama). However, in the Kavango the amount of *lobola* is significantly less than in some other Namibian societies where the practice exists. The usual amount for *lobola* can be a hoe, some *mahangu*, a head of cattle or an oxen. The most often mentioned *lobola* is a head of cattle. Many people from the other communities feel that some families have made the paying of *lobola* a 'business' venture. Data from this research indicate that the Nama, who are patrilineal, pay lower *lobola* than the Herero, some Owambo (both matrilineal) and Lozi ('cognatic') communities.<sup>3</sup>

**1.1.4** Within the research population, the payment of *lobola* is perceived to give the husband and the husband's extended family rights of control over the wife. Due to the payment of *lobola*, which is sometimes seen by the husband's family as having purchased the rights of control over a woman's domestic production, fertility and offspring, the practice of wife and/or husband inheritance – upon the death of a spouse – is prevalent in most Namibian communities (with the exception of the Nama). This means that people also feel that *lobola* may give the husband's extended family rights of control over other female relatives from the wife's extended family.<sup>4</sup>

**1.1.5** Rights of control over children are also linked to the payment of *lobola*, as well as descent patterns (Okupa 1999:3.26). In matrilineal societies the payment of *lobola* only secures the husband's rights of control over the children in certain circumstances, but the responsibility of financial support and reprimand of children is done by the mother's brother (avuncular rule). Therefore, fathers of children in matrilineal communities do not pay maintenance as this is considered the responsibility of the mother's uncles (ibid.:5.11) ... In patrilineal communities the payment of *lobola* secures the father's rights of control and care over all aspects of the children's upbringing (Okupa 1999:3.26). In the Nama communities interviewed for this research, people feel that the wife has a right to keep the children should death or divorce occur. In Lozi the payment of *lobola* also means that the father has a right to keep the children after the death of his wife or in cases of divorce.<sup>5</sup>

**1.1.6** Parental rights secured by the payment of *lobola* may include the right of the father's family to custody of children in the event of divorce or the mother's death. However, data from this research also indicate that the age of the children is

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<sup>2</sup> Ibid at 36.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Ibid at 36-37.

a factor because it would not be wise for a husband to take a breastfeeding child. Therefore, babies would stay with their mothers until they are weaned.<sup>6</sup>

**1.1.7** In most Namibian communities it is not a requirement that *lobola* be returned unless the wife is found to be at fault for the divorce and under certain circumstances such as if she has not yet had a child by her husband. In most Namibian communities, if *lobola* was paid, it is not returned. However, in Herero society, when *lobola* has been paid but the couple divorce, the extended family of the person at fault for causing the divorce has to pay the other extended family a “*gift for getting divorced*” which is not considered paying back the *lobola* as much as it is a divorce fee.<sup>7</sup>

**1.1.8** ... [I]n the Kavango, whoever is at fault for causing the divorce also has to pay a divorce fee, which is generally said to only be one or two head of cattle. In Lozi, when *lobola* has been paid but the couple divorce, the *lobola* is supposed to be paid back if the woman is seen to have caused the divorce. Examples of when this payment is required include if the woman had an affair or if the woman leaves the relationship. If the husband is seen as causing the divorce, *lobola* is not returned.<sup>8</sup>

**1.1.9** In Owambo (for those communities that pay *lobola*), Herero, Lozi and to a lesser extent the Kavango, if *lobola* was paid and the wife dies, the widower is inherited by another female relative of the deceased wife. In this case *lobola* is not paid for the new wife because the widower’s extended family has already paid for the right to have a wife for the widower from the deceased’s extended family.<sup>9</sup>

**1.2** The UNAM study concludes: “*Although lobola, in and of itself, is not a cultural impediment to women’s rights to property, contemporary interpretations of what rights having paid lobola grant to the husband and his family imply that some people feel that paying lobola gives the husband absolute rights over his wife and her economic production.*”<sup>10</sup>

## 2. LAW REFORM PROPOSALS IN NAMIBIA

**2.1** Namibia’s Law Reform and Development Commission has already put forward proposals for the recognition of customary marriages in Namibia. They propose that some minimum requirements for customary marriage should be set by statute: a minimum age for marriage, a requirement of free consent on the part of both spouses, and a requirement that all future customary marriages be monogamous. Other than these requirements, the rules about customary marriage will be the same ones that

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<sup>6</sup> Ibid at 37.

<sup>7</sup> Ibid at x.

<sup>8</sup> Ibid at 41.

<sup>9</sup> Ibid at 36.

<sup>10</sup> Ibid at 56.

already apply under customary law. This means that customs like *lobola* would continue as now practised, without statutory interference.<sup>11</sup>

## LOBOLA

Please permit me to point out one of the devices used in both customary and modern marriages which I consider to be instrumental to the same enslavement of wives by their husbands, and that is the payment of the so-called bride price, “lobola”, which is demanded by parents and relatives of the bride from the bridegroom and paid either by himself, his parents or relatives to the parents or relatives of the bride. In certain communities the bride who has been paid for is by implication considered a servant of the man to whom she got married and his relatives until she bears a child for the husband. That is when she could be fully accepted into the family’s membership. ... It is my strongest feeling that in marriages contracted on the principle of equality no partner should be subjected to be a buyer or to be bought. In actual fact, the very concept of bride price or “lobola” should be done away with. Namibia should not tolerate the slavery of women through the selling and buying of them under the cover of the so-called marriage price.

**Minister of Fisheries and Marine Resources**, 1995 MPEA debate, NA

I am a typical African women and I am saying lobola has a very negative influence on marriages and I am going to explain ... The problem of lobola as it is currently being experienced, is that husbands, or our men, some of those who pay lobola, feel that the payment of whatever cattle or whatever amount of money is in exchange for that women. That is exactly why some husbands do not participate in household work. They say, ‘I have paid for you, how do you expect me to work?’

**Minister of Youth and Sport**, 1995 MPEA debate, NA

... Lobola is not taking us anywhere. Lobola is ruining our families in the sense that the young husband is required to pay a number of animals or an amount of money and by the time they form their family, they have absolutely nothing. That man has nothing, and, therefore, he as the man sometimes feels bitter, because he has to borrow if he does not have those cattle and now here is the wife demanding, “I want this dress, I want this item in my kitchen”. Then he will say, “Don’t you know how much I have paid and now you are asking me I must buy you this eye-level oven, I gave everything to your parents.”

**Minister of Youth and Sport**, 1995 MPEA debate, NA

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<sup>11</sup> Law Reform and Development Commission, *Report on Customary Law Marriages*, Project 7, LRDC 12, October 2004.

Lobola is not buying, it is one of those insults that are brought in from Europe. When Richard Burton buys a one million dollar ring for Elizabeth Taylor, that is not buying, but when I give one ox and two heifers in exchange, as a present or appreciation for my wife, that is buying.

**Mr Kaura**, 1995 MPEA debate, NA

Again in Namibia we have a tradition of paying lobola to the woman's parents that will guarantee an affirmative action and dignity to have such woman called in your name as a legitimate wife. Otherwise without such lobola – money or herds of cattle – such woman may only be your girlfriend and free for any man to take her from you, while in some other communities you just marry or get married to her like a cow and no compensation to her parents, no matter whether they suffered to give her higher education.

**Mr Walubita**, 1995 MPEA debate, NC

In many black communities in Namibia, if not in the whole of Africa, men must pay lobola in different forms to the family of his wife. Why do women not do the same if they are equal?

**Mr Sheyapo**, 1995 MPEA debate, NC

### 3. SOUTH AFRICA

**3.1** The South African Law Commission Discussion Paper on Customary Marriages initially called for further comment on how bridewealth should fit into the scheme for recognition of customary marriages – as one of the requirements of marriage, as acceptable evidence that a customary marriage has been concluded without being a requirement, or as a token of appreciation or a mark of the cultural attributes of the marriage without any legal significance.<sup>12</sup>

**3.2** Public opinion was extremely divided on this question. The South African Law Commission (SALC) noted that there is ambivalence on the topic, with some feeling that *lobola* is degrading to women and others saying that it shows respect for the ancestors and “dignifies the wife”.<sup>13</sup> The SALC concluded that *lobola* is widely viewed as being part of African cultural identity and that it enjoys considerable public support which would make its abolition impossible to enforce.

**3.3** Thus, the SALC ultimately recommended that the giving of *lobola* should not be prohibited, nor should any restriction be imposed on the amount payable. Yet it felt that the payment of *lobola* should not be deemed essential for the validity of customary

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<sup>12</sup> South Africa Law Commission, Project 90: The Harmonisation of the Common Law and the Indigenous Law, *Discussion Paper 74: Customary Marriage* (August 1997) at paragraph 4.5.

<sup>13</sup> *Id* at para 4.3, quote from subpara 4.3.3.6.

law marriages. Instead, parties wishing to give it should be free to do so, with payment or non-payment having no effect on the spouses' marriage. Yet, although it is felt that the payment of *lobola* should not be a requirement for a valid customary marriage, it might serve as evidence that a customary marriage has in fact taken place. The SALC also suggested that courts granting divorces should have the power to order the return of *lobola* upon divorce.<sup>14</sup>

**3.4** The Centre for Applied Legal Studies (CALC) recommended that the law's recognition of customary marriage should ignore customary practices such as the exchange of bridewealth, explaining this in the following terms:

*We support a third definition of recognition which treats customary practices as purely private matters. Parties are free to resort to custom as one among many permissible forms leading to the solemnization of marriage. On occasions where parties seek the intervention of the state in family disputes it will only be the egalitarian unified state law which will be applied ... In this way we hope to celebrate the positive aspects of both systems while moving away from the discriminatory or problematic elements within them. This neutral framework will regulate marriage in the spirit of ubuntu and equality, while allowing the flourishing of all South African cultures.*<sup>15</sup>

CALC felt that bridewealth in particular "should remain untouched by legislation and constitute an optional cultural attribute of marriage".<sup>16</sup>

**3.5** In the end, the *Recognition of Customary Marriages Act 120 of 1998* acknowledged *lobola* as a requirement pertaining to the validity of some customary marriages, without directly regulating it in any way. Without mentioning *lobola* or any other customary requirements specifically, the act generally requires that valid customary marriages "must be negotiated and entered into or celebrated in accordance with customary law."<sup>17</sup> The act also provides that any *lobola* agreed to must be recorded in the marriage register at the time of registration.<sup>18</sup>

**3.6** *Lobola* is not specifically mentioned in connection with divorce. Instead, the act provides more generally that the court granting the divorce decree "may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law".<sup>19</sup>

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<sup>14</sup> South African Law Commission, Project 90 – The Harmonisation of the Common Law and the Indigenous Law, *Report on Customary Marriages* (1998) at paragraphs 4.3-ff.

<sup>15</sup> Centre for Applied Legal Studies, *Response by the Gender Research Project, Centre for Applied Legal Studies, University of the Witwatersrand, to the South African Law Commission's Report on the Harmonisation of the Common Law and the Indigenous Law (Customary Marriages)* (1996) at paragraph 19.2.3.

<sup>16</sup> *Ibid.*

<sup>17</sup> Section 3(1)(b).

<sup>18</sup> Section 4(4)(a): "A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any *lobolo* agreed to and any other particulars prescribed."

<sup>19</sup> Section 8(4)(e). The act defines *lobolo* in section 1 as "the property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name,

**3.6.1** The possibility of drawing a connection between *lobola* and maintenance in terms of this provision has been criticised, since *lobola* usually goes to the family of the bride rather than to the bride herself. In light of this fact, it has been suggested that *lobola* should have no connection to maintenance upon the dissolution of marriage.<sup>20</sup>

### **A SOUTH AFRICAN MAN AGAINST LOBOLA**

*This strongly worded argument against lobola written by a black South African man (Babusi Sibanda) appeared in a popular magazine a few years ago:*

Lobola may differ slightly from one part of Africa to another. The ritual may be more elaborate in some parts and the negotiators may consist of different sets of people. Ultimately, though, lobola is the negotiation among men about the price at which the bride will change hands. “Bride-price” defines it exactly.

Apologists for the lobola industry will tell you that the only problem is that it’s become commercialised. Otherwise, they say, it was traditionally supposed to be a “token of appreciation”. A gift.

A token whose quantity and nature is set by the receiver? A token that would have to be returned if the new wife couldn’t bear children? ...

Many abusive husbands use as an excuse the fact that they paid lobola; many parents “advise” their daughters to stay on in abusive and loveless marriages because lobola was paid (and the father and his brothers – rarely the mother – have used it up). Any wonder these marriages are so “stable” and “durable”?

The tradition of *ukungena* – the taking over of the widow by her dead husband’s brother – is directly linked to lobola. So is the dispossession of a widow by the brothers of her deceased husband. Apologists will tell you that these are the exceptions to the rule. They should try telling that to Africa’s rural women. Or to the widows of Zambia’s 1993 national soccer team who were thrown out of their homes when their husbands were wiped out in a plane crash.

Those who say that lobola has been commercialised are just whinging about the price. Lobola has always been commercial. The currency may have changed here and there but where wealth is expressed as cattle, people still pay pretty much the same as a hundred years ago ...

Why should a young man pay money and give cattle to a young woman’s father? For raising and educating her? What about his own mother? So many South Africans are educated by their mothers; who is going to pay *her* for raising and educating *him*? They are marrying each other; he is not marrying her! Lobola transfers ownership of the woman’s

which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage”.

<sup>20</sup> See, for example, Sharita Samuel, “Women married in customary law: no longer minors”, 40 *Agenda* 23 (1999) at 29.

capacity and services from her father to her husband and, on his death, his brothers. And we want to lug this baggage on women's backs, into the 21<sup>st</sup> century, under the flag of African culture.

*Femina*, August 1999 at 12.

## **LOBOLA CONTRACT WILL END COST-OF-COWS ROW**

by **Futhi Ntshingila**, Johannesburg

A South African banker has come up with a modern solution to the age-old conflict over the price of cows in lobola negotiations.

Mpho Lebogo has developed a lobola contract that legally binds and protects the parties involved. He said he came up with the idea after paying lobola for his wife and receiving only a piece of paper as a receipt.

"The contract dignifies lobola negotiations and in the case of disagreements, it gives legal protection to everyone involved. What happens with lobola is that people often misplace the pieces of paper where the negotiations were written down and disputes over payments erupt," he said.

The contract, endorsed by the Proudly South African Campaign and the Department of Home Affairs, is a pre-printed document which the families complete by filling in personal details and the specific amounts of money involved.

Lebogo said both monogamous and polygamous contracts were available, but insisted couples would still need to register their marriages with the Department of Home Affairs.

Professor Sihawu Ngubane, the convener of the Commission for the Promotion and Protection for the Rights of Cultural, Religious and Linguistic Communities, said the contract was a good idea.

"I commend this initiative because the problem is that people no longer pay with real cows. The conflict arises in determining the money price of each cow ... Normally 11 cows are the standard bride price, except when the woman has had a child," he said.

Lebogo said: "I have made presentations to the traditional leaders ... They love the idea because it doesn't move away from our cultural practices ... it's making them fit with the current times."

Allan West – who lectures new magistrates at the state's Justice College and worked with Lebogo on the legal aspects of the contract – described it as a "wonderful innovation".

"It works as an assistance to the parties so that they can prove their marriage was concluded traditionally in terms of customs and laws of people," he said.

**Sunday Times** (Johannesburg), 19 September 2004

## 4. ZIMBABWE

**4.1** In Zimbabwe, the transfer of “marriage consideration” is explicitly required by statute for registration of a customary marriage. The guardian of the woman and the intended husband must have agreed upon the amount and form of the marriage consideration. The magistrate may also fix the amount of the marriage consideration after consultation with the guardian if agreement on this point cannot be reached.<sup>21</sup>

**4.2** In some circumstances, a portion of the *lobola* may be required to be returned upon divorce, depending on the grounds of the divorce and to whom blame is attributed.<sup>22</sup>

**4.3** The 1984 case of *Katekwe v Muchabaiwa*<sup>23</sup> interpreted Zimbabwe’s *Legal Age of Majority Act 15 of 1982* to mean that women had independent freedom of choice in matters pertaining to customary marriage, with implications for *lobola*:

*It seems to me that an African woman with majority status can if she so desires, allow her father to ask for roora/lobola from the man who wants to marry her. She and she alone can make that choice. If she does agree to her father asking for roora from his future son-in-law before marriage the father can go through the contractual procedures required before an African marriage is effected. The position, as from 10 December 1982, when the Legal Age of Majority Act came into effect, is that an African woman of majority status can contract a marriage, whether that marriage be in terms of the African Marriages Act [Chapter 238] or the Marriage Act [Chapter 37] without the consent of her guardian.*<sup>24</sup>

**4.4** However, the applicability of the *Legal Age of Majority Act* to women who are subject to customary law was subsequently undermined by the widely-criticised decision in the case of *Magaya v Magaya*.<sup>25</sup> In this case, which dealt primarily with the right of a widow to inherit under customary law, the court ruled that *Katekwe* (and the cases following it) were wrongly decided because the discrimination against women in customary law did not stem from their perpetual minority but from more fundamental tenets of customary law. The court stated that the *Legal Age of Majority Act* cannot give women rights which they never had under customary law, where women had no rights to “*heirship, demanding payment of lobola ... , or to contract a marriage under the Customary Marriages Act [Chapter 5:07]*”.<sup>26</sup>

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<sup>21</sup> *Customary Marriages Act [Chapter 5:07]*, sections 7 and 5(1)(b). “Marriage consideration” is defined in section 1 as “the consideration given by or to be given by any person in respect of the marriage of an African woman, whether such marriage is contracted according to customary law or solemnised in terms of the Marriage Act or this Act”.

<sup>22</sup> UNAM study (n 1) at 41.

<sup>23</sup> 1984 (2) ZLR 112.

<sup>24</sup> At 124-25 (*obiter dictum*).

<sup>25</sup> Civil Appeal No 635/92, S.C. 210/98.

<sup>26</sup> At 12.

*On the intention of the Legislature in passing the Majority Act, my view is that although it wanted to emancipate women by giving them locus standi for 'competencies' in all matters generally, especially under common law, it was never contemplated that the courts would interpret the Majority Act so widely that it would give women additional rights which interfered with and distorted some aspects of customary law.*<sup>27</sup>

**4.4.1** As the concurring opinion pointed out, the import of the *Magaya* opinion is that while a woman over the age of 18 might be competent to enter into a civil marriage without her father's consent as a result of the *Legal Age of Majority Act*, she cannot do so under the provisions of customary law.<sup>28</sup> Others have stated that the decision effectively repeals the *Legal Age of Majority Act* in so far as it applies to customary law.<sup>29</sup>

## 5. ZAMBIA

**5.1** The payment of *lobola* is now widespread in Zambia, even amongst ethnic groups where it was not traditionally practised.<sup>30</sup> According to one recent study, a woman's in-laws in Zambia use the payment of *lobola* as justification for asserting that anything of value resulting from the marriage rightfully belongs to them.<sup>31</sup>

*The practice of paying bride price, or lobola, which is still widespread, is detrimental to women. Once lobola has been paid, the wife has no right to return to her parents' home after the death of her husband. She is therefore highly vulnerable to mistreatment by her in-laws, who consider her as 'property'. The payment of lobola is often used as a pretext for 'property-grabbing' and even for the taking away of children after their father's death. Some see lobola as 'the price paid' for the wife – and, thus, she can be cast away as easily as she was 'bought'.*<sup>32</sup>

**5.2** A useful analysis of the positive and negative functions of *lobola* in Zambia society is contained in the box below.

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<sup>27</sup> At 14. The court went on to suggest that the legislature itself considered the courts' interpretation of the *Legal Age of Majority Act* to be too broad, noting "widespread calls in and out of Parliament" for its amendment. The court also cited a statement attributed to President Mugabe "apparently in a moment of jest, that if his sister were to get married, he would demand *lobola*, and if the intended husband pointed to the *Katekwa* judgment, he would say to him: OK that is the judgment. Do you want to marry my sister or not?" At 14, referring to *Hansard* 12 September 1984.

<sup>28</sup> McNally, JA at 18-19, who goes on to say: "She could not, as it were, accept and reject customary law at the same time."

See also *Women and Law in Southern Africa Research Trust Newsletter*, June 1999 at 4.

<sup>29</sup> See *Women and Law in Southern Africa Research Trust Newsletter*, June 1999 at 5, reprinting a protest letter signed by seven women's groups in Zimbabwe.

<sup>30</sup> *Women and Law in Southern Africa: Zambia*, "Lobola: a price for a bride", 26 April 2001, [www.wlsa.org.zm/zambia/pages/26apr01p1.htm](http://www.wlsa.org.zm/zambia/pages/26apr01p1.htm).

<sup>31</sup> Centre on Housing Rights and Evictions, *Bringing Equality Home, Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa*, 2004 at 2.9.3.1-2.9.3.2.

<sup>32</sup> *Id.*

## **LOBOLA: A PRICE FOR A BRIDE**

... In traditional society, the payment of 'lobola' secured the position of the woman within the marriage and his family, it also granted her certain rights, claims and guarantees. She could not just be 'expelled' or arbitrarily divorced by the husband without an elaborate process involving both families. Therefore, the implications of 'lobola' on women depends on the social meaning of the practice.

It entitles a woman to say 'I am married', and entitles her to the protection of her husband, maintenance and other conjugal rights. It is also viewed as giving 'extra dignity and respect to the woman', and 'helps to keep the marriage together'. During WLSA's study on the family, women in Western Province stated that it gave them a right to be jealous over their husband. It is said to be a mark of a 'man's respect' for his wife and that because of the liability to repay on divorce it acts as a deterrent to misconduct on the part of the wife.

Another implication is the transfer of the woman's labour to her husband's kin. This is common in rural farming communities where a married woman can no longer 'help' in her father's or uncle's field and has to work her husband's field instead. Her own kin lose out on the services she used to render before she got married.

In some matrilineal and patrilineal groups it transfers a woman's fertility or protective capacity to her husband and his kin. It entrenches a woman's subordinate status by giving her reproductive rights to another person or group of persons. She then becomes a utility vessel for the man's family. For example, among the Ngoni, 'malowolo' a payment of between one to twelve cattle is made which transfers the woman's fertility to the husband. Sometimes it is paid only after a child has been born. WLSA found that in Bweengwa, a child born outside the marriage was said to belong to the husband.

It is common place that in many instances, the 'lobola' demanded is not paid in full. This may be unimportant the longer one stays in marriage, but has had terrible consequences for some, as on the death of the wife, her relatives have refused to bury her until the full amount of 'lobola' is paid.

In accordance, it therefore entitles a man to claim the children in the event of a divorce, whereas he cannot do so if no such payments were made. In addition, 'lobola' has to be returned in the event of a divorce. This causes a lot of difficulties for the woman as she is often forced stay in marriage just because her kin are unable to return the 'lobola', or for fear of being castigated by her family. ...

In other instances, the payment of 'lobola' has tied the woman to her husband's family even after his death. Mrs C. was sued by her late husband's family for adultery, as she was in a relationship with a widower. This was in spite of the fact that her husband had been dead for 6 years. Their claim was that our client was still married to the family because of the payment of 'lobola'. ...

In modern times, men have interpreted 'lobola' as giving them ownership of their wives. This attitude has been thought to encourage wife beating. Additionally, the link between 'lobola' and economic activity has created the inherent danger of economic interests overriding the intention of unifying families.

It is also a form of male control over women, to a point where women's bodies are commodified. Today, for example, the 'lobola' is linked to the educational qualifications of the bride to be. The disintegration of the wider family has not helped 'lobola' at all; it has only changed the nature and distribution of 'lobola' to reveal a change in the control of women, i.e. from the wider kinship groups towards control by the father (who benefits) and husbands (who now pay the 'lobola').

On the whole, 'lobola' has both negative and positive aspects to it. On the one hand it can be a basis for claiming certain rights and privileges and on the other, is used to justify men mistreating their wives. It would appear that the payment of 'lobola' has lost its original intention. Although many deny that payment of 'lobola' constitutes the purchase of a woman, the fact that a man or his family has parted with resources – either money or cattle – in order to acquire a wife, affects the man's perceptions of the nature of the marriage relationship. Many male respondents in our research state that they have purchased the women and therefore they are property to them. It is in this regard that many oppose the criminalisation of forced sexual intercourse on a wife, as they believe that the wife is obliged to give sex, as she has been paid for. The dilemma posed by 'lobola' can probably be resolved by making registration of marriages compulsory and by standardising the sums involved so that they are no longer used by greedy persons to enrich themselves.

**Women and Law in Southern Africa**, Zambia, 26 April 2001

## 6. OVERVIEW

**6.1** In 2002, Women and Law in Southern Africa published an in-depth study of the function of *lobola* in seven Southern African countries where it is a commonly-observed tradition (Botswana, Zambia, Zimbabwe, Lesotho, Malawi, Mozambique and Swaziland).

**6.2** The study's findings have been summarised as follows:

*The study considers this social institution in both matrilineal and patrilineal societies to show that almost without exception, the practice of paying the bride price results in the wife become the property not only of her husband but also of his extended family. It discusses how this impacts negatively on her reproductive rights – she becomes a child-rearing machine, has little control over family planning or her sexual health – and therefore on the health and development of the whole society. It argues that the institution of 'lobola', which is weakening in some circles but still*

widely condoned under the guise of the preservation of tradition, is incompatible with a basic standard of human/personal rights for women; calls for its abolition; and for governments to take a stronger lead in formulating laws that better protect women's marital and reproductive rights.<sup>33</sup>

**6.3** One of the books' authors, Sylvia Chirawu, makes the following observations:

*[L]obola legitimizes violence against women in marriage but the woman may not be able to escape the abuse because of the lobola paid or because of the fear of losing access to her children who are seen as belonging to the husband ... Besides, lobola-related violence makes women vulnerable to HIV infection from unfaithful partners – they suffer rape and severe beatings when they suggest the use of condoms. Typically, the men say they have paid lobola in full and that “no cow was deducted to compensate for the use of condoms”. And if a man dies (of AIDS, for instance), his wife could be inherited by a brother or nephew; refusal could result in her being turned out of the marital home without her children.<sup>34</sup>*

**6.4** A subsequent paper presented by Women and Law in Southern Africa at an International Conference on Bride Price in 2004 made the following points about the impact of *lobola* on women's rights:

- (1) **Lobola compromises a woman's personhood** by transferring decision-making powers over a wife to her husband and his family.
- (2) **Lobola violates a woman's bodily integrity** by transferring control over her body, including her productive and reproductive capacity, to her husband.
- (3) **Lobola commodifies women** because it places a value on women in a process of negotiation and exchange. The bride is not always consulted on whether or not she consents to the exchange of *lobola*, and she is often excluded from the negotiation process of negotiation.
- (4) **Lobola legalises violence against women** by binding a woman to an abusive marriage and eroding the support she might otherwise get from her natal family to leave such a relationship.<sup>35</sup>

**6.5** This paper recommended that *lobola* should not be the determinant of the validity of marriages in Southern Africa, and that it should ultimately be abolished, after sensitisation of the regions on its implications.<sup>36</sup>

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<sup>33</sup> Michigan State University Press website, <http://msupress.msu.edu/book>.

<sup>34</sup> Quoted in Benhilda Chanetsa, “Bride price and violence”, 24 April 2005, <http://www.boloji.com/wfs3/wfs363.htm>.

<sup>35</sup> Women and Law in Southern Africa Research and Education Trust, “Lobola in Southern Africa: its implications for women's reproductive rights”, presented by Tinyade Kachika at the International Conference on Bride Price, Uganda, February 2004 (mimeo).

<sup>36</sup> Id.

## **AFRICAN WOMEN CHALLENGE LOBOLA**

KAMPALA – “We are going to shout about bride price across Africa and we are going to say no to the sale of women,” Atuki Turner told a crowded hall at Makerere University here.

Turner was speaking at the opening this week of the first international conference on the tradition of bride price.

The groundbreaking event was organised by Mifumi, a women’s non-governmental organisation in rural eastern Uganda. It brought together activists from Uganda, Kenya, Tanzania, Nigeria, Ghana, Senegal, Rwanda and South Africa to discuss the effect that payment of bride price has on women.

Delegates also talked about ways of eliminating this practice in Africa and elsewhere.

Bride price is one of the most widespread and entrenched cultural institutions in Africa. It requires a man to give money and possibly goods such as livestock and foodstuffs to his bride’s family.

Although the tradition varies from place to place, women’s rights activists say that in most cases it contributes to gender inequality and domestic violence.

Turner, Mifumi’s executive director, said that in Uganda and various other countries there were no laws governing bride price.

Many conference participants argued that the bride price had outlived its original purpose, which was to be a token of appreciation that cemented the bond between two families.

Miria Matembe, a prominent member of parliament in Uganda, said the tradition was now an excuse to accumulate wealth – with a bride’s family routinely demanding large numbers of livestock, as well as cash and other presents.

“The girl’s parents look at her as a source of income and demand too much from the groom’s side. Once the groom has paid so much, he starts looking at his wife as property,” Matembe said. “Bride price perpetuates the low status of women and keeps them in bondage.”

In some countries, such as Uganda, men demand a full refund of the bride price if a marriage ends.

This effectively prevents women from leaving abusive marriages.

Domestic violence is a serious problem in Uganda, but still rarely discussed in public.

**Nampa-Sampa**

*The Namibian*, 20 February 2004

## 7. RECOMMENDATION FOR NAMIBIA

**7.1** Initially, in its report on customary marriage, the Legal Assistance Centre recommended that there should be no reference to “bridewealth” in the statute which gives recognition to customary marriages, although the transfer of bridewealth might continue outside the legal framework.<sup>37</sup> This report submitted that the legislation should remain silent on bridewealth, which should remain an “optional cultural attribute” of customary marriage.<sup>38</sup> If the law remains silent on the issue of bridewealth, this does not prevent communities from continuing their traditions, in the same way that some religious requirements for marriage take place outside the legal framework.

**7.2** In light of the many problems associated with *lobola* as revealed by the UNAM study, we now believe that this previous recommendation does not go far enough. One problem is that a traditional leader acting as a marriage officer could refuse to register a marriage that had not complied with that community’s prevailing custom on *lobola*, on the grounds that it had not been entered into in accordance with the relevant customary law. In this way, even a silent statute would implicitly recognise and reinforce *lobola*.

**7.3** Another problem is the perceived impact of *lobola* on women’s property rights in some instances – a factor that might undermine marital property reforms.

### Recommendation

#### **LOBOLA**

We propose that any statute on the recognition of customary marriage should state explicitly that while the statute is no bar to the exchange of *lobola* between individuals or families, the absence of *lobola* will not, on its own, serve as a basis for considering a marriage otherwise concluded in terms of customary law to be ineligible for registration as a valid customary marriage. This would make *lobola* into a more ceremonial and symbolic ritual, akin to the exchange of wedding rings in church weddings – a common ritual with great symbolic importance for many people, but not one which the law requires for the validity of a civil marriage.

Similarly, we propose that any law reform on marital property should state explicitly that the transfer of *lobola* will not be deemed to affect the respective property rights of husband and wife in any way.

It should also be provided by statute that the return of *lobola* will not be enforced as a requirement for customary divorce.

<sup>37</sup> Legal Assistance Centre, *Proposals for Law Reform on the Recognition of Customary Marriages* (1999).

<sup>38</sup> The phrase in quotation marks is borrowed from the Centre for Applied Legal Studies as it seems to provide an apt description. *CALS Response* (n 16) at paragraph 27.5.

Such explicit statutory pronouncements on *lobola* will not prevent people from continuing to transfer *lobola* if this is part of their culture, but should help to dissociate the custom from oppressive effects on women.

Farther-reaching reforms on *lobola* could take place at a later date in other contexts.

# Chapter 12

## PROPERTY DIVISION UPON DIVORCE

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*Law reform proposals have already been put forward on the division of marital property on divorce. The Legal Assistance Centre has published recommendations for law reform in this area, which formed the basis for recommendations by the government's Law Reform and Development Commission. This chapter will review briefly the recommendations which are already on the table and propose a few additional recommendations.*

### 1. CURRENT POSITION IN NAMIBIA

**1.1** The current situation pertaining to divorce was discussed in some detail in Chapter 4. What follows is a brief re-cap of the current situation.

#### Civil marriage

**1.2** The way that a couple's property will be divided upon divorce depends on the marital property regime applicable to the marriage. If the couple were married "in community of property", the joint marital estate will be divided into two equal parts, and each person will receive one part. If the couple were married "out of community of property", each person will receive his or her own separate property. If the "accrual system" applied, the property of each spouse prior to the marriage remains separate, but the spouses share equally in the profits and losses which accrue during the course of the marriage.

**1.3** In divorce cases based on adultery or malicious desertion, the plaintiff (the "innocent" spouse) may request a court order that the defendant (the "guilty" spouse) forfeit any past and/or future benefit that he or she derived or will derive from the marriage.<sup>1</sup> This is called "forfeiture of benefits". It is based on the idea that no spouse should profit from a marriage that he or she has destroyed. A request for forfeiture of benefits must be made whilst the divorce proceedings are pending; it cannot be made after the divorce is granted. If such an order is requested by the "innocent spouse", the court has no discretion to refuse to grant it.

**1.3.1** An order for the forfeiture of benefits is possible only where the plaintiff has contributed more than the defendant to the joint estate. If the defendant has contributed more, then this remedy is of no use since the defendant will have no benefits to forfeit. For this reason, "forfeiture of benefits" is seldom of use in practice to female plaintiffs, who often have lower-paying jobs or take greater

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<sup>1</sup> Forfeiture of benefits in a marriage out of community of property which also excludes community of property and loss could include benefits by virtue of a succession clause, donations to be made between the spouses in terms of the ante-nuptial contract which were not yet concluded, or the right to a tenancy. DSP Cronje, *The South African Law of Persons and Family Law* (3d edition, 1994) at 266-267.

responsibility for child care. However, as long ago as 1940, at least one South African case held that the court is entitled to take into account the services of a spouse in managing the joint household and caring for the children, in its calculation of the spouses' respective contributions.<sup>2</sup>

**1.4** Either spouse in a marriage “in community of property” may also ask for an adjustment upon division of the joint estate in terms of the *Married Persons Equality Act*, on the grounds that the other spouse entered into a transaction which required the consent of the first spouse without obtaining such consent, that the other spouse knew or reasonably should have known that he or she would probably not obtain such consent, and that the joint estate has suffered a loss as a result of the transaction.<sup>3</sup>

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

## Customary marriage

**1.6** The UNAM study provides the following overview:

*With most communities in Namibia during customary divorce, heard at a customary court, the wife receives little or none of the marital property (with the possible exception of cooking pans or other small household items), even if the husband is at fault for the divorce. In other communities, such as Lozi, a wife may receive a small amount of communal property if she can prove that her husband was at fault for the break-up of the marriage. In the Kavango, the person found at fault for the divorce, whether the husband or the wife, has to pay a “divorce fine”. However, given the fact that customary courts are only held by men, in many customary courts women may not be allowed to attend or may not be allowed to speak, and frequently these men are related to the husband being accused of wrong-doing – it is frequently the case that women do not get a fair hearing before a customary court. In Nama communities, division of property is probably the most equitable because all divorce is done in civil court. The Nama say that in the past the husband got all of the livestock but now livestock are shared between the couple.<sup>4</sup>*

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<sup>2</sup> *Gates v Gates* 1940 NPD 361 at 364-5: “Further, it seems to me indisputable that although a wife may not, in a positive sense, actually bring in or earn any tangible assets or money during the marriage, her services in managing the joint household, performing household duties, and caring for children, have a very real and substantial value, which may well and usually does, exceed the bare cost of her maintenance. ... [O]n general principles I think it is but equitable that a wife, devoting herself to domestic services, should be credited with the value of such of them as she is shown to have performed. It may be very difficult to arrive at anything like an accurate valuation of such services, nevertheless I think an estimate of their value ought to be attempted.”

<sup>3</sup> *Married Persons Equality Act* 1 of 1996, section 8.

<sup>4</sup> Debie LeBeau, Eunice Iipinge and Michael Conte, *Women's Property and Inheritance Rights in Namibia*. University of Namibia, Windhoek, 2004 (hereinafter “UNAM study”) at ix-x.

**1.7** Both the LAC study and the UNAM study found that “fault” in customary divorce, as in civil divorce, affects marital property distribution.

## **2. PROPOSALS FOR REFORM**

**2.1** The Law Reform and Development Commission has proposed the following reforms on division of property in the case of a divorce:

- The basic ground for divorce in both civil and customary marriage should be irretrievable breakdown, thus removing the element of fault. This is consistent with international trends and recognises that marriages are usually too complex for a simplistic assignment of fault to one spouse or the other.<sup>5</sup>
- Civil divorces will take place in the High Court, but under procedures which should reduce the need for court appearances in uncontested cases. Customary divorces will follow customary law and procedure, as long as this is consistent with the Constitution.<sup>6</sup>
- Forthcoming divorce law should give increased discretion to presiding officers in civil divorce cases to order an equitable division of property, even if this means a departure from the default regime or the regime agreed upon by means of an ante-nuptial agreement. The property regime and the provisions of any ante-nuptial contract should be taken into consideration by the court in deciding on the distribution of assets between the divorcing spouses, but this would be only one of a list of factors, including the duration of the marriage and the separation of the spouses; the contributions made by each spouse to the marriage (including domestic and child-caring duties); the economic circumstances of each spouse; which parent will have custody of the children; the loss of any benefits such as medical aid or pension benefits as a result of the divorce and any relevant factor *other than* fault (to be consistent with the new no-fault approach). No adjustment will be made in favour of a spouse unless that spouse has contributed, directly or indirectly, to the maintenance or increase of the other spouse’s estate by means of income, services or saving on expenses.<sup>7</sup>
- Special provisions are proposed for taking into account the loss of anticipated benefits under retirement funds and life policies.<sup>8</sup>
- Divorces from customary marriages should require a clear agreement about the division of property and the spouses should have a right to approach the

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<sup>5</sup> Law Reform and Development Commission, *Report on Customary Law Marriages*, Project 7, LRDC 12, October 2004 (hereinafter “LRDC 12”) and Law Reform and Development Commission, *Report on Divorce*, Project 8, LRDC 13, November 2004 (hereinafter “LRDC 13”).

<sup>6</sup> Ibid.

<sup>7</sup> LRDC 13 (n 5). See the useful discussion of how to take gender roles into account in such judicial re-distribution in *Bezuidenhout* 2003 (4) SA 676 (CPD).

<sup>8</sup> Ibid. In South Africa, it has been held that assets of trust can in some circumstances be taken into account in judicial re-distribution. *Jordaan* 2001(3) A 288 (KPA).

High Court in cases where an agreement on property division cannot be reached. The customary law marriage officer would have the duty to ensure that an agreement had been reached, or a court order made, for property division before issuing a customary marriage divorce certificate.<sup>9</sup>

### 3. FURTHER RECOMMENDATIONS FOR REFORM

**3.1** It is not necessary here to survey the legal position in other jurisdictions, as comparative law was already considered when the recommendations summarised above were put forward. However, aspects of the law on divorce in selected countries are examined here in connection with a few further recommendations for reform.

#### South Africa: property division in customary divorce

**3.2** In South Africa, divorce in customary marriages may be granted only by a court (which does not include traditional tribunals) on the grounds of irretrievable breakdown – the same ground which applies to divorce in the case of civil marriage. Courts granting a decree of divorce in a customary marriage arguably have the power to make orders for the division of assets (and for spousal or child maintenance) in the same way as for civil marriages (although there is some ambiguity in the drafting on this point).<sup>10</sup> Section 8(4) of the South African *Recognition of Customary Marriages Act 120 of 1998* reads as follows:

- (4) A court granting a decree for the dissolution of a customary marriage –
  - (a) has the powers contemplated in sections 7 [division of assets and maintenance of parties], 8 [recission, suspension or variation of orders], 9 [forfeiture of patrimonial benefits of marriage] and 10 [costs] of the *Divorce Act, 1979*, and section 24( I ) of the *Matrimonial Property Act, 1984 (Act No. 88 of 1984)* [distribution of matrimonial property upon dissolution of marriage for want of consent of parents or guardian];

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<sup>9</sup> It is not entirely clear if the High Court would be bound by customary law in such cases, subject of course to the requirements of the Namibian Constitution.

<sup>10</sup> Sections 7(3)-(6) of the *Divorce Act* gives the courts broad power to redistribute marital property in certain circumstances, limited however to marriages concluded before the marital property reforms of the 1980s. These powers do not on their face apply to customary marriage. However, it is possible that the court's discretionary powers extend to customary marriages, as section 8(4)(a) of the *Recognition of Customary Marriages Act* does not technically apply the relevant portions of the *Divorce Act*, but rather gives the court the powers contemplated in the relevant sections. No South African case law could be located on this issue. In any event, it has been argued that this judicial discretion *should* be extended to customary divorces. Bronstein "Confronting Custom in the New South African State: An Analysis of the Recognition of Customary Marriages Act 120 of 1998", 16 *SAJHR* 558 (2000) at 570-72. Bronstein believes that the use of judicial discretion for the divisions of assets in customary divorce cases would be a good way to protect heirs who may have an interest in assets inherited by the husband.

In South Africa, the court also has the power to make any appropriate order for maintenance, custody, guardianship or access pertaining to any minor child of a customary marriage, in the same manner as for civil marriages. *Recognition of Customary Marriages Act*, section 8(3), read together with section 6 of the *Divorce Act*.

- (b) *must, in the case of a husband who is a spouse in more than one customary marriage, take into consideration all relevant factors including any contract, agreement or order made in terms of section 7(4), (5), (6) or (7) [allocation of property in polygamous marriages] and must make any equitable order that it deems just;*
- (c) *may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings;*
- (d) *may make an order with regard to the custody or guardianship of any minor child of the marriage; and*
- (e) *may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law ...*

**3.2.1** The South African Law Commission suggested that the choice of general law courts as the forum for customary divorces was compelled by the constitutional provision giving everyone the right to have any dispute resolved “before a court or, where appropriate, another independent and impartial tribunal”.<sup>11</sup> However, the role of family members and traditional tribunals in mediating problems in customary marriages is explicitly acknowledged:

*Nothing in this section [the section on divorce in customary marriage] may be construed as limiting the role, recognised in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by a court.*<sup>12</sup>

**3.3** The Namibian proposals, in contrast, leave the forums and procedures for customary divorce untouched (while making the grounds for divorce consistent with those for civil marriages). However, the Namibian proposals add a right of recourse to the High Court in cases where agreement over property division cannot be reached by the spouses. However, it is not clear from the Namibian proposals whether the High Court would be bound by customary law, or would have discretion to order an equitable distribution of property after considering a range of relevant factors, as in the case of civil marriage.

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<sup>11</sup> South African Law Commission, Project 90 – The Harmonisation of the Common Law and the Indigenous Law, *Discussion Paper 74: Customary Marriage*, at paragraph 7.1.12, referring to section 34 of the South African Constitution.

<sup>12</sup> *Recognition of Customary Marriages Act*, section 8(5).

## Recommendation

### ADDITIONAL REFORMS ON PROPERTY DIVISION IN CUSTOMARY DIVORCE

The Namibian proposal for property division in customary divorce is a compromise approach which attempts to combine accessibility of forum for customary divorce with the protection of the general court system. However, the option of approaching the High Court for assistance in cases where the divorcing spouses cannot reach agreement would not be very realistic in practice for most Namibians. Therefore we would make the following additional recommendations:

- Where agreement on property division cannot be reached, parties should have the option of first approaching the local magistrate's court, with a right of appeal to the High Court if necessary.
- The magistrate's court should have discretion to re-distribute assets in the same way as the proposed Divorce Bill allows for civil marriage, to ensure an equitable division of property regardless of the marital property regime or the applicable customary law. The proposed provision for division of assets and liabilities in civil divorces should be equally applicable to customary divorces in cases where no agreement is reached between the parties.<sup>13</sup>
- If the husband is a spouse in more than one customary marriage, then the court should have a duty to take the interests of the other spouses into consideration, after considering the agreements made in respect of such marriages.
- The court should be required to join any other person who has a sufficient interest in the proceedings where property division is being considered – such as a spouse in another customary marriage with the husband.
- As discussed in the previous chapter, the law should specifically state that the refund of *lobola* will not be enforced as a pre-requisite for the finalisation of a customary divorce.

## South Africa: maintenance

**3.4** The South African Law Commission recommended that maintenance should be available to both spouses and children of customary marriage, both during the existence of the marriage and upon divorce, although it recognised that this would constitute a radical break with previous traditions of customary law. It explained:

<sup>13</sup> This is section 6 in the Draft Divorce Bill appended to LRDC 13.

*Customary law had no concept of post-marital maintenance, since the purpose of divorce was to put an end to the spouses' relationship and that of their families. Wives were expected to return to their guardians, who took over the responsibility for maintaining them. Today, however, women have no guarantee of support from their natal families and they are often left to raise minor children alone.*

The SALC thought that social change justified importing this provision from civil and common law to deal with modern conditions.<sup>14</sup> As a result, the *Recognition of Customary Marriages Act* applies the same provisions on maintenance used in civil divorce to customary divorce.<sup>15</sup>

**3.5** The Namibian proposal for maintenance in customary divorce is similar to that for property division. If the spouses cannot reach agreement on maintenance, then they may approach the High Court to settle the dispute. However, as in the case of property distribution, it is not clear whether the High Court would be expected to follow customary law or the norms which apply to maintenance in civil divorces.

## **Recommendation**

### **ADDITIONAL REFORMS ON MAINTENANCE IN CUSTOMARY DIVORCE**

Child and spousal maintenance in the case of a customary divorce should follow the same rules as in the case of civil divorce. This will ensure that vulnerable women and children are protected where necessary, if the division of property is not adequate for this purpose.

This would be consistent with the *Maintenance Act 9 of 2003* which overrules customary law on maintenance in favour of one set of maintenance rules for all persons in Namibia. For example, section 3(1)(c) provides that both parents of a child are liable to maintain that child regardless of whether the parents are subject to any system of customary law which does not recognise both parents' "liability to maintain a child", while section 3(2) provides a set of guiding principles which apply "notwithstanding anything to the contrary at customary law", and states that "the legal principle, which imposes a legal duty on children to maintain their parents must be applied to children and parents who are subject to customary law".

The law on maintenance in customary divorce, which supplements the rules on property division, should similarly apply a unitary approach to all Namibians.

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<sup>14</sup> See also South African Law Commission, Project 90 – The Harmonisation of the Common Law and the Indigenous Law, *Report on Customary Marriages* (1998) at paragraphs 7.1-7.4 on these points.

<sup>15</sup> See section 8(4)(e) of the *Recognition of Customary Marriages Act 120 of 1998*, quoted above.

## Australia and Sweden: protecting property rights prior to divorce

**3.6** In Australia, property between a married couple is considered separate, so spouses can, in theory, do as they please with their individual property. However, there are certain safeguards that spouses can use prior to dissolution of the marriage to protect property. These safeguards include:

- applying to a court for an injunction to stop property from being sold or the proceeds of sale being disposed of;
- applying for a sole use and occupation order;
- seeking a freeze on bank accounts;
- ending a joint tenancy; or lodging a caveat over property notifying others of the spouse's interest.<sup>16</sup>

**3.7** In Sweden, if one of the spouses reduced their marital property within three years before divorce proceedings without the other spouse's consent, by either making a gift or by using marital property to increase the value of their separate property, that value will be included when each party's marital property shares are determined.<sup>17</sup> The reduction cannot be "insignificant" for this provision to apply.

### Recommendation

#### ADDITIONAL REFORMS ON PROTECTION OF PROPERTY RIGHTS PRIOR TO DIVORCE

Section 8(a) of the proposed Divorce Bill provides some protection against situations where one spouse gives assets away to third parties with the intention of prejudicing the other spouse, in anticipation of divorce. To remedy this situation, all dispositions not made for value within a year of institution of divorce proceedings shall be disregarded, provided they have the effect of reducing the value of the estate by 20% or more.

It is suggested that additional mechanisms similar to those used in Australia and Sweden be considered for addition to the Namibian Divorce Bill, to provide additional protection against transactions intended to frustrate equitable property division in anticipation of divorce.

<sup>16</sup> Attorney General's Office of Australia, "Protecting property" from Fact Sheets on Marriage and Property, online: <http://www.familylaw.gov.au>.

<sup>17</sup> Swedish *Marriage Code*, Chapter 11, section 4.

# Chapter 13

## PROPERTY DIVISION UPON DEATH

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*Marital property is a separate issue from inheritance, even though these two legal concepts are often intertwined in public discourse.*

*When a married person dies, the marital property must be separated before inheritance begins. Separate property is allocated to the spouse who owns it, and joint property must be divided between the two spouses. Inheritance cannot take place until after this process of division of the marital property is complete. Only the marital property which is allocated to the deceased is distributed amongst the deceased's heirs. The property which rightfully belongs to the surviving spouse is not part of the deceased's estate and so is not available for distribution to the deceased's heirs.*

*A separate but obviously related question is whether the surviving spouse has any entitlement to inherit some share of the property of a deceased who died intestate. However, law reform is already underway on the topic of succession at the time of writing, and proposals on this topic have been put forward by the Legal Assistance Centre in separate publications.*

*This chapter will therefore confine its discussion to issues pertaining to the separation of marital property prior to the application of the laws of inheritance.*

**1.1** If the property regimes proposed in this report are adopted, then the first step when a married person dies would be to divide the marital property according to the applicable property regime. This would be true regardless of whether the marriage was a civil or customary marriage. Adoption of the proposed regimes for customary marriage should go a long way towards removing the disadvantages which women currently experience with respect to property ownership in customary marriage.

**1.2** Proposed divorce law reforms for Namibia, discussed in the previous chapter, would give courts discretion to adjust property division to ensure an equitable result, taking into account a specific list of factors, instead of following the applicable marital property regimes strictly. Similar judicial discretion applies to the division of property in divorces in other countries, both in Africa and in jurisdictions in other parts of the world.

**1.3** In South Africa, the fact that such powers of re-distribution apply on divorce but not upon the death of one of the spouses has been criticised. The result is the odd situation that a divorced spouse can be advantaged over a widow (or a widower) in similar circumstances. Accordingly, it has been suggested in South Africa that the redistributive powers applicable in the case of divorce should be applied to all forms of dissolution of marriage.<sup>1</sup>

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<sup>1</sup> Alick Costa, "A plea for enlightened reform", *De Rebus*, May 2003 at 30.

**1.4** The treatment of divorced spouses and widowed spouses is different in many other countries. For example, in Tanzania and in Zimbabwe, there is judicial discretion to re-distribute marital property upon divorce, but this option does not apply where the marriage is dissolved by death.<sup>2</sup>

**1.5** Similar treatment of property division in divorce and death would obviously be difficult, since in the case of death there is only one of the two spouses left to motivate adjustment of the division mandated by the marital property regime.

## Recommendation

### PROTECTING THE SURVIVING SPOUSE IN THE DIVISION OF MARITAL PROPERTY UPON DEATH OF A SPOUSE

Because wide judicial discretion to re-allocate marital property contrary to the marital property regime would be difficult to apply after the death of one spouse, we believe that the interests of a surviving spouse would be better protected by the following mechanisms:

- **Give the government authority which administers estates the duty to ensure that the marital property is in fact divided in accordance with the applicable marital property regimes and any applicable nuptial agreement before distribution amongst the heirs take place.**
- Under the supervision of the administering authority, allow for **limited adjustments**
  - in terms of the *Married Persons Equality Act*
  - for damages for delicts paid by one spouse, or received by one spouse for non-patrimonial damages
  - for damages in respect of delicts committed by one spouse against the other spouse (for injuries resulting from domestic violence, for example) and
  - for any similar items involving matters which were concluded prior to the death of the one spouse.
- Involve civil and customary marriage officers in **public education on the distinction between the division of marital property and inheritance.**

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<sup>2</sup> Tanzania: See JS Read, "A milestone in the integration of personal laws: the new law of marriage and divorce in Tanzania", [1972] 16(1) *J.A.L.* 19 at 32; B Rwezaura, "Tanzania: Family Law and the New Bill of Rights" [1990-91] 29 *Journal of Family Law* 453.

Zimbabwe: Welshman Ncube, "Re-allocation of Matrimonial Property at the Dissolution of Marriage in Zimbabwe" [1990] 30(1) *J.A.L.* 1.

- Make special provision for **treatment of the matrimonial home** in the case of divorce or death, as proposed in the following chapter.

In the case that neither division of the marital property nor the applicable share of inherited property are sufficient to provide adequately for the surviving spouse, make it possible for the surviving spouse to apply for **maintenance from the estate of the deceased spouse** before the remainder of the estate is distributed to the heirs.<sup>3</sup>

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<sup>3</sup> This option is discussed in more detail in Legal Assistance Centre, *Customary laws on Inheritance in Namibia*, 2005.

# Chapter 14

## THE MATRIMONIAL HOME

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Many respondents in our field research suggested special provisions pertaining to the treatment of the matrimonial home in the event of divorce or death. In Namibia, the common law already gives protection to both spouses' right to the family home during the subsistence of the marriage, regardless of who owns the home and regardless of the marital property regime. The question is whether any additional protections are needed during the subsistence of the marriage, and upon divorce or death.

### 1. CURRENT LAW IN NAMIBIA

**1.1** There are certain principles which currently apply to the matrimonial home regardless of the marital property regime which applies to the marriage, and regardless of which spouse owns or leases the home.<sup>1</sup>

**1.2** Both spouses have a right to occupy the matrimonial home, and both are under a reciprocal duty to contribute to its upkeep. Neither spouse has a right to eject the other spouse from the matrimonial home without providing suitable alternative accommodation, even if the matrimonial home is owned by one spouse alone.<sup>2</sup>

**1.3** A similar principle applies to the appurtenances of the matrimonial home, such as the furniture. As one court said, a spouse's right of occupation cannot "be reduced to the empty shell of the matrimonial home".<sup>3</sup>

**1.4** The right to remain in the matrimonial home is not absolute, but depends "on the merits of the matrimonial dispute".<sup>4</sup> A spouse has the right to protect his or her occupation of the matrimonial home against interference by the other spouse, which occurs most often in the form of domestic violence or threats of such violence. The traditional remedy in such cases has been to seek an interdict from the High Court restraining the violent spouse from remaining in or entering the matrimonial home.<sup>5</sup>

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<sup>1</sup> This, according to Hahlo, is one of the "invariable consequences of marriage". Hahlo, *The South African Law of Husband and Wife* (4<sup>th</sup> edition, 1975) (hereinafter "Hahlo (4<sup>th</sup> edition)") at 121-22.

<sup>2</sup> See Hahlo (4<sup>th</sup> edition) (n 1) at 121; June Sinclair, *The Law of Marriage, Volume I* (Juta, 1996) at 476, citing *Owen* 1968 (1) SA 480 (E) and *Badenhorst* 1964 (2) SA 676 (T). See also, for example, *Oglodzinski* 1976 (4) SA 273 (D).

<sup>3</sup> Hahlo (4<sup>th</sup> edition) (n 1) at 122, citing *Whittingham* 1974 (2) SA 636 (R) and *Petersen* 1974 (1) PH B5 (R). The quote comes from *Whittingham* at 637.

See also, for example, *Du Randt* 1995 (1) SA 401 (O) (motor vehicle); *Ross* 1994 (1) SA 865 (E) (household goods); *Manga* 1992 (4) SA 502 (ZSC) (car and furniture); *Coetzee* 1982 (1) SA 933 (C) (car); *Rosenbruch* 1975 (1) SA 181 (W) (furniture).

<sup>4</sup> *Badenhorst* 1964 (2) SA 676 (T) at 679.

<sup>5</sup> See Sinclair (n 2) at 477, note 236.

The court will grant such an order where, as occurred in *Badenhorst*, “a prima facie case has been made out of a reasonable fear of molestation”.<sup>6</sup>

**1.4.1** Significantly, in the *Lovell* case, where there were allegations of domestic violence by both parties, the applicant wife was granted occupation of the matrimonial home, not on the basis that she was the registered owner, but because she was the carer of the two children who “not being of school going age should be returned to their home”.<sup>7</sup>

**1.5** A more accessible alternative is now provided by the *Combating of Domestic Violence Act 4 of 2003*, which makes it possible in cases of physical abuse for the victim to seek a protection order from a magistrate’s court evicting the abusive spouse from the joint household, regardless of which spouse owns or leases the residence. Such an order can also direct that the contents of the joint residence (or certain specified contents) must be left in the residence for the use of the spouse who is granted possession.<sup>8</sup>

**1.5.1** The court must consider the following factors:

- the length of time that the residence has been shared by the complainant and the respondent, but without prejudicing the complainant on the grounds that he or she has at any stage fled the common residence to assure his or her safety or the safety of any child or other person in the complainant’s care;
- the accommodation needs of the complainant and any other occupants of the residence, considered in light of the need to secure the health, safety and well-being of the complainant or
- any child or other person in the care of the complainant
- any undue hardship that may be caused to the respondent or to
- any other person as a result of such order
- in the case of communal land, the respective customary practice which governs the rights of ownership or occupation of that communal land.<sup>9</sup>

**1.6** In general, the right of a spouse to remain in the matrimonial home is enforceable only against the other spouse, not against third parties.<sup>10</sup>

**1.6.1** However, it has been held that while a landlord would have the right to evict a couple from their matrimonial home, the landlord could not evict one spouse if the other spouse had a right to remain.<sup>11</sup>

**1.7** Where a spouse is in peaceful and undisturbed possession of the matrimonial home and its contents and the other spouse unlawfully deprives the first spouse of such possession, the first spouse can apply for a *mandament van spolie*, also known as a

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<sup>6</sup> *Badenhorst* 1964 (2) SA 676 (T) at 679.

<sup>7</sup> *Lovell* 1980(4) SA 90 (T)

<sup>8</sup> See section 14(2)(c) of the *Combating of Domestic Violence Act 4 of 2003*.

<sup>9</sup> *Id.*

<sup>10</sup> Hahlo (4<sup>th</sup> edition) (n 1) at 122, citing *Tabha v Fyzoo* 1965 (1) SA 461 (N); *Norden NO v Bhanki* 1974 (4) SA 647 (AD); *Cattle Breeders Farm (Pvt) Ltd v Veldman* 1973 (2) PH B14 (R).

<sup>11</sup> *Cattle Breeders Farm (Pvt) Ltd v Veldman* 1973 (2) PH B14 (R).

spoliation order. Such an order is designed to prevent people from taking the law into their own hands. The legal rule is that disputes about property must be resolved through the operation of the law, and not by one party simply taking things away from the other by force. Thus, a spoliation order directs the person who deprived someone of peaceful possession of property, to return that property to the possessor. The person seeking the order does not have to prove that he or she owns the property or has an undisputed right to it, but simply that he or she was in peaceful possession of it. Once the property is restored to the possessor, then other legal action can be taken to resolve disputes about the ultimate disposition of the property.<sup>12</sup>

## 2. OVERVIEW OF POSITION IN OTHER JURISDICTIONS

**2.1** The Committee on Economic, Social and Cultural Rights has stated that “... *the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head, or views shelter exclusively as a commodity. Rather, it should be seen as the right to live somewhere in security, peace and dignity.*”<sup>13</sup>

**2.2** Protection of the family home is a natural corollary of constitutional provisions which give protection to the family unit. The home is “... *not just a place of physical shelter and security but also emotional shelter and security*” for the whole family.<sup>14</sup>

**2.3** What does protection of the family home mean? The family home in most jurisdictions is defined as encompassing the “*dwelling in which a married couple ordinarily resides*” and the surrounding land.<sup>15</sup> The concept of the home may sometimes include household contents as well as the home itself. Protection of the family home refers to a right of occupation regardless of title. It is particularly important where the title vests in one spouse.

**2.3.1** Circumstances where the family home may necessitate special protection in the interests of the untitled spouse are:

- improvident transactions by the spouse who holds the title
- protection against creditors
- domestic violence
- property adjustment in separation and divorce proceedings
- inheritance.

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<sup>12</sup> Sinclair (n 2) at 478-ff, citing *Rosenbuch* 1975 (1) SA 181 (W); *Oglodzinski* 1976 (4) SA 273 (D); *Ross* 1994 (1) SA 865 (SE); *Manga* 1992 (4) SA 502 (ZSC); *Coetzee* 1982 (1) SA 933 (C); and *Du Randt* 1995 (1) SA 401 (O). See also *Sonnekus* at 36, citing *Mans* [1999] 3 All SA 506 (C).

<sup>13</sup> Committee on Economic, Social and Cultural Rights, General Recommendation No 4, para 7.

<sup>14</sup> Dr Tom Altobelli, “The Family Home in Australian Law”, Australian Institute of Family Studies Conference, 2000, [www.aifs.gov.au/institute/afrc7/altobelli.pdf](http://www.aifs.gov.au/institute/afrc7/altobelli.pdf).

<sup>15</sup> For example, in Ireland, section 2 of the *Family Home Protection Act 1976* defines the family home to include “any garden or portion of ground attached to and usually occupied with the dwelling or otherwise required for the amenity or convenience of the dwelling”.

**2.3.2** Most jurisdictions which protect the family home in law make provision for improvident transactions by the titled spouse, cases of domestic violence, property adjustment proceedings and inheritance. A more limited number of jurisdictions protect the family home against unsecured creditors.

### 3. LEGAL MECHANISMS TO PROTECT THE FAMILY HOME DURING MARRIAGE

**3.1** In considering the following information, it should be kept in mind that the manner in which the family home is protected is often dependent on the marital property system which applies in the jurisdiction in question.<sup>16</sup>

**3.2 New Zealand:** The *Property Relationships Act 1976* states that “... each of the spouses or de facto partners is entitled to share equally in ... the family home ...”<sup>17</sup> as part of relationship property. Additionally, “each spouse or de facto partner has a protected interest in the family home”<sup>18</sup> and the protected interest “is not liable for the unsecured debts of the spouse or de facto partner other than an unsecured debt incurred by the spouses or de facto partners jointly, or by the spouse or de facto partner subsequently declared, for the purpose of acquiring, improving or repairing the family home”.<sup>19</sup>

**3.2.1** Prior to the enactment of the *Property Relationships Act 1976*, the *Joint Family Homes Act 1964* exclusively protected the family home. It provided for the registration of property as the joint family home. Under section 9 of the act, this had the effect of granting the husband and wife equal rights in connection with possession, use and enjoyment of the registered property, and upon the death of either, the registered property would become the property of the survivor.<sup>20</sup> Additionally, it allowed the “settlor to pay all debts other than debts charged on the property ... without the aid of that property.”<sup>21</sup>

**3.3 Canada:** Provincial legislation gives both parties an equal right to live in the matrimonial home during the marriage. This right of possession applies regardless of whether the home is owned by one spouse or the other, or both. This means that

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<sup>16</sup> For example in countries such as Canada and New Zealand, where there is a rebuttable presumption of co-ownership in property adjustment proceedings, protection of the family home is less important than in jurisdictions where the property system is “out of community of property”.

<sup>17</sup> *Property Relationships Act 1976*, section 11(1)(a).

<sup>18</sup> Section 20B (1).

<sup>19</sup> Section 20B (2).

<sup>20</sup> Section 9(2)(a)-(b).

<sup>21</sup> *Joint Family Homes Act 1964*, section 3B. Although the *Property Relationships Act 1976* expressly states that nothing in the act with regard to the family home derogates from the provisions of the *Joint Family Homes Act 1964*, the present utility of the earlier act has been debated. The future of the act was the topic of a recent Law Commission Report, which recommended that it be repealed. The only surviving benefit is protection against unsecured creditors, and it was suggested that this be replaced with a blanket protection up to the amount of the specified sum of the bankrupt’s principal dwelling house. Law Commission of New Zealand, Report 77, *The Future of the Joint Family Homes Act*, December 2001 at 8.

neither spouse can alienate the house or have an encumbrance placed on the title without the other's agreement, or a court order to that effect.<sup>22</sup>

**3.3.1** For example, in Nova Scotia, section 8(1) of the *Matrimonial Property Act* states that neither spouse shall dispose of or encumber any interest in a matrimonial home unless the other spouse has consented or released his or her interest in the home, a court order has been obtained allowing the transaction, or the house has not been designated a matrimonial home but instead another property has been designated. Subsection 8(2) provides that if 8(1) is breached, the court can set aside the transaction. A similar provision is provided in Section 21 of the Ontario *Family Law Act*.

**3.3.2** The matrimonial home is defined similarly in both the Ontario and Nova Scotia acts. In Nova Scotia the matrimonial home is defined as meaning "the dwelling and real property occupied by a person and that person's spouse as their family residence in which either or both of them have a property interest other than a leasehold interest". In Ontario, section 18 of the *Family Law Act* states that "every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home".

**3.3.3** According to the Ontario Law Reform Commission "... *the matrimonial home must be made the subject of separate treatment corresponding to its special significance as a major asset, a basic family shelter, and a focal point for family activity and as such requires occupational rights in it to be secured ...*"<sup>23</sup>

**3.4 Australia:** Unlike New Zealand or Canada, the law in Australia provides no special protection for the family home except in so far as the property regime protects it by virtue of the presumption of co-ownership. However, reformers have argued that there is a need for special treatment of the family home in Australian law, particularly when the interests of minor children are involved.<sup>24</sup>

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<sup>22</sup> Provincial/Territorial Law on Matrimonial Property, Government of Canada Website: <http://canada.gc.ca/>.

For example, under section 20 of Part II of the *Family Law Act 1990* of Ontario, an order for exclusive possession may be granted to one spouse. In determining whether to make such an order the court may consider the best interests of the children affected, any existing family property orders under the act, the financial position of both spouses, any written agreement between the parties, the availability of other suitable and affordable accommodation and any violence committed by a spouse against the other spouse or the children. Additionally, in determining the best interest of a child the court shall consider the possible disruptive effects on the child of a move to other accommodation and the child's views and preferences if they can reasonably be ascertained. Ontario *Family Law Act 1990*, section 24 (3)-(4).

In terms of Part 5 of the *Family Relations Act 1996* of British Columbia, each spouse is entitled to an undivided interest in a family asset as a tenant in common. "Family asset" is defined as property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose. British Columbia *Family Relations Act 1996*, Part 5, sections 56(2) and 58(2).

<sup>23</sup> Ontario Law Reform Commission, *Report on Family Law Part IV Family Property Law 1974- 1975* at 53.

<sup>24</sup> Altobelli (n 14).

**3.5 Finland:** The Law of Marriage 1987 places restrictions on unilateral dispositions of the matrimonial home. These restrictions apply to property used solely or mainly as a matrimonial home, regardless of which spouse holds the title to the property.<sup>25</sup>

**3.6 Sweden:** The Marriage Code of 1987 places restrictions on the matrimonial home and its contents. These assets cannot be disposed of or encumbered without the consent of the other spouse.<sup>26</sup>

**3.6.1** A spouse cannot alienate, mortgage, grant the use of, pledge as security, or let the spouses' joint dwelling without the consent of the other spouse.<sup>27</sup> A joint dwelling is real property held by both or one of the spouses which is intended to be the joint home of the parties and is used as such.<sup>28</sup> Similar restrictions are placed upon the household goods, which include furniture, domestic appliances and other chattels intended to be used for the joint home.

**3.7 The Netherlands:** Law on matrimonial property<sup>29</sup> in the Netherlands forbids transactions concerning the family home without the consent of both spouses.<sup>30</sup>

**3.8 Ireland:** The *Family Home Protection Act 1976*, as amended by the *Family Law Act 1995*, provides that where a spouse, without the prior written consent of the other spouse, purports to convey any interest in the family home to any person except the other spouse, the conveyance will be void.<sup>31</sup>

**3.8.1** There are certain circumstances upon which the court will dispense with the consent requirement, after having considered the respective needs and resources of the spouses and of the dependent children:

- where the spouse whose consent is required has alternative suitable accommodation
- where desertion is proved or
- the other spouse is incapable of consenting by reason of unsoundness of mind.

**3.8.2** Additionally, the court may on the application of a spouse, make any appropriate order in a case where the other spouse is engaging in conduct that may lead to the loss of any interest in the family home or may render it unsuitable

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<sup>25</sup> David Bradley, *Politics, Culture and Family Law in Finland: Comparative Approaches to the Institution of Marriage*, at 300.

<sup>26</sup> Swedish *Marriage Code*, Chapter 7, section 3.

<sup>27</sup> *Id.*

<sup>28</sup> *Ibid*, section 4.

<sup>29</sup> Civil Code Title 7 of Book 1. This law is under review at the time of writing. See Masha Antokolkaiia and Katherina Boele-Woelke. "Dutch Family Law in the 21<sup>st</sup> Century: Trend Setting and Stragglng Behind at the Same Time", Netherlands Comparative Law Association, at 8.

<sup>30</sup> *Family Home Protection Act 1976*, article 1:88.

<sup>31</sup> *Family Home Protection Act 1976*, section 3.

for habitation as a family home, with the intention of depriving the applicant spouse or a dependent child of the family of his residence in the family home.<sup>32</sup>

**3.9 England:** The spouse without title can register a right of occupation in the marital home which then enjoys protection against third parties, including creditors of the spouse who has title to the property if that spouse is insolvent. Once the right of occupancy is registered, it can be terminated or restricted only by judicial order. Sale of the house to cover debts can be postponed in such cases, after consideration of the interests of the creditors, the needs and resources of the solvent spouse and the needs of the children.<sup>33</sup>

**3.10 Botswana:** In terms of a 1996 Amendment to the *Deeds Registry Act*, both spouses must be present to register any action affecting immovable property, such as sale, transfer or other alienation.

**3.11 Ethiopia:** The *Revised Family Code of 2000* grants spouses equal rights in the management of the family and provides for community of property in relation to property acquired after marriage. This law creates a presumption of common property for all property registered in the name of one spouse, and requires the consent of both spouses for property transfers.<sup>34</sup> It also envisages joint administration of family property.<sup>35</sup>

**3.12 Uganda:** The *Land Act* prohibits practices or transactions which limit women's entitlement to land or are likely to deny them rights to land where the family normally resides.<sup>36</sup> This law stresses the need to ensure that the rights of women and children are not damaged in the process and presumes that household property is co-owned.<sup>37</sup> It is argued that indirect non-financial contributions such as caring for the children justify such an interest; women "*have the right to co-own land with their husbands as compensation for their labour in the fields, home and caring for household members*".<sup>38</sup>

**3.13 Tanzania:** Because the property regime provided for married couples is a separation of property system, each party has control of their own assets. An exception is made for the matrimonial home, however. Under the *Law of Marriage Act 1971*, alienation of the matrimonial home is forbidden without the consent of the other spouse, and "... *in the event of alienation without consent, the right of the spouse to reside in the home is an over-riding interest unless the purchaser satisfied the court that he had no*

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<sup>32</sup> Section 5.

<sup>33</sup> Sinclair (n 2) at 481-82. Sinclair suggests that "South African law should not be insensitive to this problem".

<sup>34</sup> *Revised Family Code 2000*, articles 58, 62, 63 and 68.

<sup>35</sup> *Ibid*, article 66.

<sup>36</sup> "The economic role of women in agricultural and rural development: revisiting the legal environment," Summary report of a seminar, Kampala, Uganda, 19-23 February 2001, [www.cta.int/pubs/women/](http://www.cta.int/pubs/women/) at 44.

<sup>37</sup> *Ibid* at 45.

<sup>38</sup> Ali Maria Tripp, "Women's Movements, Customary Law and Land Rights in Africa: the case of Uganda", *African Studies Quarterly*, [www.africa.ufl.edu/asq/v7/v7i4a1.htm](http://www.africa.ufl.edu/asq/v7/v7i4a1.htm) at 11.

notice of the spouse's interest and could not by the exercise of reasonable diligence have become aware of it". A deserted spouse can be evicted from the matrimonial home only on sale by the court in execution of a decree against the spouse, or by a trustee in bankruptcy of the spouse. The *Land Act 1998*, which affirms the equality of men's and women's land rights,<sup>39</sup> creates a presumption of spousal co-ownership of family land.<sup>40</sup> In the case of borrower default the lender must serve a notice to the borrower's spouse before selling the mortgaged land.<sup>41</sup>

**3.14** A recent report by the Centre on Housing Rights and Evictions makes practical recommendations with regard to registration of land in order to enhance implementation. It recommends that property gained during marriage should be registered in the name of both spouses in order to ensure that once the marriage is dissolved either spouse is entitled to maintain an interest in the marital property, including the home and the land. It also recommends that systems for registration of property should be readily accessible, and that documentary proof of registration should be given to both spouses.<sup>42</sup>

## Recommendation

### AMENDMENTS TO THE *MARRIED PERSONS EQUALITY ACT ON THE MATRIMONIAL HOME*

Despite the protections already contained in the common law and the *Combating of Domestic Violence Act*, it would be helpful to enact added protection for the matrimonial home in the *Married Persons Equality Act*.

The matrimonial home should be defined as encompassing the dwelling and the land immediately surrounding the dwelling where a married couple ordinarily resides.

Both spouses should have an explicit right to occupy the matrimonial home, and both should be put on notice by statute that they are under a reciprocal duty to contribute to its upkeep.

Regardless of the marital property regime which applies to a marriage, and regardless of which spouse owns the title to the matrimonial home (or in

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<sup>39</sup> Section 3(2); see Lorenzo Cotula, "Chapter II Women's Right's to Land and Other Natural Resources", *Gender and law: women's rights in agriculture*, FAO Legislative Studies, 2002, available online at <http://www.fao.org/documents/>.

<sup>40</sup> Section 161; see *ibid*.

<sup>41</sup> Section 112(3); see *ibid*.

<sup>42</sup> Centre on Housing Rights and Evictions (COHRE), *Bringing Equality Home, Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa*, 2004 (hereinafter "COHRE") at 5.7 Recommendation for Model Legislation on Inheritance.

the case of communal land, the relevant communal land right), no spouse should be competent to engage in any transaction pertaining to the matrimonial home or its ordinary household contents – including buying, selling, donating or encumbering the home and contents – without the written consent of the other spouse. This rule should be equally applicable to civil and customary marriages.

## 4. TREATMENT OF FAMILY HOME UPON DISSOLUTION OF MARRIAGE BY DIVORCE

**4.1** In many jurisdictions, it is possible for one spouse to continue living in the marital home after a divorce, regardless of the property regime in question and regardless of who owns the home. This can be based on need, or on which spouse takes custody of the children. The division of the marital property can be adjusted at the time to take into account the occupation of the home by one spouse, or the house can be sold and the proceeds divided appropriately at a later stage, such as when the children have completed their schooling.

**4.2 Canada:** In certain circumstances the court may award sole or exclusive possession of the marital home to one spouse.<sup>43</sup> This is usually awarded to the spouse who has custody of the children, on the theory that it is in the best interests of the children to continue living in the matrimonial home. Exclusive possession can also be awarded when adequate housing cannot be obtained for a price similar to the cost of maintaining the marital home. In situations where there are no children, but both spouses wish to remain in the marital home after the divorce, then the court would look at any extenuating circumstances that would require one spouse to remain in possession of the marital home. This could include the financial position of either spouse, any written agreements between the two, or the availability of alternative accommodation that is affordable and adequate.<sup>44</sup>

**4.2.1** One very interesting factor to be considered in an application for exclusive possession found in the Ontario legislation is whether or not violence had occurred by one spouse towards another.<sup>45</sup> This consideration shows that the court is aware that violence in the home often leads to the abused spouse fleeing when left with no other alternative. The argument would then be made that the abused spouse left the home and therefore showed little intention of wanting to stay in the home. Under this legislation the court would be allowed to take into

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<sup>43</sup> Nova Scotia *Matrimonial Property Act*, section 11; Ontario *Family Law Act*, section 24.

<sup>44</sup> Section 24(3) of the Ontario *Family Law Act* lists the following criteria for an order for exclusive possession: (a) the best interests of the children affected; (b) any existing orders under Part 1 (Family Property) and any existing support orders; (c) the financial position of both spouses; (d) any written agreement between the parties; (e) the availability of other suitable and affordable accommodation; and (f) any violence committed by a spouse against the other spouse or the children.

<sup>45</sup> Ontario *Family Law Act*, section 24(3)(f).

consideration that although the one spouse deserted the marital home, he or she did so only for fear of their safety and therefore the “desertion” should not have any bearing on future intentions.

**4.3 Sweden:** Without going into the intricacies of the underlying marital property system in Sweden, the *Marriage Code* provides that the spouse “most in need” of the joint dwelling shall be entitled to receive this asset upon divorce.<sup>46</sup> It must be “reasonable” to give it to the spouse in need of it. The party who receives the dwelling must include this asset in their share of the property, and if this asset brings the value of their marital property above that of their spouse, then they will have to surrender property or a corresponding sum of money to equalise the spouses’ marital property.

**4.4 Norway:** With respect to the family home, even if it is owned by one spouse, the other spouse can be entitled to receive it in the division process “when special reasons so indicate”.<sup>47</sup> Special reasons involve the needs of the spouse and the children.<sup>48</sup> This amount would be added to the value of the joint property the receiving spouse has, and if their total exceeds 50% of the total value of joint property between the couples, as in the normal equalisation process, the receiving spouse must make a payment to the other spouse. At times, a spouse will be given the right to “possess” the family home for a period following divorce (depending on the needs of the respective spouses and the children), despite the fact that the other spouse has ownership of the home and continues to do so after the division.<sup>49</sup>

**4.5 Australia:** The spouse who is awarded custody of the children will normally continue to reside in the family home, but will likely have reduced property rights in other areas of the couple’s financial resources. The court is empowered to order that the house not be sold until all of the children of the marriage have finished their education.<sup>50</sup>

**4.6 Tongo:** In Tonga a spouse can make an application to the court to live in the matrimonial home upon divorce, even though title is in the other spouse’s name. This is dependent on the children being of school-going age, and is terminated upon remarriage. However, such an order will not be made in favour of the wife if the matrimonial home is in the husband’s village.<sup>51</sup>

**4.7 Kenya:** In Kenya, marital property is divided with reference to the English *Married Women’s Property Act 1882*, which is a vestige of British colonial occupation. Marital property is essentially separate property – which means that each spouse retains whatever she or he owned before marriage, as well as what he or she acquired during

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<sup>46</sup> Swedish *Marriage Code*, Chapter 11, section 8.

<sup>47</sup> Ministry of Children and Family Affairs, “Property Relations Between Spouses” 1995 at 14.

<sup>48</sup> Id.

<sup>49</sup> Id at 15.

<sup>50</sup> See *Family Law Act 1975*; M Lefebvre, “Property Division on Marriage Breakdown”, seminar paper presented 25 June 1998; online: <http://www.netSPACE.net.au/~barkers/Family/mjlseminar.htm>.

<sup>51</sup> Catholic Women’s League of Tonga, “Matrimonial Property and Land Rights”, available online at <http://www.rtt.org.fj/TONGA/RESOURCES/LEAFLETS/TOPR.HTM>.

marriage. However, despite this underlying concept of separate property, the courts have recently moved towards a fair (although not always equal) division of property based on the financial and non-financial contributions made by both spouses. This approach has been applied to marriages under both customary law and Islamic law, as well as to civil marriages.<sup>52</sup> Within this system, a non-titled spouse has a vested interest in the family home if he or she can establish direct or indirect financial contributions to it.<sup>53</sup> In the decision of *Kivuitu v Kivuitu*,<sup>54</sup> contributions were extended to encompass non-financial forms such as the work of an urban housewife and a wife of a rural home. Justice Omollo stated that “these women do definitely contribute to the acquisition of property even though their contribution is not quantified in monetary terms.”<sup>55</sup> The cases of *Nderitu*<sup>56</sup> and *Kimani*<sup>57</sup> indicate that there is no basis for awarding a spouse a beneficial interest in property held by the other spouse in the absence of strict proof of contribution. However, Nyamu-Musembi argues that “once it is established that a couple are married for a certain period of years ... there should be a presumption in favour of equal ownership, at least of the matrimonial home and its contents. The burden of proof should shift to the party claiming that the non-title-holding spouse has no entitlement to the family assets”.<sup>58</sup>

## Recommendation

### TREATMENT OF MATRIMONIAL HOME ON DIVORCE

The law reform proposals put forward for Namibia in respect of divorce propose fairly broad judicial discretion for re-allocating and re-distributing marital property, but do not make any specific mention of the matrimonial home.<sup>59</sup>

<sup>52</sup> Celestine Nyamu-Musembi, “Sitting on her husband’s back with her hands in his pockets’: Commentary on Judicial Decision-Making in Marital Property cases in Kenya”, *International Survey of Family Law* 2002 at 229-ff. *Kivuitu v Kivuitu* [1991] 2 *Kenyan Appeal Review* 241 was the seminal case on non-financial contributions. The *Nderitu* case (Civil Appeal No 203 of 1997, Nairobi) held that child-bearing counts as a contribution to family welfare and creates an entitlement to marital assets.

<sup>53</sup> Indirect financial contributions involved payment for the household expenses and education of the children (*I v I* 1971 East African Law reports). In *Karanja* (1976 Kenya Law Reports 307) the court emphasised a wife’s ability to use her income from employment to meet household expenses, thus freeing up her husband’s income and enabling him to invest in acquisition of property.

<sup>54</sup> 1991 2 *Kenyan Appeal Reports* 241.

<sup>55</sup> Celestine Nyamu-Musembi, “Sitting on her husband’s back with her hands in his pockets’: Commentary on Judicial Decision-Making in Marital Property Cases in Kenya”, *International Survey of Family Law*, 2002 at 235.

<sup>56</sup> Civil Appeal No 203 of 1997 (Nairobi).

<sup>57</sup> *Beatrice Wanjiru Kimani v Evanson Kimani Njoroge* High Court Civil Case No 1610 of 1995.

<sup>58</sup> Nyamu-Musembi (n 55) at 236.

<sup>59</sup> Law Reform and Development Commission, *Report on Divorce*, Project 8, LRDC 13, November 2004.

The judicial discretion proposed in connection with divorce should be extended to allow for an award of the matrimonial home and its contents to one spouse, regardless of the marital property regime, or for a right of occupation on the part of the spouse with custody of the children in appropriate cases, for a temporary period, or until the children have completed their schooling. Custody of the children should not automatically lead to retention of the matrimonial home, as this might encourage parents to seek custody for the wrong reasons.

In exercising judicial discretion with respect to the matrimonial home, the court should consider factors similar to those enumerated in section 14(2)(c) of the *Combating of Domestic Violence Act 4 of 2003*.

- the length of time that the residence has been shared by the spouses
- the accommodation needs of the spouses and any other occupants of the residence
- the interests of any child or other person in the care of either spouse
- any undue hardship that may be caused to either spouse or to any other person as a result of an order pertaining to the matrimonial home.

The court should also consider the amount of assets available to the other spouse if the matrimonial home is placed aside for the occupation of one spouse.

## 5. TREATMENT OF FAMILY HOME UPON DISSOLUTION OF MARRIAGE BY DEATH

**5.1** Once again, there are many jurisdictions where the surviving spouse retains the marital home upon the death of the other spouse, regardless of the property regime in question and regardless of who owns the home.

**5.2** The states of the African Union have a special obligation to protect the surviving spouse's right to occupy the matrimonial home after the death of the other spouse. The Protocol to the African Charter on the Rights of Women (which Namibia has joined) guarantees the right of the surviving spouse to reside in the matrimonial home: "... *In the event of death, the surviving spouse has a right, whatever the matrimonial regime, to continue living in the matrimonial home.*"<sup>60</sup>

**5.3 Ghana:** Section 3 and 4 of the *Intestate Succession Law* provide that if the estate of a deceased only includes one house, the surviving spouse and/or children shall be entitled to that house and the household chattels. Section 18 defines household chattels as including jewellery, clothing, furniture and furnishings, refrigerator, television,

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<sup>60</sup> Protocol to the African Charter on the Rights of Women, Article 21.

radiogram, other electrical and electronic appliances, kitchen and laundry equipment, simple agricultural equipment, hunting equipment, books, motor vehicles other than vehicles used wholly for commercial purposes, and household livestock.

**5.3.1** If the estate has two or more houses, then the spouse and the children shall together determine which of the houses each shall take. If they cannot decide, the High Court is to decide for them.

**5.3.2** The spouse and children hold the house in question as tenants in common.<sup>61</sup>

**5.3.3** These rules apply to all marriages in Ghana, both civil and customary.

**5.3.4** An amendment to the 1985 law, the *Intestate Succession Law Amendment 1991*, prohibits any person from ejecting a spouse or child from the matrimonial home prior to the distribution of the estate, irrespective of whether the deceased person died testate or intestate. Anyone who attempts to or succeeds in ejecting the surviving entitled spouse from the home is liable to a large fine and imprisonment not exceeding one year. This amendment has helped in keeping women in their marital homes.

**5.3.5** However, problems have been created by section 16(c) of the act which states that a surviving spouse or child cannot be ejected “... where the matrimonial home is the family house of the deceased, unless a period of six months has expired from the date of the death of the deceased”. The problem is that this clause has been misinterpreted by some (perhaps deliberately) to mean that the widow *must* be ejected six months after the death of her husband.<sup>62</sup>

**5.4 Zimbabwe:** Zimbabwe’s *Administration of Estates Act* was amended in 1997 to provide that, if the deceased was married under civil law, then the surviving spouse is automatically entitled to ownership of the matrimonial home. Similar provision is made for customary marriages, with multiple wives to take ownership of the houses in which they were living, or if they were sharing a home to continue this arrangement if possible. However, there is reportedly still a huge gap between what the law says and what happens in practice.<sup>63</sup>

**5.5 Zambia:** Under Section 9 of the *Intestate Succession Act 1989* the deceased’s surviving spouse or spouses and children are entitled to the house (if any) as tenants in common. This right terminates upon remarriage, but as long as the surviving spouse remains unmarried, she or he enjoys a life interest in the common property and all the rights of a co-owner. Even though the surviving spouse’s interest in the common property (as a tenant in common) is real property, she or he cannot, on this basis alone, force the other co-owners to dissolve the tenancy in common. Problems sometimes arise between the children of the deceased spouse by a person other than the surviving

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<sup>61</sup> COHRE at 60.

<sup>62</sup> Ibid at 62-63.

<sup>63</sup> Ibid at 167-69.

spouse, and between surviving co-wives. The only way the surviving spouse or any other beneficiary can have a separate individual share of the estate is by the partition of the property or by sale in lieu of partition and the distribution of the proceeds of sale, rent for occupation and consensual buy out.

## **Recommendation**

### **TREATMENT OF MATRIMONIAL HOME UPON DEATH OF SPOUSE**

The primary function of inheritance rules should be to minimise the disruptive effect of the death on the family unit. In light of this principle, we recommend allowing the surviving spouse and any minor children who were residing in the house at the time of the death of the deceased to retain a right of residence as tenants in common, which would cease in respect of the spouse upon remarriage or in respect of the children upon attaining the age of majority. The basic household furnishings should remain with the marital home during the period of continued residence by the spouse and/or children.

The value of the house (if any) should form part of the estate along with all other property and ultimately be distributed in the same way as the rest of the estate – the distribution should merely be deferred. Rent for occupation and/or consensual buy-out could be provided as mechanisms for adjustment, as in the case of Zambia. If the surviving spouse and children did not wish to remain in the home at any stage during their entitlement to it, the deferred distribution could then proceed.

This approach may admittedly disadvantage other heirs if the house is the main component of the estate. However, in a small estate, the distribution of percentages to a wide range of heirs is unlikely to satisfy the needs of all of these family members even if the house is included. It would seem better to at least allow the household of the deceased to remain intact in such cases.

The *Communal Land Reform Act 5 of 2002* already allows widows and widowers to remain on the deceased's communal land. If no similar provision is applied to households outside communal areas, then it could be argued that spouses outside communal areas are being discriminated against as compared to spouses inside communal areas.

Such a reform would bring Namibia in line with the African Charter on the Rights of Women in Africa.

Prohibitions on property-grabbing should clearly forbid any person from ejecting a spouse or child from the matrimonial home prior to the distribution of the estate.

# Chapter 15

## MUSLIM MARRIAGES

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*In South Africa, the South African Law Reform and Development Commission has proposed an Islamic Marriages Bill to make special provision for Muslim marriages. This chapter examines the question of whether Namibia needs any legislative action on Muslim marriages.*

### 1. RECENT SOUTH AFRICA CASE LAW ON MUSLIM MARRIAGES

**1.1** Historically, Muslim marriages have not been recognised in South Africa because the South African courts regarded such marriages as potentially polygamous, describing such marriages as *contra boni mores* and as “recognized concubinage”.<sup>1</sup> For example, in the 1983 *Ismail* case, the court stated:

*The concept of marriage as a monogamous union is firmly entrenched in our society and the recognition of polygamy would, undoubtedly, tend to prejudice or undermine the status of marriage as we know it; and from a purely practical point of view it would, in my view, also be unwise to accord recognition to polygamous unions for the simple reason that all our marriage and family laws – and to some extent also our laws of succession – are primarily designed for monogamous relationships ... Furthermore, in view of the growing trend in favour of the recognition of complete equality between marriage partners, the recognition of polygamous unions solemnized under the tenets of the Muslim faith may even be regarded as a retrograde step; ex facie the pleadings, a Muslim wife does not participate in the marriage ceremony; and while her husband has the right to terminate their marriage unilaterally by simply issuing three ‘talaaqi’, without having to show good cause, the wife can obtain an annulment of the marriage only if she can satisfy the Moulana that her husband has been guilty of misconduct. While this may be consistent with the tenets of the Muslim faith, it is entirely foreign to our notion of a conjugal relationship. I also mention, in passing, that it seems unlikely that the on-reception of polygamous unions will cause any real hardship to the members of the Muslim community, except, perhaps, in isolated instances. According to the pleadings, only about 2 per cent of all Muslim males in South Africa have more than one wife. This means that approximately 98 percent of all Muslim males have either contracted valid civil marriages or de facto monogamous unions [which can be converted into de jure monogamous unions by means of transforming them into civil marriages]. In the result, I have come to the conclusion that the polygamous union between the parties in the instant case must be regarded as void on the grounds of public policy.<sup>2</sup>*

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<sup>1</sup> *Ismail v Ismail* 1983 (1) SA 1006 (AD); *Brown v Fritz Brown’s Executors and Others* (1860) 3 Searle 313 at 318.

<sup>2</sup> *Ismail* (n 1) at 1024E-1025B.

**1.2** Thus, while Muslim unions may have been regarded as marriages in terms of the prescriptions of Islam, they have been relegated to the legal status of cohabitation where they do not comply with the formalities prescribed in the *Marriage Act*.<sup>3</sup>

**1.3** The first case in the “new South Africa” which was confronted with the issue of Muslim Personal Law and the consequences of a Muslim marriage was **Rylands v Edros**.<sup>4</sup> In this case, the court for the first time removed the stigma attached to Muslim marriages established in previous cases, by taking judicial notice of the consequences of such a union. The court emphasised the changing nature of *boni mores* of a community now influenced by principles of equality, tolerance and accommodation.<sup>5</sup> The court did not recognise the union in question as a marriage but merely held that the law could enforce certain terms of a contract made between the parties collateral to their union, as the contract in question was not *contra boni mores*. The court concluded that “*the Ismail decision no longer operates to preclude a court from enforcing claims such as those brought by the defendant in this case*”.<sup>6</sup>

**1.3.1** The *Rylands* case was hailed as a breakthrough because it did away with the uncertainty of spouses married in terms of Muslim Personal Law having to prove their contribution to the estate in order to be given the status of universal partnership.<sup>7</sup> However, the victory secured in this case was a hollow one, as it merely lessened the burden on parties suing at the breakdown of a Muslim union and allowed for the court to take judicial notice of the consequences of such a union.<sup>8</sup> The question was simplified in the *Rylands* case because the union in question was in fact a monogamous one, and because the framework of the case did not force the court to consider whether the union should be recognised as a marriage.

**1.4** In ***Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equality intervening)***<sup>9</sup> the question before the court was whether or not to recognise a spouse to a Muslim marriage in order to entitle the spouse to claim compensation from the Multilateral Motor Vehicle Accidents Fund as a result of her

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<sup>3</sup> Act 25 of 1961.

<sup>4</sup> 1997 (2) SA 690 (C).

<sup>5</sup> Id at 701I-702A the court formulated the question as follows: ‘*Is the Court precluded from enforcing the terms of the “contractual agreement” between the parties because of the decision of the Appellate Division in **Ismail v Ismail** 1983 (1) SA 1006 (A), in which it was held that claims for maintenance and deferred dowry brought by a woman against a man to whom she had been married by Muslim rites were not enforceable because they were intrinsic to a conjugal union between the parties which, being potentially polygamous (although in fact monogamous) was void on the grounds of public policy?*’ The court answered this question in the negative at 707G but at the same time stated that the court’s views *in casu* were restricted to the contractual terms flowing from a monogamous union and not a polygamous union (at 709 D).

<sup>6</sup> Ibid at 709F.

<sup>7</sup> Sibongile Ndashe *The Development of Muslim Personal Law through Litigation and Law Reform* Women’s Legal Centre 2003 Advancing Women’s Rights Conference, available at [http://www.wlce.co.za/conference\\_2003/2003\\_conference\\_ndashe.php](http://www.wlce.co.za/conference_2003/2003_conference_ndashe.php).

<sup>8</sup> Id.

<sup>9</sup> 1999 (4) SA 1319 (SCA).

husband's death in a motor vehicle accident. The respondent opposed the claim on the grounds that the union did not have the status of a marriage in civil law and that any legal duty which the deceased had to support the applicant was a contractual consequence of this unrecognised union. The court once again sidestepped the issue of the general validity of a Muslim marriage; it resolved the question before it under a narrower approach, by merely looking at whether there was a legal duty of support between the deceased and the appellant.<sup>10</sup> Once again, the court in support of finding in favour of the appellant, adopted the reasoning in the *Rylands* case by examining the changing *boni mores* of the community:

*The crucial question which therefore needs to be applied is whether or not the legal right which the appellant had to support from the deceased during the subsistence of the marriage, is a right which in the circumstances disclosed by the present case, deserves recognition and protection by the law for the purposes of the dependant's action. In my view it does, if regard is had to the fact that at the hearing before us it was common cause that the Islamic marriage between the appellant and the deceased was a de facto monogamous marriage; that it was contracted according to the tenets of a major religion; and that it involved "a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable". The insistence that the duty of support which such a serious de facto marriage imposes on the husband is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnized and recognized by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the boni mores of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom ... .<sup>11</sup>*

**1.4.1** As in the *Rylands* case, the monogamous nature of the marriage in the case at hand simplified the question, as did the nature of the question before the court. The judgement commented as follows on the question of polygamy:

*I have deliberately emphasized in this judgment the de facto monogamous character of the Muslim marriage between the appellant and the deceased in the present matter. I do not thereby wish to be understood as saying that if the deceased had been party to a plurality of continuing unions, his dependants would necessarily fail in a dependant's action based on any duty which the deceased might have towards such dependants. I prefer to leave that issue entirely open.<sup>12</sup>*

The court also stated that its holding would not necessarily lead to a recognition of "other incidents of such a marriage which have neither been articulated nor properly analysed in the present appeal", stating that "it is perfectly in order to

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<sup>10</sup> Ndashe (n 7). At paragraph 25 the court states as follows: "For the purposes of the dependant's action the decisive issue is not whether the dependant concerned was or was not lawfully married to the deceased, but whether or not the deceased was under a legal duty to support the dependant in a relationship which deserved recognition and protection at common law."

<sup>11</sup> At paragraph 20.

<sup>12</sup> At paragraph 24.

recognize one incident of such a marriage for a special purpose without necessarily recognizing any other incident of such marriage for that purpose or any other purpose”.<sup>13</sup>

**1.5** The 2003 case of *Daniels v Campbell NO and Others*<sup>14</sup> considered for the first time the issue of whether or not a person who had a marriage solemnised in terms of Muslim Personal Law could be considered a “spouse”, and ruled in favour of such an interpretation. The facts of the case are as follows: The applicant, Mrs Daniels, was married to her now deceased husband according to Muslim rites in 1977. The marriage was not solemnised under the civil law by a marriage officer. When her husband died intestate in 1994, the house in which they lived was transferred to the deceased estate. The applicant, who sold goods from the front of her house to supplement her income as a domestic worker, had contributed substantially towards the house, including its purchase price. The house was originally purchased in her name but was transferred into her husband’s name, due to a council regulation. The respondents are the executors of the estate, and some interested family members. The applicant was told that she could not inherit from the estate because, her marriage not being recognised as valid in terms of the Marriage Act, she did not qualify as a “surviving spouse” in terms of the *Intestate Succession Act 81 of 1987*. She was also ineligible in terms of the *Maintenance of Surviving Spouses Act 27 of 1990* to apply for maintenance from the estate of the deceased.

**1.6** This case illustrates the interplay between discrimination on the grounds of sex and discrimination on the grounds of religious beliefs. It was argued by counsel for the applicant that the narrow meaning given to the word “spouse” so as to exclude parties to a Muslim marriage resulted in unfair discrimination on grounds of marital status, religion and culture, and violated the right to dignity.<sup>15</sup>

**1.7** The High Court ruled that there was no authority for interpreting the term “spouse” so as “to extend to a husband or wife in a *de facto* monogamous marriage by Muslim rites”.<sup>16</sup> However, it found that the statutory provisions as they stand violate the equality clause of the Constitution. The High Court’s remedy was to “read in” words which would make the statutes constitutional, to the effect that the term “spouse” shall include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union.<sup>17</sup>

**1.8** On appeal to the Constitutional Court, Sachs J (writing for the majority of the court) held that the word “spouse” in its ordinary meaning includes parties to a Muslim marriage. Accordingly, it was not necessary to read words into the statutes. He asserted that the constitutional values of equality, tolerance and respect for diversity point strongly in favour of giving “spouse” a broad and inclusive construction, especially

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<sup>13</sup> At paragraph 27.

<sup>14</sup> 2003 (9) BCLR 969 (C); 2004 (5) SA 331 (CC).

<sup>15</sup> 2004 (5) SA 331 at paragraph 16.

<sup>16</sup> 2003 (9) BCLR 969 at 979E-989F.

<sup>17</sup> *Ibid* at 1002I-1005E.

when it corresponds with the ordinary meaning of the word.<sup>18</sup> Sachs J found that solemnisation under the *Marriage Act* is not a pre-condition to parties being considered “spouses”.<sup>19</sup> As he put it:

*The central question is not whether the applicant is lawfully married to the deceased but whether the protection which the acts intended widows to enjoy should be withheld from relationships such as hers. Put another way, it is not whether it had been open to the applicant to solemnize her marriage under the Marriage Act but whether in terms of “common sense and justice” and the values of our Constitution, the objectives of the act would best be furthered by including or excluding her from the protection provided.*<sup>20</sup>

Sachs J emphasised that, as in the *Amod* case, the *Daniels* case “eliminates a discriminatory application of particular statutes without implying a general recognition of the consequences of Muslim marriages for other purposes.”<sup>21</sup>

**1.9** In the dissenting judgement Moseneke J held, with Madala J concurring, that the word “spouse” has a specific and settled meaning in law, and must refer to a party married in accordance with the provisions of the *Marriage Act*. This precludes parties who have not complied with the formalities of that act from being regarded as spouses in the context of other legislation. He found further that the exclusion of people married under Muslim rites from the protection of the acts in question is clearly a remnant from the apartheid era and unjustifiably discriminatory. Like the High Court, he would remedy this problem by reading appropriate words into the statutes at issue.<sup>22</sup>

**1.10** In the *Daniels* case, the High Court noted an interesting aspect of the problem of dealing with Muslim marriages. It was common cause between the parties that in terms of the Islamic law of intestate succession, the applicant would be entitled to inherit one-eighth of the estate of her deceased husband. However, the Islamic law of intestate succession (unlike African intestate succession under customary law) is not recognised by statute and is thus not legally enforceable. If the applicant were considered to be the “spouse” of the deceased for purposes of the *Intestate Succession Act*, she would inherit in terms of that system. If she were determined not to be the

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<sup>18</sup> 2004 (5) SA 331 at paragraphs 19-21.

<sup>19</sup> *Ibid* at paragraphs 29-34. Ngcobo J elaborates on this point in a concurring judgement at paragraphs 59-61. Previous cases dealing with same-sex couples are distinguished from the case at hand on the grounds that they were concerned with couples who did not claim to be married under any law, in contrast to the present claim that the applicant is married by Muslim rites. It is thus possible to draw a distinction between persons who have had their unions solemnised in terms of some law (be it customary, civil or personal law) and those whose unions are not so solemnised (such as same-sex partnerships), while at the same time assuring that these different groups are treated equally before the law. See below how this approach compares with the SALC (legislative) approach taken and the criticism thereof.

<sup>20</sup> *Ibid* at paragraph 25.

<sup>21</sup> *Ibid* at paragraph 26.

<sup>22</sup> *Ibid* at paragraph 109: “Pending the legislative recognition of Islamic law of succession in a way that conforms to foundational values of the Constitution, the applicant is entitled to appropriate relief dictated by section 38 of the Constitution. An order reading in appropriate words to that effect, precise and faithful to the legislative scheme of the Acts, would best vindicate the applicant’s equality claim.”

“spouse”, that statute would still apply, but she will not be eligible to receive any inheritance. Neither outcome is consistent with Islamic law. The only way for the Islamic rules of succession to apply to the estate of a deceased Muslim is if they are applied through the terms of a will of the deceased.<sup>23</sup>

## 2. SOUTH AFRICAN LAW REFORM PROPOSALS

**2.1** The South African Law Reform Commission (“SALC”) established a Project Committee in March 1999, which published **Issue Paper 15 on Islamic Marriages and Related Matters** for public comment in May 2000.<sup>24</sup> The SALC was of the opinion that the issues that needed to be addressed by the legislature in respect of Muslim marriages were the status of the spouses, the status of children, divorce, maintenance and other obligations, custody and access of minor children, and proprietary consequences of the marriage.

**2.2** After considering the comments received on the Issue Paper, the SALC published **Discussion Paper 101 on Islamic Marriages and Related Matters** in 2001. This paper contained a proposed Draft Bill (“First Draft Bill”).<sup>25</sup>

**2.3** After considering a second round of public comments on the First Draft Bill, the SALC published a **Report on Islamic Marriages and Related Matters** in July 2003, with a second proposed Draft Bill (“Final Draft Bill”).<sup>26</sup>

**2.4** According to one South African law firm:

*Succinctly stated, the Bill recognized Islamic marriages as valid and enforceable within the South African legal framework. More particularly, the Bill prescribes the requirements for the validity of Islamic marriages in the South African legal framework, and provides for their enforcement and dissolution. Although the provisions of the Bill in large measure shadow the provisions of Islamic law itself, the Bill reflects an interesting synthesis between Islamic law and the related provisions of South African law.*<sup>27</sup>

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<sup>23</sup> 2003 (9) BCLR 969 at 996G-999B.

<sup>24</sup> Referred to hereinafter as “SALC Issue Paper 15”. There was also a call by some groups on the SALC to review the Islamic law of succession, but the SALC felt that these issues were too complex and manifold to be addressed in the course of its investigation into Muslim marriages. As a short-term measure, the SALC recommended amending the *Intestate Succession Act 81 of 1987* and the *Maintenance of Surviving Spouse Act 27 of 1990* by broadening the definition of “spouse” to include persons married in terms of Muslim rites.

<sup>25</sup> Referred to hereinafter as “SALC Discussion Paper 101”. For easy reference the terms “First Draft Bill” and “Final Draft Bill” are used in this paper. The term “First Draft Bill” refers to the draft bill contained in Discussion Paper 101 and the term “Final Draft Bill” refers to the draft bill contained in the Report on Islamic Marriages and Related Matters published in July 2003.

<sup>26</sup> Referred to hereinafter as “SALC Report”. All three SALC documents on Muslim marriages are available at [wwwserver.law.wits.ac.za/salc/html](http://wwwserver.law.wits.ac.za/salc/html).

<sup>27</sup> “The Draft Islamic Marriages Bill”, Bowman Gilfillan Attorneys, 23 July 2003, at [www.bowman.co.za/PressRoom/Publications/Media\\_Islamic.asp](http://www.bowman.co.za/PressRoom/Publications/Media_Islamic.asp).

**2.5** The South African Law Reform Commission proposals as contained in the Final Draft Bill have been summarised in brief as follows:<sup>28</sup>

*The bill provides for the following in relation to marriage and divorce:*

- *Recognition of all existing marriages – monogamous, polygynous and a civil marriage to a second wife;*
- *Future marriages – monogamous and polygynous. A man who enters into another Muslim marriage has to make an application to court – if he fails to do this he ‘shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000’;*
- *Registration of all marriages – monogamous and polygynous;*
- *Opt out clause – spouses in future and existing Muslim marriages can elect to opt out of the Bill;*
- *Proprietary regime/consequences of all marriages – a Muslim marriage to which the Bill applies shall automatically be out of community of property, excluding the accrual system, unless the parties enter into an antenuptial contract;*
- *Divorce – talaq<sup>29</sup> is defined, faskh defined with listed grounds<sup>30</sup> as well as khula;<sup>31</sup>*
- *Enforcement of divorce and marriage through courts and marriage officers. This is a significant move away from informal Muslim judicial bodies. A Muslim judge will preside over the proceedings, assisted by two Muslim assessors. If there is no Muslim judge, a practicing Muslim advocate or attorney with at least 10 years experience will act as the presiding officer.*

**2.6** These proposals have proved to be very controversial. Without attempting to give a comprehensive survey of the public responses, some of the problems which have identified include the following:<sup>32</sup>

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<sup>28</sup> Wesahl Agherdién Domingo, “Marriage and divorce: opportunities and challenges facing South African Muslim women with the recognition of Muslim Personal Law”, *Agenda Special Focus 2005* at <http://www.agenda.org.za/index>.

<sup>29</sup> *Talaq* in terms of section 1 of the Bill means the dissolution of a Muslim marriage, forthwith or at a later stage, by a husband, his wife or agent, duly authorised by him or her to do so, using the word *talaq* or a synonym or derivative thereof in any language, and includes the pronouncement of a *talaq* pursuant to a *Tawfid al-Talaq*.

<sup>30</sup> *Faskh* means a decree of dissolution of a marriage by a court upon the application of either the husband or wife.

<sup>31</sup> *Khula* is the dissolution of a marriage at the instance of the wife, in terms of an agreement for the transfer of property or other permissible consideration between the spouses according to Islamic Law.

<sup>32</sup> For further discussion of related issues, see also Najma Moosa, “The Interim Constitution and Muslim Personal Law” in S Liebenburg, ed, *The Constitution of South Africa from a Gender Perspective* (Cape Town: The UWC Community Law Centre) 1996 at 167-184, reprinted in *Dossier 16*: 33-48, August 1996; W

- **The Women’s Legal Centre (WLC) has objected to the fact that the proposal allows couples to opt in or out of the law:** “*The WLC believes that the recognition of marriage should not be a matter of choice. We argue that the State has a duty to protect its citizens and that, in passing laws of general application, citizens are not generally given a choice of whether or not to be bound by such laws. We are convinced that the proposed choice may result in a situation where parties who do not want his/her Muslim marriage to be recognized in law may persuade his/her spouses to opt out of the law, to his/her detriment. In the event of a dispute it is not clear what the Court will have to take into account when deciding whether this legislation should be applicable.*”<sup>33</sup>
- **The Women’s Legal Centre has also objected to the proposed default regime of “out of community of property”, which differs from the default regime of “in community of property” for all other marriages in South Africa.** This proprietary regime is exacerbated by the fact that there is no reciprocal duty of support between spouses under Muslim personal law, but only a duty on a husband to maintain his wife. Also, although the bill would allow spouses to change the proprietary consequences of their marriage by means of an ante-nuptial contract, the Women’s Legal Centre feels that this is insufficient protection for women who may be illiterate, ill-informed or in a weak negotiating position.<sup>34</sup>
- Domingo, a law lecturer at the University of the Witwatersrand, while praising many aspects of the proposal, notes that **there are many provisions of the Final Draft Bill which treat men and women differently** (such as the *iddah* waiting period after a divorce when the ex-wife is forbidden to re-marry, while the ex-husband is free to do so), **meaning that the bill could be unconstitutional on grounds of unfair discrimination.**<sup>35</sup>
- **The final Draft Bill applies the Maintenance Act 99 of 1998 to Muslim marriages, but does not address all the instances where Muslim Personal Law contains conflicting rules about maintenance.**<sup>36</sup>

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Freedman, “Islamic Marriages, the duty of support and application of the Bill of Rights” in *Tydskrif vir Hedendaagse Romeinse-Hollandse Reg* 61(3): 532-538, August 1998; Fauzia Cassim, “Understanding Women’s Rights in Islam” in *Codicillis* 40(1): 2-9, 1999; B Clark & AJ Kerr, “Dependent Action for Loss of Support: Are Women married by Islamic Rites victim of unfair discrimination?” in *South African Law Journal* 116(1): 20-27, 1999; MA Vahed, “Should the question: ‘What is in a child’s best interest?’ be judged according to the child’s own cultural and religious perspective? The Case of the Muslim Child.” in *Comparative and International Law in Southern Africa* 32(3): 365-375, November 1999; C Rautenbach, “The Recognition of Muslim Marriages in South Africa: Past, Present and Future” in *Recht van de Islam* 17:36-89, 2000. Suleiman E Dangor, “Historical Perspective, Current Literature and An Opinion Survey among Muslim Women in Contemporary South Africa: A Case Study” in *Journal of the Institute of Muslim Minority Affairs* 21(1): 109-129, April 2001.

<sup>33</sup> “Muslim Personal Law: Draft Bill of the Islamic Marriages Act” in *Women’s Legal Centre Annual Report 2003*. Domingo agrees with this criticism. Domingo (n 28) at 75.

<sup>34</sup> *Ibid.* See also Women’s Legal Centre, “Muslim Personal Law and Equality”, Paper for Family law Conference, 2003. available at [www.wlce.co.za/advocacy/mpl\\_adv\\_famlawpaper.php](http://www.wlce.co.za/advocacy/mpl_adv_famlawpaper.php).

<sup>35</sup> Domingo (n 28) at 74.

<sup>36</sup> See Women’s Legal Centre, “Muslim Personal Law and Equality”, Paper for Family law Conference, 2003. available at [www.wlce.co.za/advocacy/mpl\\_adv\\_famlawpaper.php](http://www.wlce.co.za/advocacy/mpl_adv_famlawpaper.php).

- **The Final Draft Bill would recognise polygamous marriages, which some feel constitutes discrimination against women.**
- The Final Draft Bill provides that *dower*<sup>37</sup> shall be recorded in the marriage registration. It also specifically provides that a surviving spouse can upon death (but not upon divorce it seems) lodge a claim against the deceased husband's estate in respect of any unpaid dower.<sup>38</sup> **Whereas dower is similar to lobolo, the latter was not acknowledged in this manner in the Recognition of Customary Marriages Act 120 of 1998.** In terms of that law, *lobola* is to be recorded in the marriage registration and taken into account in respect of maintenance, but there is no claim against a deceased estate for its payment.<sup>39</sup>
- The SALC felt that because of the “intrinsically divine basis and character” of Muslim Personal Law<sup>40</sup>, the “preservation”<sup>41</sup> and effective implementation of this system, in the context of a secular state, is at the heart of the preservation of the community itself, its distinct identity, character and ethos.<sup>42</sup> However, **others argue that Quranic texts are divine and should not be enforced by means of a secular legal system.**<sup>43</sup>

### 3. RECOMMENDATIONS FOR NAMIBIA

**3.1** The Namibian situation is different from the South African situation in that the Muslim community in Namibia is not a large one. One Muslim interviewed by the Legal Assistance Centre estimated the total Muslim community in Namibia as comprising not more than 500 persons, with many of these being non-Namibians residing temporarily in the country for work or study purposes. Other estimates range from 500 to 5 000. There appear to be only five to seven mosques in the whole of Namibia.

**3.1.1** In South Africa, the large Muslim community called for law reforms to recognise Muslim marriages, which stimulated the work of the South African Law Reform Commission on this topic.<sup>44</sup> We are aware of no such calls in Namibia

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<sup>37</sup> As noted above, *dower* is defined in the Final Draft Bill as “the money, property or anything of value, including benefits which must be payable by the husband to the wife as an *ex lege* consequence of the marriage itself in order to establish a family and lay the foundations for affection and companionship”. It differs from *lobola* in some respects, as *lobola* is given to the wife's guardian.

<sup>38</sup> Final Draft Bill, clauses 6(3)(c) and 9 (8).

<sup>39</sup> Compare *Recognition of Customary Marriages Act 120 of 1998*, sections 4(4)(a) and 8(4)(e).

<sup>40</sup> SALC Report (n 26).

<sup>41</sup> It is interesting to note that the word “preservation” as opposed to the less rigid/ biased term, “recognition”, as contained in Section 15 of the Final Constitution, is used by the SALC when referring to Muslim Personal Law.

<sup>42</sup> SALC Report (n 26) at 5.

<sup>43</sup> See, eg, the discussion in Domingo (n 28) at 75.

<sup>44</sup> SALC Discussion Paper 101 (n 25) at para 2.3.

to date. Furthermore, it should also be kept in mind that there may be other religious minorities in Namibia for whom the current legal regime is not entirely suitable.

**3.2** The question of how to deal with Muslim marriages has much in common with the question of how to deal with customary marriages. Both issues raise the question of legal pluralism, by acknowledging the fact that more than one legal system exists in a given society to govern society and maintain social order.<sup>45</sup> Yet customary law and the rights to religion and culture have to be consistent with other constitutional rights, including the right to sexual equality. Rather than debating pluralism versus a unitary approach in the abstract, we would agree with the South African Women's Legal Centre that society will be best served by a "unified and comprehensive relationship code" that provides legal protection to different forms of relationships, whether customary, religious or civil marriages or informal domestic partnerships.<sup>46</sup>

**3.2.1** Namibia should adopt a consistent policy on polygamy in customary marriages and polygamy in Muslim marriages, as it would make no sense to give stronger weight to religious arguments in favour of polygamy than to cultural arguments in favour of polygamy; the rights to religion and culture are both protected by the Namibian Constitution, and neither are absolute. Different approaches would also be politically untenable.

**3.2.2** The same is true with respect to *lobola* under customary law and *dower* under Muslim Personal Law.<sup>47</sup>

**3.3** It is already possible for Muslim marriages to be solemnised as civil marriages, and Muslim interviewees in Namibia indicate that this often happens in practice.

**3.3.1** Section 3(1) of the *Marriage Act 25 of 1961* states that –

*The Minister and any officer in the public service authorized thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnizing marriages **according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.***  
[emphasis added]

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<sup>45</sup> Brian Z Tamanaha, *The Folly of the 'Social Scientific' Concept of Legal Pluralism* 20 *J.L. Soc 'Y* 192-3 (1993).

<sup>46</sup> WLC Submission on Discussion Paper 101 (hereinafter "WLC Submission"), available at <http://www.wlce.co.za/advocacy/submission19.php>. The Gender Research Project at the Centre for Applied Legal Studies similarly preferred the creation of "a single, coherent system of marriage in South Africa with full protection for the disadvantaged parties, generally women and children". SALC Discussion Paper 101 (n 25) at para 3.74.

<sup>47</sup> The Final Draft Bill in South Africa defines "**dower** (*mahr*)" as "the money, property or anything of value, including benefits which must be payable by the husband to the wife as an *ex lege* consequence of the marriage itself in order to establish a family and lay the foundations for affection and companionship".

**3.3.2** Thus, as pointed out in the *Daniels* case in the High Court in South Africa, Muslim couples are theoretically free to solemnise their marriages as civil marriages in terms of the *Marriage Act*. However, the High Court in the *Daniels* case goes on to point out that “the matter is not, however, as simple as it may seem.” If the Muslim marriage is intended to be a potentially polygamous one, then this would be inconsistent with the requirements for a valid civil marriage.

**3.3.3** In South Africa, few Muslim leaders have in fact been appointed as marriage officers and the majority of Muslim marriages are not solemnised in terms of the *Marriage Act*, in contrast to the vast majority of Christian and Jewish marriages, which are solemnised as valid civil marriages.<sup>48</sup> However, the Namibian situation appears to be different.

**3.3.4** Section 29(4) of the *Marriage Act* states that “No person shall under the provisions of this Act be capable of contracting a valid marriage through any other person acting as his representative.” According to the *Ismail* case, this could be a problem as it is possible for a marriage to take place in terms of the Muslim religion without the bride’s presence. Muslim persons interviewed in Namibia also indicated that the bride is represented at the mosque by her father or male relative. However, since Muslim couples in Namibia are reportedly concluding civil marriages, perhaps in separate ceremonies, this issue has not proved to be an insurmountable one in practice.

**3.3.5** The marital property regime “out of community of property” is consistent with Islamic beliefs, and Muslim couples interviewed seemed to be aware that they could obtain this system by means of ante-nuptial contract, and to have done so in practice.

**3.6** Because of (a) the small number of Muslims in Namibia (b) the absence of a demand for law reform from within the Muslim community and (c) the possibility of concluding monogamous Muslim marriages as civil marriages with an ante-nuptial contract specifying “out of community of property”, which is apparently utilised in practice, we believe that only limited law reforms in respect of Muslim marriages (and other religious marriages) are necessary at present.

## Recommendation

### LAW REFORM ON MUSLIM MARRIAGES AND MARRIAGES RECOGNISED IN TERMS OF OTHER RELIGIONS

Firstly, to avoid hardships to Muslims or adherents of any other religion, we suggest amendments to key statutes stating that the term “spouse” in these statutes shall be understood to include any marriage concluded under

<sup>48</sup> *Daniels v Campbell NO and Others* 2003 (9) BCLR 969 at 990G-991D. It was suggested that the wife in question chose not to enter a civil marriage, but the court noted that she stated that she simply married in terms of Islamic Law without any intention to choose not to be married in the eyes of the law (at 991E-F, referring to applicant’s affidavit).

any generally-recognised system of religious law. There is precedent for similar wording in a number of South African statutes, such as section 195(2) of the *South African Criminal Procedure Act 51 of 1977*, the *Government Employees Pension Law (Proclamation 21 of 1996)* and the *Taxation Laws Amendment Act 5 of 2001*.<sup>49</sup>

In Namibia, such amendments should be applied to key statutory provisions dealing with spousal benefits and property entitlements – such as the *Intestate Succession Ordinance 12 of 1946*, and the provisions of the *Maintenance Act 9 of 2003* on the mutual duty of support between spouses, the *Employees Compensation Act 30 of 1941*, the *Medical Aid Funds Act 23 of 1995* and the *Motor Vehicle Accidents Fund Act 4 of 2001*. The *Pension Funds Act 24 of 1956* already defines “spouse” to include “a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion”. Other laws on pensions, insurance and taxation should be scrutinised by specialists in those fields to see if any similar amendments are necessary.

Although not directly concerned with marital property, we suggest that consideration should also be given to a similar amendment of the definition of “spouse” in the provisions on compulsory testimony by one spouse against the other in the *Criminal Procedure Act 25 of 2004*; the definition of spouse for purposes of permanent residence and citizenship in the *Immigration Control Act 7 of 1993* and the *Namibian Citizenship Act 14 of 1990*; the provisions on disclosure of interests in the *Regional Councils Act 22 of 1992*, the *Local Authorities Act 23 of 1992* and any similar legislation; and the spouse of the holder of a firearm license in *Arms and Ammunition Act 7 of 1996*. This list is probably not comprehensive. There should ideally be a systematic examination of laws containing the term “spouse” or similar terms (such as “dependant”) to see if they apply appropriately to civil marriage, customary marriage and marriages concluded under any generally-recognised system of religious law.

Secondly, we suggest that Namibia should in the near future enact a law giving at least a minimal level of protection to cohabitation relationships which are in the nature of marriage. Such a law would be applicable to couples who marry in a form which is not legally recognised in Namibia, and would thus provide some protection for the most vulnerable parties.

For the moment, we recommend that other aspects of Muslim marriages be dealt with outside the formal legal framework, as is the case with many religious tenets (such as the duty to tithe or the disapproval of divorce in some religions).

We would also suggest further consultation with the Muslim community, as well as with other religious minorities in Namibia.

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<sup>49</sup> See *Daniels* (n 48), at 983-ff, which cites other examples.

# Chapter 16

## JOINT BANK ACCOUNTS FOR MARRIED COUPLES

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*Commercial banks in Namibia do not allow married couples to open joint accounts, even though there is no law specifically forbidding this. Yet for couples married “in community of property”, joint accounts would in many cases be the best way to allow for joint administration of cash assets of the joint estate. This chapter looks at joint bank accounts in other countries to see if such accounts would be feasible in Namibia.*

### 1. CURRENT POSITION IN NAMIBIA

**1.1** Researchers at the Legal Assistance Centre contacted four commercial banks in Namibia to ask about joint cheque accounts. Although some contradictory information was received from different individuals at specific banks, none of the banks contacted would allow married couples to open joint accounts. However, legal advisers at all the banks consulted stated that there was no legal prohibition on joint accounts, but that it was simply bank policy not to allow them.

**1.2** The main reason given for the prohibition on joint accounts was the bank’s fear of getting involved in disputes between married couples on bank transactions. However, a sampling of the rules which apply to joint accounts in other countries which allow them shows that a clear framework for the bank’s responsibilities can be established to prevent this kind of problem.

**1.3** Most banks contacted recommended that married couples should open a bank account in one spouse’s name, with the other spouse being a signatory on the account. However, this means that the single spouse who is the owner of the account in the eyes of the bank can at any time unilaterally withdraw the other spouse’s authority over the account, which places the signatory spouse in a vulnerable position. In fact, First National Bank’s internet site gives the following warning:

*As regards bank accounts specifically, some couples prefer to operate one account together. This usually involves one partner taking the account out, and giving the other one signing power. While this could work perfectly most of the time, access to money may become a problem when one party dies. This depends on the relevant marital type – if you’re married out of community of property or in a “common law” relationship, for instance, the whole account will be frozen and could be paid into the deceased’s estate, including money the other party regards as her own.<sup>1</sup>*

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<sup>1</sup> “Spouses and financial rights”, 16 February 2004, at <http://www.fnb.co.za/FNB/popups/news/articles/20040216spoucesFinRights.scml>.

**1.4** Another problem is the signatory spouse on an account owned by the other spouse does not build up a personal credit record through the use of such an account. If this spouse later seeks a loan or credit from the bank, she (as it will usually be the wife) will have no personal credit background.

**1.5** A few bank employees recommended that married couples should have two separate accounts, one in each spouse's name. While this would be a workable solution for some couples, it could be problematic where one spouse is the primary wage-earner while the other spouse contributes other forms of contributions, such as labour in home management or child care.

**1.6** Ironically, several banks said that multiple individuals who were business partners rather than spouses would be allowed to open joint bank accounts.

**1.7** Joint bank accounts are not ideal for all married couples. For example, it was noted in a recent Indian news article that "*several couples start joint bank accounts, but not many are happy with it. The most common complaint is that one partner is only spending and not putting any money in the account. Or, in some cases, one partner (usually the husband) monopolises the cheque book and the other rarely gets to use the money kept in the joint account*".<sup>2</sup>

**1.8** However, a joint account may provide more equality and security for some couples than a situation where the bulk of the couple's assets are held in an account in one spouse's name – usually the husband's. There can also be advantages in having a joint account when one spouse dies, as in some countries the account becomes the property of the surviving spouse, meaning that this spouse will be a better position to continue with daily life while the deceased spouse's estate is being finalised.

## 2. JOINT BANK ACCOUNTS IN OTHER COUNTRIES

**2.1** No attempt was made to conduct a comprehensive survey of the international position. However, the sampling of jurisdictions discussed below shows that joint bank accounts are offered to married couples in jurisdictions with a range of systems for marital property.

**2.2** In **Ireland**, which has a separate property system for married couples, it is possible for spouses to open a joint bank account. The following basic principles apply:

- Both parties are jointly and severally liable for overdrafts.
- Most joint accounts require just one signature for transactions. Joint accounts that require both spouses' signatures for withdrawing funds exist, but have been described as "totally impractical".
- Some banks allow one party to change drawing instructions or overdraft limits on joint accounts, while some require written consent from both parties.

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<sup>2</sup> "Married and money-wise", *The Tribune*, 18 July 2004 (Chandigarh, India).

**2.3** The biggest potential problem with such accounts in Ireland has been identified as the possibility that one spouse will ‘clean out’ the account when the marriage breaks down. However, according to a specialist in family law, if “*either spouse flagrantly clears out the account, this will not go down well in a court of law ... the opposing legal team and judge will take a dim view of such conduct*”. However, it was noted that “*withdrawing disproportionately large sums of money can be viewed as acceptable if there is a valid reason*”. Valid reasons might include the following:

- (1) One spouse is the sole earner and the other has been spending extravagantly following the marriage breakdown and prior to the separation agreement.
- (2) Husband or wife has a large tax bill outstanding and is afraid the other party will spend the money put aside for this payment.
- (3) If one spouse is a homemaker and the other spouse refuses to pay maintenance before the separation agreement, it would be reasonable for the non-working spouse to withdraw a substantial sum from the joint deposit account.

If either spouse is concerned about the disproportionate amounts of money being withdrawn from joint deposit accounts, it is recommended that they write to their bank about this. Although banks are not obliged to follow requests from one spouse in such circumstances, it was noted that it would take a brazen bank to refuse.<sup>3</sup>

**2.4** Joint accounts are possible in **Australia**, which also has a separate property system for married couples. The principles applied by one Australian bank, are as follows:

- Each depositor may operate the account as an individual.
- Where a joint depositor dies, the survivor will own the account deposits.
- Joint depositors are jointly and severally liable for all obligations owing to the bank.<sup>4</sup>

**2.5** Joint accounts are also possible in **New Zealand**, which applies deferred community of property to married couples. The following terms and conditions apply to joint accounts at the Bank of New Zealand:

- **Deposits:** Where the bank receives a deposit in favour of any one joint account holder (whether by cheque, draft, bill of exchange or other instrument or payment authority), the bank will credit it to the joint account unless instructed in writing to pay the deposit into a separate account in the name of the individual in question.
- **Operating the joint account:** Unless specified otherwise in writing, either spouse may instruct the bank to act in respect of the joint account. In other words, any one joint account holder can operate the joint account separately, unless all account holders have given the bank written instructions to the contrary. This means that either spouse may withdraw all of the money

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<sup>3</sup> “Joint accounts need mutual trust to work”, *Sunday Business Post*, 21 March 2004.

<sup>4</sup> Information from Rabobank at [www.rabobank.au](http://www.rabobank.au).

credited to the joint account or incur the maximum debt allowed against the account.

- **Death of one spouse:** If any joint account holder dies, the remaining account holder automatically becomes the owner of all funds in the joint account and has full authority to operate the account. The bank will treat any credit balance in the joint account as payable and belonging to the surviving joint account holder, and the bank will incur no liability in paying or delivering such funds to the surviving spouse.
- **Debts to bank:** Each joint account holder is jointly and individually liable for the whole of the amount owing to the bank in respect of a joint account. This means that the bank can require each joint account holder to pay either a part or all of such amount. If any joint account holder dies, no liability to the bank will be discharged as a result of that death.
- **Notices:** Any notice given to one joint account holder is deemed to be sufficient notice to all joint account holders.
- **Suspension or closure of joint account:** The bank has the right to suspend the operation of or close a joint account without prior notice if:
  - there is any dispute between any of the joint account holders and this has not been resolved to the bank's satisfaction;
  - one joint account holder attempts to withdraw or notifies the bank of his or her intention to withdraw from the joint account;
  - the bank learns that any joint account holder has committed an act of bankruptcy or been declared bankrupt or that a petition has been presented to declare any joint account holder bankrupt; or
  - any joint account holder purports to assign or dispose of his or her interest in the joint account.

In such a case, each joint account holder prior to suspension or closure of the account will continue to be jointly and individually liable for any outstanding debt; and the bank will not be liable to any joint account holder for any consequences of the suspension or closure of the joint account. The bank will also have no liability to any joint account holder if it does not suspend or close a joint account when it could have done so.

- **Joint security:** When jointly owned assets are provided as security for borrowing, independent legal advice should be sought about individual liability for debts incurred now and in the future and the implications of this for the assets given as security.
- **Disputes:** If a dispute occurs between joint account holders, they have a duty to advise the bank immediately and should seek independent legal advice.
- **Closure of joint accounts:** Unless the account holders have specified that two or more signatories are required to operate the joint account, the joint

account may be closed on the instructions of any one account holder. In such a case, the bank will not be liable to the other joint account holder(s) for any consequences arising from the closure.<sup>5</sup>

**2.6 Kenya**, with a default system of separation of property, allows joint accounts. Where a wife and husband have a joint bank account they are presumed to be entitled to it in equal shares. Where investments are made out of the joint account in the name of the husband, he will be held to be a trustee for his wife, who would be entitled to a half share of the investment.<sup>6</sup>

**2.7** In most countries examined, spouses who have a joint bank account are legally considered co-owners of that account. This means that if one spouse dies, the surviving spouse becomes the full owner of that account – thus having access to money outside of the estate of the deceased.

### 3. RECOMMENDATION FOR NAMIBIA

**3.1** There appears to be nothing in Namibia's banking legislation or in the *Married Persons Equality Act 1 of 1996* which would prohibit joint bank accounts for married persons. In fact, providing the option of joint bank accounts would seem to be consistent with the policy of equal administration of joint estates contained in the *Married Persons Equality Act*.

**3.2** Certainly banks would need to obtain agreement on such accounts to protect themselves, such as a contractual undertaking that clearly makes both spouses jointly and severally liable for any debts to the bank in respect of a joint account. But appropriate rules for the operation of such accounts without undue inconvenience on the part of the banks seem to have been developed with ease in other jurisdictions. The New Zealand example seems particularly detailed and useful in this regard.

#### Recommendation

#### JOINT BANK ACCOUNTS FOR MARRIED COUPLES

While joint bank accounts would certainly not be the best option for all married couples, they should be available as an option for those who wish to utilise them, with appropriate conditions attached to clarify the rights and duties of both spouses with respect to each other and to the bank. There appears to be no reason to limit joint accounts to couples married under any particular marital property regime.

<sup>5</sup> Bank of New Zealand at [http://www.bnz.co.nz/About\\_Us/1,1184,3-50-547,FF.html#Terms\\_and\\_Conditions\\_Specific\\_to\\_Joint\\_Accounts](http://www.bnz.co.nz/About_Us/1,1184,3-50-547,FF.html#Terms_and_Conditions_Specific_to_Joint_Accounts).

<sup>6</sup> *Law and Status of Women in Kenya*, International Environmental Law Research Centre, at 6.

We recommend that the government convene a meeting of representatives of local banks to discuss this issue, and that local banks be encouraged to make this service available.





**LEGAL ASSISTANCE CENTRE**