

## DIVORCE BILL

**To** consolidate and reform the law on divorces relating to civil marriages; abolish the common law grounds for divorce as well as grounds for divorce which applied under legislation before the commencement of this Act; abolish orders for restitution of conjugal rights and judicial separation; provide for custody, guardianship of, and access, to children of the marriage; provide for spousal maintenance, child maintenance, financial and other consequences of divorce; provide for periodical allowance, child maintenance, financial and other consequences of annulment of marriage; provide for forfeiture of patrimonial benefits; provide for recognition of foreign divorces and annulment of marriages; to restrict access to and publication of certain court proceedings; to amend the High Court Act, 1990, so as make certain consequential amendments; to amend Magistrates' Courts Act, 1944, so as to confer jurisdiction on a court established in terms of that Act to deal with divorces proceedings; provide for incidental matters.

*(Introduced by the Minister of Justice)*

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**BE IT ENACTED** as passed by the Parliament, and assented to by the President of the Republic of Namibia as follows:

**Definitions**

1. (1) In this Act, unless the context otherwise indicates -

“assets” in relating to parties to the marriage means assets to which a party to the marriage is, or the parties to the marriage are, entitled;

“annulment of marriage proceedings” means proceedings for an order for annulment of marriage;

“Child Care and Protection Act, 2015” means the Child Care and Protection Act, 2015 (Act No. 3 of 2015);

“child maintenance order” means an order issued in terms of section 13 of this Act for the maintenance of a child of the marriage;

“child of the marriage” means -

- (a) a child born to both parties to the marriage, irrespective that child was born before or after the marriage;
- (b) a child adopted by both parties to the marriage; or
- (c) a child of one party to the marriage who has been adopted by the other party to the marriage;

“court” means -

- (a) the High Court; or
- (b) a court established in terms of the Magistrates’ Court Act, 1944 (Act No. 32 of 1944, and on which jurisdiction is conferred in terms of that Act to deal with divorce proceedings;

“disability” means a physical or mental impairment that alone, or in combination with social or environmental barriers, affects the ability of a person to carry out normal day to day activities;

“divorce” means the termination of a marriage otherwise than by the death of a party to the marriage, but does not include termination of marriage by an order for annulment of marriage;

“divorce proceedings” means a proceeding in a court in which either party to the marriage or both parties to the marriage seek a divorce order alone or seek a divorce order together with an order for -

- (a) division of assets;
- (b) forfeiture of patrimonial benefits;
- (c) maintenance of a child of the marriage;
- (d) spousal maintenance;
- (e) periodical allowance; or
- (f) custody, guardianship of, of or access to, a child of the marriage;

“irretrievable breakdown of the marriage” means a disintegration of the marriage relationship to the extent that there is no reasonable prospect of its restoration;

“marriage” means a marriage -

- (a) concluded and registered in Namibia in terms of the Marriage Act, 1961 (Act No. 25 of 1961);
- (b) recognised in terms of the Recognition of Certain Marriages Act, 1991 (Act No. 18 of 1991); or
- (c) recognised by the law of Namibia as a valid civil marriage;

“medical practitioner” means a person registered or regarded to be registered as a medical practitioner under the Medical and Dental Act, 2004 (Act No. 10 of 2004);

“Minister” means the Minister responsible for justice;

“periodical allowance order” means an order issued in terms of section 12(1) for the maintenance of a party to the proceedings for annulment of marriage;

“rules of court” in relation to divorce proceedings or annulment of marriage proceedings, means -

- (a) the rules made in terms of the High Court Act, 1990 (Act No. 16 of 1990); or
- (b) the rules made in terms of the Magistrates’ Court Act, 1944 (Act No. 32 of 1944);

“settlement agreement” means an agreement between the parties to a marriage, including a void marriage, in which the parties agree to any or all the following:

- (g) division of assets;
- (h) maintenance of a child of the marriage;
- (i) custody, guardianship of, or access to, a child of the marriage;
- (j) spousal maintenance;

- (k) periodical allowance;
- (l) any other matter the parties consider relevant to include;

“social worker” means a social worker registered or regarded to be registered as a social worker in terms of the Social Work and Psychology Act, 2004 (Act No. 6 of 2004); and

“spousal maintenance order” means an order issued in terms of section 11(1) for the maintenance of a party to the marriage.

(2) The term “child of marriage” in subsection (1) includes a child born from a marriage which is the subject of the annulment of marriage proceedings.

(3) The use of the phrases “apply” or “application” to describe a proceeding under this Act, may not be construed as limiting the name under which and the form or manner in which proceeding may be taken, and the name, manner and form of the proceeding is as provided by the rules of court.

### **Irretrievable breakdown of marriage to be sole ground for divorce**

2. (1) From the date of commencement of this Act -

- (a) the only ground on which a court may dissolve a marriage is the irretrievable breakdown of the marriage; and
- (a) the common law grounds for divorce as well as other grounds for divorce that applied in terms of a statute before the commencement of this Act are abolished.

(2) A statement of irretrievable breakdown is conclusive evidence that the marriage has irretrievably broken down.

### **Instituting divorce proceedings**

3. (1) Either of the parties to the marriage or both parties to the marriage jointly may institute divorce proceedings on the ground of the irretrievable breakdown of the marriage.

(2) If both parties to the marriage jointly institute divorce proceedings on the ground of irretrievable breakdown of marriage the court may grant a divorce, but if there is a child of the marriage the court may not grant a divorce unless the provisions of section 6 relating to the wellbeing of the child of the marriage have been complied with.

(3) If either of the parties to the marriage institutes divorce proceedings on the ground irretrievable breakdown of marriage and the other party to the marriage does not deny the irretrievable breakdown of the marriage, the court may grant a divorce but if there is a child of the marriage the court may not grant a divorce unless the provisions of section 6 relating to the wellbeing of the child of the marriage have been complied with.

(4) If either of the parties to the marriage institutes divorce proceedings on the ground irretrievable breakdown of marriage and the other party to the marriage denies the irretrievable breakdown of the marriage, the court may -

- (a) grant a divorce, but if there is a child of the marriage the court may not make a divorce order unless the provisions of section 6 relating to the wellbeing of the child of the marriage have been complied with; or
- (b) if it appears to the court that there are reasonable prospects of reconciliation between the parties to the marriage, continue the divorce proceedings for a period of one month or such longer period prescribed in the rules of court to enable attempts to be made to effect such a reconciliation.

(5) At the expiry of the period referred to in subsection (4)(b), the court may grant a divorce.

**Best interest of the child paramount**

4. The best interests of the child is the paramount consideration in making decisions about the wellbeing of the child of the marriage in terms of this Act.

**Resolution of disputes**

5. (1) Parties to the marriage who institute divorce proceedings have the duty to attempt to resolve matters relating to the division of assets, custody, guardianship of, of or access to, a child of the marriage and the maintenance of a child of the marriage, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.

(2) A legal practitioner who undertakes to act on behalf of a party to the marriage or either of the parties to the marriage in divorce proceedings must -

(a) inform the party or parties of the availability of mediation to resolve the matters relating to division of assets, custody, guardianship of, of or access to, a child of the marriage and the maintenance of a child of the marriage; and

(b) encourage the party or parties to attempt to resolve the matters relating to division of assets, custody, guardianship of, of or access to, a child of the marriage and the maintenance of a child of the marriage, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.

(3) In divorce proceedings the court may -

(a) on application made by either of the parties to the marriage or both parties to the marriage, jointly refer the party or parties to mediation offered by the court or to a private mediation if the party or parties wish to make use of private mediation at own cost; or

(b) at its own initiative, refer the party to the marriage or parties to the marriage to mediation offered by the court or to private mediation at own cost, if in the opinion of the court this will be in the best interest of parties or the child of the marriage, unless the

circumstances of the case are of such a nature that it would clearly not be appropriate to do so.

### **Divorce proceedings where there is child of the marriage**

6. (1) In divorce proceedings where there is a child of the marriage, the court may not grant a divorce unless the court is satisfied that arrangements made for the custody, guardianship of, of or access to, a child of the marriage and the maintenance of a child of the marriage are in the best interests of the child.

(2) If the parties to the marriage have entered into an agreement for the custody, guardianship of, of or access to, a child of the marriage and the maintenance of a child of the marriage, the court must give effect to the agreement if the agreement in the courts opinion is in the best interests of the child.

(3) If -

- (a) the parties to the marriage have not agreed or are unable to agree on custody, guardianship of, of or access to, a child of the marriage and the maintenance of a child of the marriage; or
- (b) the court is not satisfied that the arrangements for custody, guardianship of, of or access to, a child of the marriage and the maintenance of a child of the marriage, are in the best interests of the child,

the court may refer the party to the marriage or the parties to the marriage to obtain a social worker report.

### **Safeguards in respect of diminished mental capacity or continued unconsciousness**

7. (1) In divorce proceedings or annulment of marriage proceedings, the court must appoint a *curator ad litem* for a defendant or respondent who -

- (a) is admitted to an institution used for the care of mentally ill persons in terms of a reception order referred to in Chapter 3 of the Mental Health Act, 1973 (Act No. 18 of 1973);

- (b) is being detained as a President's patient at an institution used for the care of mentally ill persons;
- (c) is being detained as a mentally ill convicted prisoner at an institution used for this purpose; or
- (d) on the basis of the evidence of at least two medical practitioners who have conducted recent examinations of such person, with one of them being, where practicable, a psychiatrist, lacks the mental capacity to conduct his or her own legal affairs.

(2) In divorce proceedings or annulment of marriage proceedings, the court must appoint a *curator ad litem* for a defendant or respondent who -

- (a) is in a state of continued unconsciousness; and
- (b) has, on the basis of the evidence of at least two medical practitioners, one of whom the court must appoint, no reasonable prospect of regaining consciousness in the near future.

(3) The court may order the plaintiff or applicant, in divorce proceedings or proceedings for annulment of marriage to pay the costs associated with the appointment of a *curator ad litem* in terms of subsection (2).

(4) If this section applies, the court may make any order it considers appropriate with regard to the furnishing of security by the plaintiff or applicant in respect of any patrimonial benefits to which the defendant or respondent may be entitled by reason of the termination of the marriage or annulment of marriage.

### **Settlement agreements**

8. (1) In divorce proceedings or proceedings of annulment of marriage, the court may make a settlement agreement entered into between the parties to the marriage an order of court.

- (2) If the parties to the marriage enter into a settlement agreement:
  - (a) the agreement must be entered into freely and voluntarily;

- (b) the legal practitioner acting on behalf of either of the parties to the marriage or both parties to the marriage must explain to each party independently the terms of the agreement and rights of the parties;
- (c) the legal practitioner acting on behalf of either of the parties to the marriage or both parties to the marriage must after the signing of the agreement provide each party with a copy of the signed agreement;
- (d) if a legal practitioner is not acting on behalf of the parties to the marriage, the parties to the marriage must ensure that they obtain legal advice on the implication of the agreement and their rights in terms of the agreement; and
- (e) the legal practitioner acting on behalf of the parties to the marriage, or the parties to the marriage if a legal practitioner is not acting on their behalf, must submit a statement to the court that the provisions of this subregulation have been complied with.

(3) In considering whether to make the settlement agreement entered into by the parties to the marriage an order of court the court must take into account the following:

- (a) whether the provisions of subsection (2) have been complied with;
- (b) any other factor which the court is required to take into account in terms of this Act in respect of a matter included in the settlement agreement; and
- (d) any other factor which the court, in each case, might determine to be relevant.

### **Division of assets**

9. (1) In divorce proceedings, either party to the marriage or both parties to the marriage jointly may apply to the court for an order with regard to the division of assets.

(2) The orders the court may make in terms of subsection (1) include but are not limited to the following -

- (c) an order for the sale of assets;

- (b) an order for the transfer of assets to either of the parties;
- (c) an order for the payment of a capital sum of money;
- (d) an order concerning the occupation of the matrimonial home; or
- (e) an order that any necessary instrument be executed, and that such documents of title be produced and such other things be done, as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order.

(3) In making orders for division of assets the court must have regard to the marital property regime of the parties to the marriage or the provisions of any ante-nuptial contract, and the court must take into account the following factors:

- (a) any settlement agreement or other agreement of either of the parties to the marriage or both parties to the marriage;
- (b) the duration of the marriage;
- (c) any financial contribution made, directly or indirectly, by or on behalf of a party to the marriage, to the acquisition, conservation or improvement of any of the assets of the parties to the marriage or either of the parties to the marriage;
- (d) any contribution other than a financial contribution made, directly or indirectly, by or on behalf of a party to the marriage, to the acquisition, conservation or improvement of any of the assets of either of the parties to the marriage or both parties to the marriage;
- (e) any contribution made directly or indirectly by each party to the marriage to the wellbeing of the family, the children of the marriage and the extended family including contributions made by attending to domestic duties such as looking after the family home and caring for children of the marriage or extended family members;
- (f) the economic circumstances of each party to the marriage at the time of the instituting of the divorce proceedings, including the age, income, earning capacity, assets and other financial resources of each party, and the respective financial obligations and responsibilities of each party to the marriage;
- (g) which party to the marriage is to have custody of any child of the marriage;

- (h) any maintenance that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a party to the marriage or a child of the marriage;
- (i) the value to a party to the marriage or a child of the marriage of any medical aid benefit, pension interest, or a benefit in terms of a pension or a life insurance policy, which a party to the marriage or a child of the marriage loses or may lose as a result of the divorce; and
- (j) any other factor which the court, in each case, might determine to be relevant.

(4) In applying the factors referred to in subsection (3), the court may not take into account the conduct of the either party to the marriage unless the conduct has adversely affected the financial resources of the parties or if it will be inequitable not to take conduct into account in the circumstances of the case before the court.

(5) Any order for the division of assets must, where it is relevant and practicable, include, at a minimum, provisions for the disposition of the following assets and liabilities -

- (a) immovable property;
- (b) shares, stocks, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or similar assets, or any investment held in a financial institution;
- (a) furniture or other effects of the common household;
- (b) credit agreements as defined in the Credit Agreements Act, 1980 (Act No. 75 of 1980) and to which the provisions of that Act apply in terms of section 2 of that Act, where either party to the marriage is a credit receiver;
- (c) contracts as defined in the Sale of Land on Instalments Act, 1971 (Act No. 72 of 1971) and to which the provisions of that Act apply, where either party to the marriage is a purchaser in terms of such a contract;
- (d) any other outstanding indebtedness which affects the matrimonial assets; and
- (h) any costs and professional fees incurred in the division of assets and liabilities under this section.

(6) Unless the context otherwise indicates, this section applies, with the changes required by the context, to annulment of marriage proceedings.

### **Forfeiture of benefits**

**10.** (1) In divorce proceedings, either party to the marriage may apply to the court for an order of forfeiture of patrimonial benefits.

(2) The court may make an order of forfeiture of patrimonial benefits, only if it grants a divorce.

(3) The court may make order that the patrimonial benefits of the marriage be forfeited by one party to the marriage in favour of the other party to the marriage and such order may be made in respect of the whole or part only of the patrimonial benefits.

(4) The court must make an order for forfeiture patrimonial benefits that is just and equitable, taking into account the following factors -

- (b) the misconduct of the party which led to the breakdown of the marriage and the court must assess the extent, nature and gravity of the conduct which gave rise to the breakdown of the marriage;
- (b) the circumstances of the irretrievable breakdown; and
- (c) the duration of the marriage.

(5) In making an order for forfeiture of patrimonial benefits court must have regard to the any division of assets made in terms of section 9 for purposes of adjusting that order to give effect to the order for forfeiture of patrimonial benefits.

### **Spousal maintenance**

11. (1) In divorce proceedings, either of the parties to the marriage or both parties to the marriage jointly may apply to the court for an order of spousal maintenance or interim spousal maintenance.

(2) The court may make a spousal maintenance order requiring either of the parties to the marriage to secure or pay such periodic sums to the other party as the court considers appropriate as spousal maintenance.

(3) The court may make an interim spousal maintenance order requiring either of the parties to the marriage to secure or pay such periodic sums as the court considers appropriate as interim spousal maintenance, pending the determination of the application in terms of subsection (1).

(3) A spousal maintenance order or an interim spousal maintenance order may be for a definite or an indefinite period or until the happening of a specified event and the court may impose such other conditions as it considers appropriate and just.

(4) The objective of a spousal maintenance or interim spousal maintenance is to -

- (a) recognise any economic advantages or disadvantages to the parties to the marriage arising from the marriage or its breakdown;
- (b) alleviate economic hardship of the parties to the marriage as a result from the breakdown of marriage; and
- (c) in so far as practicable, promote the economic self-sufficiency of each party to the marriage within a reasonable period of time.

(5) The court must in terms of this section make a spousal maintenance order or interim spousal maintenance order that is just and equitable, taking into account the following factors -

- (a) terms of a court order made or to be made under section 9;
- (b) any other agreement relating to maintenance of either party to the marriage;
- (c) the duration of the marriage;

- (d) the economic circumstances of each party to the marriage at the time of the instituting of the divorce proceedings, including their respective income, earning capacity, assets and other financial resources, and their respective financial obligations and responsibilities;
- (e) any impairment of the present or future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties, or having foregone or delayed education, training, employment or career opportunities due to the marriage;
- (f) contributions and services by the party seeking maintenance to the education, training, employment, career or career potential of the other party;
- (g) which party to the marriage is to have custody of any children of the marriage, taking into account any financial consequences arising from the daily responsibility for the care of a child of the marriage including caring for a party to marriage where that party to the marriage is a person with disability or for caring for a child of the marriage who is a person with disability; and
- (h) any other factor which the court, in each case before it, might determine to be relevant.

(6) In applying the factors referred to in subsection (5), the court may not take into account the conduct of the either party to the marriage unless the conduct has adversely affected the financial resources of the parties or if it will be inequitable not to take conduct into account in the circumstances of the case before the court.

### **Periodical allowance in annulment of marriage proceedings**

**12.** (1) In annulment of marriage proceedings, either party to the proceedings may apply to the court for a periodical allowance order.

(2) The court may on good reason shown make an order requiring either party to the annulment of marriage proceedings to secure or pay such periodic sums, as the court considers appropriate for the maintenance of the other party.

(3) In annulment of marriage proceedings, either party to the proceedings may apply to the court for an interim periodical allowance order.

(4) The court may on good cause shown make an order requiring either of the parties annulment of marriage proceedings to secure or pay such periodic sums as the court considers appropriate for the maintenance of the other party pending the determination of the proceedings for annulment of marriage.

(3) Unless the context otherwise indicates, the provisions of section 11(4), (5) and (6) apply with changes required by the context, to proceedings for a periodical allowance order or an interim periodical allowance order made in terms of subsection (2) and (4).

### **Child maintenance**

**13.** (1) In divorce proceedings or annulment of marriage proceedings either party to the marriage may apply for an order of maintenance in respect of a child of the marriage.

(2) The court may, on application made by either party to the marriage or both parties to the marriage jointly, make an order requiring one party to pay to the other party maintenance in respect of any or all the children of the marriage.

(3) On application by either party to the marriage or both parties to the marriage, the court may make an interim child maintenance order requiring one party to secure or pay such periodic sums, as the court considers appropriate for the maintenance of any or all of the children of the marriage, pending the determination of the application in terms of subsection (1).

(4) A child maintenance order or an interim child maintenance order may be for a definite or an indefinite period or until the happening of a specified event and the court may impose such other terms, conditions or restrictions as it considers appropriate and just.

(5) In making a child maintenance order or an interim child maintenance order in terms of this section the court must take into account:

- (a) an order of court or an agreement relating to maintenance of a child of the marriage;
- (b) the needs, resources and earning capacities of the parties to the marriage;
- (c) the financial, educational and developmental needs of any child of the marriage, including the needs of a child with a disability; and
- (d) any other factor which the court, in each case before it, might determine to be relevant.

### **Custody or guardianship of, or access to, children**

**14.** (1) In divorce proceedings or annulment of marriage proceedings the court may, on application by either party to the marriage or both parties to the marriage jointly, make an order with respect to the custody, guardianship of, or access to, any or all the children of the marriage.

(2) In divorce proceedings or annulment of marriage proceedings, the court may, on application made by either party to the marriage, both parties to the marriage, jointly **or on its own initiative**, make an interim order respecting the custody or guardianship of, or access to, a child of the marriage pending the determination of the application under subsection (1).

(3) The court may make an agreement between the parties regarding custody or guardianship of, or access to, a child of the marriage an order of court, if in the opinion of the court the agreement is in the best interests of the child.

(4) When deciding what is in the best interests of the child of the marriage the court for purposes of custody, access and guardianship the court must have regard to the factors set out in section 3 of the Child Care and Protection Act, 2015, and must also take into account-

- (a) the degree of commitment and responsibility which the respective parties to the marriage have shown towards the child, as evidenced by such factors as financial support, maintaining or attempting to maintain contact with the child; and

- (b) the financial positions of the parties to the marriage, but -
  - (i) the financial positions of the parties are not the decisive factor; and
  - (ii) the court must not approve an application for the custody of a child, if the application is based on a motive to avoid the payment of maintenance in respect of that child.

(5) In making an order in terms of this section the court must have regard to the right of the marriage to know and be cared for by both parents and the goal of resolving disputes in a non-adversarial manner, if possible.

(6) If the court has not in terms of this Act made an order granting sole guardianship of a child of the marriage to either party to the marriage, both parties continue to exercise equal powers of guardianship after the divorce or the granting of an order for the annulment of marriage.

### **Joint custody**

**15.** (1) In divorce proceedings or annulment of marriage proceedings the court may, on application made jointly by both parties to the marriage, make an order for the joint custody of a child of the marriage, if in the circumstances of the particular case the court is of the opinion that it is in the best interests of the child.

(2) If the court makes an order for joint custody in terms of subsection (2), that order must specify that both parties have equal powers of guardianship.

(3) In making an order in terms of this section the court must take into account the following factors -

- (a) whether the parties seeking joint custody are fit to take care of the child;
- (b) whether the parties seeking joint custody desire continuous contact with the child;
- (c) whether the parties seeking joint custody are perceived by the child as sources of emotional support;

- (d) whether the parties seeking joint custody are able to communicate and co-operate in promoting the best interests of the child; and
- (e) whether the parties seeking joint custody live in sufficiently close physical proximity to make joint custody feasible.

(4) The court may grant joint custody to divorced parties or parties in respect of whose marriage the court previously made an order of annulment of marriage only if the parties can demonstrate to the court that circumstances have changed since the divorce order or order of annulment of marriage.

### **Other access**

**16.** (1) In divorce proceedings or proceedings for annulment of marriage the court may, on application made by either party to the marriage, make an order respecting access to a child of the marriage by a person other than the parent of the child if in the opinion of the court it is the best interests of the child.

(2) Before deciding on an application referred to in subsection (2), the court must order a report by a social worker.

(3) In making a decision in terms of subsection (1), the court must be guided by the factors referred to in section 15(3) and (4) which apply with changes required in the context to this section.

(4) An order in terms of subsection (2) may be for a definite or an indefinite period or until the happening of a specified event and the court may impose such other conditions as it considers appropriate and just.

### **Rescission or variation of court orders**

**17.** (1) The court may vary or rescind a child maintenance order, an interim child maintenance order, spousal maintenance order, an interim spousal maintenance, a periodical allowance order, an interim periodical allowance order or an order for the custody, guardianship of, or access to, a child of the marriage.

**Recognition of certain foreign divorces and foreign annulments of marriages**

**18.** (1) A divorce or an annulment of marriage effected, before or after the commencement of this Act, in accordance with the law of a foreign country is recognised as valid in Namibia, where on the date of the order -

- (a) the defendant or respondent had his or her habitual residence in that country; or
- (b) the plaintiff or applicant had his or her habitual residence in that country, but only -
  - (h) where the plaintiff or applicant had been habitually resident in that country for not less than one year before the date of order;
  - (ii) both parties were habitually resident in that country; or
  - (iii) both parties were nationals of that country;
- (c) the plaintiff or applicant was a national of the country, but only where -
  - (i) the plaintiff or applicant had his habitual residence in that country; or
  - (ii) the plaintiff or applicant had habitually resided in that country for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings;
- (d) the plaintiff or applicant was a national of that country and both the following further conditions were fulfilled -
  - (ii) the plaintiff or applicant was present in that country at the date of institution of the proceedings; and
  - (iii) the parties last habitually resided together in a country whose law, at the date of institution of the proceedings, did not provide for divorce or annulment.

(2) A divorce or an annulment of marriage is not recognised as valid in Namibia in terms of subsection (1), where -

- (a) under the common law rules of private international law, recognition of its validity would be refused on the ground that a party to the marriage had been denied natural justice; or
- (b) recognition would be contrary to public policy.

### **Abolition of orders for restitution of conjugal rights and judicial separation**

**19.** A court may not make an order for the restitution of conjugal rights or judicial separation in respect of divorce proceedings instituted after the commencement of this Act.

### **Privacy of certain proceedings**

**20.** On application made by either party to the marriage or jointly by both parties to the marriage, any person, or at the initiative of the court, the court may make an order -

- (a) directing that divorce proceedings or proceedings for annulment of marriage or certain parts of such proceedings; and
- (b) that no person other than the party or parties and the legal practitioners acting on behalf of the party or parties, the required court officials and persons whose presence is necessary, be present at the proceedings referred to in paragraph (a),

if the court is satisfied that there is a likelihood that harm may result to a child of the marriage or any other child connected to the proceedings.

### **Restriction on publication of certain court proceedings**

**21.** (1) For the purpose of this section “publish” means disseminate or provide access to the public or a section of the public information by any means, including by -

- (a) publication in a book, newspaper, magazine or other written publication;
- (b) broadcast by radio or television;
- (c) public exhibition;
- (d) broadcast or publication by means of the internet; or
- (e) other electronic communication.

(2) A person may not publish, for the information of the public or to a section of the public, any particulars of a divorce proceeding or annulment of marriage proceedings or any information or evidence which emerges in the course of such a proceeding, which is intended or likely to identify a child or personal information about a child as being involved in the proceedings.

(3) A person may not publish, for the information of the public or to a section of the public, any particulars of a divorce proceeding or annulment of marriage proceedings or any information or evidence which emerges in the course of such a proceeding, except with the permission of the court granted on application in terms of the rules of court.

(4) Despite subsection (3), a person may, unless the court orders otherwise, publish in relation to divorce proceedings or annulment of marriage proceedings, the following particulars -

- (a) the names of the parties to the proceedings;
- (b) that proceedings between the parties is pending in a court of law; and
- (c) the order of the court.

(5) Subsection (3) does not apply to the publication of particulars or information in respect of divorce proceedings or annulment of marriage proceedings -

- (a) for the purposes of the administration of justice;
- (b) in a *bona fide* law report which does not form part of any other publication than a series of reports of the proceedings in courts of law or a collection of the judgments of courts of law;
- (a) for the purpose of *bona fide* academic research ; or
- (b) if both parties to the divorce proceedings consent in writing to the publication.

(6) A person who contravenes subsection (2) or (3), commits an offence and is liable on conviction to a fine not exceeding N\$100 000 or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.

**Donations and gifts**

- 22.** Subject to the provisions of the Insolvency Act, 1936 (Act No. 24 of 1936) -
- (a) a transaction as contemplated in that Act, and effected before or after the commencement of this Act is not void or voidable because it amounts to a donation between the parties to the marriage; and
  - (b) a gift given in anticipation of a marriage becomes the assets of the person who received it, despite the subsequent dissolution of the marriage.

**Transitional provisions**

- 23.** (1) This Act does not apply with reference to pending -
- (a) divorce proceedings;
  - (b) annulment of marriage proceedings;
  - (c) proceedings for the restitution of conjugal rights;
  - (d) proceedings for forfeiture of patrimonial benefits;
  - (e) proceedings for judicial separation; or
  - (f) appeals in respect of proceedings referred to in paragraph (a), (b), (c), (d) or (e),

and such proceedings must be dealt with in accordance with the law which applied before the commencement of this Act.

(2) For purposes of subsection (1), pending refers to proceedings instituted before the commencement of this Act and not finalised at the date of commencement of this Act.

**Repeal and amendment of laws**

**24.** (1) The laws specified column 1 and 2 of Schedule 1 to this Act are repealed to the extent specified in the third column of that Schedule.

(2) The laws specified in Schedule 2 to this Act are amended to the extent specified in that Schedule.

### Short title and commencement

25. This Act is called the Divorce Act, 2022 and comes into operation on a date to be determined by the Minister by notice in the *Gazette*.

### SCHEDULE 1 LAWS REPEALED

No. and year of law	Short title	Extend of repeal
Ordinance No. 18 of 1935	Divorce Laws Amendment Ordinance, 1935	The repeal of the whole.
Ordinance No. 25 of 1955	Matrimonial Affairs Ordinance, 1955	The repeal of the whole.
Ordinance No. 9 of 1967	Matrimonial Affairs Amendment Ordinance, 1967	The repeal of the whole.
Act No. 22 of 1939	Matrimonial Causes Jurisdiction Act, 1939	The repeal of the whole.
Act No. 17 of 1943	Matrimonial Causes Jurisdiction Amendment Act, 1943	The repeal of the whole.
Act No. 35 of 1945	Matrimonial Causes Jurisdiction Amendment Act, 1945	The repeal of the whole.
Act No. 37 of 1953	Matrimonial Affairs Act, 1953	The repeal of the whole.

Act No. 70 of 1968	General Law Amendment Act, 1968	The repeal of the whole.
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SCHEDULE 2  
LAWS AMENDED

The laws specified are amended to the extend set out:

**1. High Court Act No. 16 of 1990**

**Amendment of section 1 Act No. 16 of 1990 as amended by Act No. 10 of 2001**

**1.** (1) Section 1 of the High Court Act, 1990 (Act No. 16 of 1990) (hereafter referred to as the principal Act is amended -

- (a) by the substitution of the introductory sentence to section (1) for the following introductory sentence:

“(1) In this Act, except where the context otherwise indicates -;”;

- (b) by the insertion after the definition of “deputy sheriff” of the following definitions:

“ “Divorce Act” mean the Divorce Act, 2022 (Act No. of 2022);

“divorce proceedings” means divorce proceedings as defined in section (1) of the Divorce Act;”;

and

- (c) by the insertion of the following subsection after subsection (1):

“(2) The phrases “marriage”, “interim child maintenance”, “interim spousal maintenance” and “interim periodical allowance” have the meaning assigned to the phrases in section 1 of the Divorce Act.”.

### **Amendment of section 18 Act No. 16 of 1990**

2. The Principal Act is amended by the substitution for subsection (7) of section 18 of the following subsection:

“(7) Notwithstanding anything to the contrary in any law contained, no appeal shall lie from a judgment or order of the High Court in proceedings in connection with an application -

- (a) by one spouse against the other for [**maintenance pendente lite**] interim child maintenance, interim periodical allowance or interim spousal maintenance;
- (b) for contribution towards the costs of a pending [**matrimonial action**] divorce proceedings or annulment of marriage proceedings;
- (c) for the interim custody of a child when [**matrimonial action**] divorce proceeding or annulment of marriage proceedings between the parents is pending or is about to be instituted;
- (d) by one parent against the other for interim access to a child when a [**matrimonial action**] divorce proceeding or annulment of marriage proceedings between the parents is pending or is about to be instituted.”.

### **Substitution of section 16 of Act No. 16 of 1990**

3. The Principal Act is amended by the substitution for section 16 of the following section:

#### **“Persons over whom and matters in relation to which the High Court has jurisdiction**

**16.** (1) The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognisance, and shall, in addition to any powers of jurisdiction which may be vested in it by law, have power -

- (a) to hear and determine appeals from all lower courts in Namibia;
- (b) to review the proceedings of all such courts; and
- (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

(2) In divorce proceedings the High Court shall have jurisdiction if either of the parties to the marriage is or if both parties to the marriage are-

(a) domiciled in the area of jurisdiction of the court on the date on which proceedings are instituted; or

(b) ordinarily resident in the area of jurisdiction of the court on the date on the date on which proceedings are instituted and has or have been ordinarily resident in Namibia for a period of not less than one year immediately prior to that date.”.

### **Amendment of section 39 of Act No. 16 of 1990 as amended by Act No. 12 of 2013**

4. Section 39 of the principal Act is amended in subsection (1) by the insertion of the following subparagraphs after subparagraph (xv) of paragraph (a):

“(xvA) keeping of records of orders made in terms of the Divorce Act and access to such records;

(xvB) the transfer of divorce proceedings between the court referred to in section 2A of the Magistrates’ Court Act, 1944 (Act 32 of 1944) and the High Court;

(xvC) transfer of certain matters relating to divorce proceedings from the court referred to in section 2(gA) of the Magistrates’ Court Act, 1944 (Act 32 of 1944) to the High Court;

(xvD) mediation during divorce proceedings;”; and

### **2. Magistrates’ Courts Act, 1944 (Act No. 32 of 1944)**

#### **Amendment of section 1 of Act No. 32 of 1944**

1. Section 1 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), (hereafter referred to as the “Principal Act) is amended -

(a) by the substitution of the introductory sentence to section (1) for the following introductory sentence:

“(1) In this Act, except where the context otherwise indicates -;”;

(b) by the insertion after the definition of “court” of the following definition:

“ “Commission” means the Magistrates’ Commission as defined in section 1 of the Magistrates Act, 2003 (Act No. 3 of 2003);”;

- (c) by the substitution for the definition of court of the following definition:

“ “court” -

(a) in relation to a civil matter referred to in section 29A, a court established under section 2(gA);

(b) in relation to any other civil matter a magistrate's court; and

(c) in respect of any other matter a court of a regional division and a magistrate's court;”.

- (d) by the insertion before the definition of “court of appeal” of the following definition:

“ “Divorce Act ” means the Divorce Act, 2022 (Act No. of 2022);

“divorce proceedings” means divorce proceedings as defined in section 1 of the Divorce Act;”;

- (e) by the insertion of the following definition after the definition of “practitioner”:

“ “regional magistrate” means a regional magistrate as defined in section 1 of the Magistrates Act, 2003 (Act No. 3 of 2003);

“ “regional court magistrate” means a regional court magistrate as defined in section 1 of the Magistrates Act, 2003 (Act No. 3 of 2003);”; and

(f) by the insertion of the following subsection after subsection (1):

(2) The phrases “marriage”, “interim child maintenance”, “spousal maintenance”, “interim spousal maintenance”, “periodical allowance” and “interim periodical allowance” have the meaning assigned to the phrases in section 1 of the Divorce Act.”.

**Amendment of section 2 of Act No. 32 of 1944 as amended by section Act No. 40 of 1952, Act No. 68 of 1957 and Act No. 17 of 1970, AG No. 3 of 1979 and Act No. 11 of 1985**

2. Section 2 of the Principal Act is amended by the insertion of the following paragraph after paragraph (g):

“(gA) establish a court to adjudicate suits or proceedings contemplated in section 29A.”;

**Insertion of section 8A in Act No. 32 of 1944**

3. The following section is inserted after section 8 of the Principal Act:

“8A. (1) Only a regional magistrate who is specifically authorised in writing by the Commission may adjudicate civil suits or proceedings contemplated in section 29A;

(2) The Commission may in writing to the regional magistrate authorised as contemplated in subsection (1) withdraw the authorisation referred to in subsection (1).”.

**Amendment of section 25 of Act No. 32 of 1944 as amended by Act No. 11 of 1985 and by Act No. 6 of 2009**

4. Section 25 of the principal Act is amended:

- (a) in subsection (3) by the insertion of the following subparagraphs after subparagraph (v) of paragraph (a):

“(vA) keeping of records of orders made in terms of the Divorce Act and access to records;  
(vB) the transfer of divorce proceedings between the courts referred to in section 29A;  
(vC) transfer of certain matters relating to divorce proceedings to the High Court;  
(vD) with the concurrence of the Judge-President of the High Court, legal practitioners’ fees to be charged in relating to divorce proceedings;  
(vE) mediation during divorce proceedings;”; and

- (b) by the substitution for subsection (5) of the following subsection:

**“(5) No new rule or any alteration or rescission of a rule shall take effect unless it has been confirmed by the Cabinet and published in the Official Gazette at least one month before the day upon which it is expressed to take effect.”.**

#### **Amendment of section 28 of Act No 32 of 1944 as amended by Act No. 40 of 1952**

5. Section 28 of the principal Act is amended by the insertion after subsection (1) of the following subsection:

“(1A). In divorce proceedings, a court established in terms of section 2(gA) has jurisdiction if either of the parties to the marriage is or both parties to the marriage are -  
(a) domiciled in the area of jurisdiction of the court on the date on which proceedings are instituted; or  
(b) ordinarily resident in the area of jurisdiction of the court on the date on the date on which proceedings are instituted and has or have been ordinarily resident in Namibia for a period of not less than one year immediately prior to that date.”.

#### **Amendment of section 29 of Act No 32 of 1944 as amended by Act No. 40 of 1952, Act No. 19 of 1963 and Act No. 17 of 1970; Act No. 94 of 1974, Act No. 11 of 1985 and Act No. 9 of 1997**

6. Section 29 of the Principal Act is amended:
- (a) by the insertion of the following section after section 29 -

**Jurisdiction of court of to adjudicate certain civil suits or proceeding**

“29A (1) Subject to section 8A, a court established in terms of subsection (gA) of section 2 has jurisdiction -

- (a) to hear and determine divorce proceedings;
- (b) to grant a divorce order;
- (c) to hear and determine a question relating to the domicile of a party or parties to the marriage where such parties have instituted divorce proceedings;
- (d) to grant an order for the division of assets as contemplated in the Divorce Act;
- (e) to grant an order for the forfeiture of patrimonial benefits as contemplated in the Divorce Act;
- (f) to grant an order relating to the custody and guardianship of, or access to, any or all children of the marriage as contemplated in the Divorce Act;
- (g) to grant an order for the transfer of assets or the payment of money, regardless of the value of the assets or money in question, if such order relates to a divorce proceeding;

- (h) to appoint a *curator ad litem* as contemplated in section 8 of the Divorce Act and make orders for cost as contemplated in that section;
- (i) to grant an order for child maintenance or interim child maintenance as contemplated in the Divorce Act;
- (j) to grant an order for spousal maintenance or interim spousal maintenance as contemplated in the Divorce Act;
- (k) to hear and determine proceedings for orders for variation or rescission of orders made in terms of the Divorce Act and make orders of variation or rescission of its judgement or orders;
- (l) to hear and determine proceedings for contempt of court in respect of failure to comply with an order or judgment it made in terms of the Divorce Act, and make orders for contempt of court;
- (m) to order parties to the marriage or a party to the marriage to attend mediation in divorce proceedings;
- (n) to order social worker reports as contemplated in the Divorce Act;
- (o) to grant any other order that the High Court is entitled to make, whether under the common law, a statute or other law or the rules of the High Court, if such order relates to or is incidental or is in relation to any procedural matter with regard to an order referred to in this subsection.”;  
and

(2) Notwithstanding subsection (1), a court established in terms of section 2(gA) does not have jurisdiction to determine proceedings relating to annulment of marriage, validity of a marriage, recognition of foreign divorces or recognition of foreign annulment of marriages.

(3) Notwithstanding the power of the court established in terms of section 2(gA) to vary or rescind the judgement or orders it has made in terms of Divorce Act, where the variation or rescission relates to -

- (a) the custody and guardianship of, or access to, any or all children of the marriage or children of divorced parents, the Children's Court defined in section 1 of the Child Care and Protection Act, 2015 (Act No. of 2014) is the only competent court to vary and rescind such orders; or
- (b) maintenance of a child, the court referred to in section 1 of the Maintenance Act, 2003 (Act No. 9 of 2003) is the only competent court to vary and rescind such judgement or orders."

#### **Amendment of section 46 of Act No. 32 of 1944**

7. Subsection (1) of section 46 of the Principal Act is repealed.
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