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# LAW OF LIFE PARTNERSHIPS COURSE GUIDE 2016



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## **INTRODUCTION**

### **1.1 Overview**

The Law of Life Partnerships is a compulsory stand-alone semester course that counts as a credit in the Faculty of Law for LLB2, as well as comprising one of the six component courses for the Legal Theory Three major in the Faculty of Humanities, Science and Commerce. It serves as an introductory course to the law affecting intimate relationships in South Africa. The Law of Life Partnerships forms part of private law, and deals with the traditional laws of husband and wife, as well as the evolution of traditional concepts in recent years under the influence of the Constitution to accommodate customary, Muslim and same-sex partnerships. In particular, this course deals with the consequences of marriage, civil unions and other marriage-like relationships.

### **1.2 Credit Value**

10 credits. This translates into 10 hours to be spent on this course per week, including the time spent at lectures.

### **1.3 Assumptions of Prior Learning**

In order to successfully complete this course, students should:

- Communicate coherently in both written and spoken English;
- Be familiar with basic legal concepts and terminology;
- Be familiar with core Constitutional values and ideas;
- Be capable of accessing resources (including books, law reports and statutes) in the Law Library and online;
- Be capable of critically analysing and extracting relevant legal principles from law reports and other material;
- Be able to identify principles and apply them to a set of facts;
- Be able to understand and apply the referencing techniques prescribed by the Faculty of Law;
- Are capable of independent research and studying.

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## **2. OUTCOMES**

### **Critical Outcomes**

It is intended that at the end of this course, students should be able to:

- Identify and solve practical legal problems;
- Organise and manage their workload;
- Collect, analyse and evaluate information;
- Communicate effectively (both orally, in class, and in written assignments and tests);
- Use technology in accessing prescribed material and researching assignments.

## Specific Outcomes

Students successfully completing this course should be able to:

- Understand and appreciate the influence of Constitutional principles on the Law of Life Partnerships, and how the courts have harmonised these with common law principles;
  - Understand and explain the recent development of South African law relating to religious marriages, domestic partnerships and civil unions;
  - Understand and explain the statutory and common law principles which govern engagement and marriage in South Africa;
  - Apply the knowledge gained during this course to solve practical problems.
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### 3. TEACHING METHOD

The course, which is taught by **Mr Ryan McDonald**, has been divided into specific topics which will be covered during the first semester in the form of *viva voce* lectures. These lectures will comprise of a discussion of the law as contained in textbooks, case law and legislation. Students are expected to read ahead of the next lecture so that they may participate in the lecture and solve legal problems either individually or in groups. There will also be voluntary seminars every three weeks during the semester for revision, problem scenarios and preparation of exams and tests.

**NB. There is no comprehensive handout for the course and as such, students will be expected to take their own notes during lectures and to supplement these notes with readings provided in the course outline. It is expected that students assume responsibility for their own learning by independent study according to the guidance provided by the detailed course outline.**

Feedback for assignments and tests will usually be given within the formal lecture periods, but may be given outside of these times at a voluntary extra meeting. Students are referred to the Faculty's 'Law Student's Survival Guide' in respect of DP requirements for attendance of lectures. Students are welcome to discuss problems with the lecturer.

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### 4. COURSE CONTENT

1. Introduction
  2. Social changes and the evolution of traditional concepts
  3. Engagement
  4. Legal requirements
  5. Void and voidable marriages
  6. Invariable consequences of marriage
  7. Variable consequences of marriage
  8. The dissolution of marriage
-

## 5. RESOURCES

In order to assist your preparation for lectures, a course outline listing the core readings is provided. However, it will be in your interests to read more widely than the readings listed. Here, the *Family Law Service* (accessed via MyLexisNexis) provides a valuable resource. It is important to note that the leading judgments on various aspects of the law of life partnerships constitute an important resource for this course. A list of prescribed cases is included in your course outline. These cases can be found in the law reports, which may be accessed in the Law Library, as well as on the internet.

The recommended texts to buy for this course are:

- J Heaton *South African Family Law* 3 ed (2010) LexisNexis: Durban
- J Heaton *Casebook on South African Family Law* 3 ed (2010) LexisNexis: Durban

Given that the textbook mentioned above is slightly dated, copies of a more updated family law textbook are available in the law library, as follows:

- A Barratt (ed) *Law of Persons and the Family* (2012) Pearson: Cape Town

Perhaps the most up-to-date, but the most expensive, book (for the second half of the course) is:

- J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) Juta: Cape Town.

There will be at least one copy on short loan.

Other texts which students may find useful (and which may be prescribed for particular lectures) include:

- B Clark (ed) *Family Law Service* Butterworths: Durban.
- A Skelton (ed) *Family Law in South Africa* (2010) Oxford University Press: Cape Town.

On occasion, students may also be referred to journal articles on aspects of the course content. These may be found in the library (where indicated, students will be able to access journal articles electronically). Students are encouraged to utilise all the available library resources and to familiarise themselves with the relevant texts on the Law of Life Partnerships by browsing through the shelves in the library and visiting electronic resources such as Hein-on-Line and JSTOR.

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## 6. STUDENT ASSESSMENT

The final mark for the course is comprised on the following components:

Class work: out of 30 marks  
Examination: out of 70 marks  
Total: 100 marks



domestic partnerships and civil unions.	- Demonstrate an understanding of the court decisions in which this area of the law has been developed.	and exam. - Class assignment.
Understand and explain the statutory and common law principles which govern engagement and marriage in South Africa.	- Discuss the law relating to engagement and the termination thereof. - Identify and explain the requirements for a valid marriage. - Explain when a marriage may be void or voidable and the effects that this shall have on the marriage. - Explain the requirements for and consequences of a putative marriage. - Discuss the invariable consequences of a valid marriage. - Discuss the various matrimonial property systems that exist in South Africa. - Explain the consequences of the death of one spouse. - Discuss the South African law pertaining to divorce and the consequences thereof. - Demonstrate an understanding of the court decisions relating to the statutory and common law principles which govern engagement and marriage in South Africa.	- Class discussions. - Theory and problem questions in test and exam.
Apply the knowledge gained during this course to solve practical legal problems.	- Apply the relevant law and precedents to a set of facts.	- Class discussions and problem solving exercises. - Problem questions in test and exam.

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## 7. EVALUATION

Students will be required to complete evaluation questionnaires according to the Law Faculty's evaluation cycle. An external examiner will assess the quality of the exam paper and student answers and will complete a report on the course. Students will be encouraged to discuss difficulties and problems regarding the course with the lecturer – either personally or through a class representative.

**I hope you enjoy this course, and possibly find inspiration to not only understand the area, but also challenge the way in which life partnerships are recognised in South Africa. Students have found inspiration in this course for LLB research papers, essay competitions and postgraduate studies – I'm hoping this will be true for some of you.**

Ryan McDonald, February 2016

## COURSE CONTENT: READING LIST

### 1. INTRODUCTION

Heaton - p3

Skelton – Chapter 1

#### (a) The nature of marriage

- *Rattigan v Chief Immigration Officer, Zimbabwe* 1995 (2) SA 182 (ZSC) 188 ff.

#### (b) Recognition of the institution of marriage vs the right to marry?

- s 15(3)(a)(i) of the Constitution of the Republic of South Africa, 1996.

- *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) pars 30-33

- *Vols NO v Robinson and Others* 2005 (5) BCLR 446 (CC) pars 80-85

- International law:

- The Universal Declaration of Human Rights 1948, Article 16

- The International Covenant on Civil and Political Rights 1966, Article 23

- The African Charter on Human and Peoples' Rights 1981, Article 18

#### (c) Marriage in the 21<sup>st</sup> Century

- I Ellman 'Marital roles and declining marriage rates' (2007) 41 *Family Law Quarterly* 455.

- H Kruuse 'You reap what you sow: regulating marriages and intimate partnerships in a diverse, post-apartheid society' in B Atkin (ed) *The International Survey of Family Law: 2013 edition* (2013) 343-362

- A Barratt (ed) *Law of Persons and the Family* (2012), Part 2, Chapter 1 (pgs 161-174)

### 2. SOCIAL CHANGES AND THE EVOLUTION OF TRADITIONAL CONCEPTS

Heaton Chapters 16-18

#### (a) Customary Marriages

- The effect of the Recognition of Customary Marriages Act 120 of 1998.

- The Constitution and customary marriages (ss 30 & 31 vs s9 of the Constitution)

#### (b) Muslim marriages

- Statutory recognition of Muslim marriages (examples):

- Definition of 'marriage' in Children's Act 38 of 2005

- Criminal Procedure Act 51 of 1977, s 195(2)
- Judicial recognition of Muslim marriages
  - *Ryland v Edros* 1997 (2) SA 690 (C)
  - *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA)
  - *Daniels v Campbell* 2004 (5) SA 331 (CC)
  - *Khan v Khan* 2005 (2) SA 272 (T)
  - *Hassam v Jacobs* [2008] 4 All SA 350 (C) & *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC)
- The Constitution and Muslim marriages
  - Draft Muslim Marriages Bill (2010) – access the bill via [http://www.justice.gov.za/legislation/bills/2010\\_muslim-marriages-bill.pdf](http://www.justice.gov.za/legislation/bills/2010_muslim-marriages-bill.pdf)
  - *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC)
- (c) Hindu marriages
  - *Singh v Rampersad and others* 2007 (3) SA 445 (D)
  - *Govender v Ragavayah NO and others* 2009 (3) SA 178 (D)
- (d) Protection of marriage-like relationships by ordinary rules of law (Heaton pgs 234ff. and Heaton (ed) 436-446)
  - Contract (universal partnership, life partnership contract & agency); estoppel; will; unjustified enrichment.
    - *Butters v Mncora* 2012 (4) SA 1 (SCA)
    - *Paixao v Road Accident Fund* 2012 (6) SA 377 (SCA)
    - *Cloete v Maritz* (6222/2010, 16433/2012) [2014] ZAWCHC 108 (13 June 2014)
- (e) Domestic Partnerships / Civil Unions
  - Opposite sex partnerships
    - *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC)
    - Draft Domestic Partnerships Bill [B-2008] Government Gazette No. 30663 (14 January 2008)
  - Same sex partnerships
    - Pre-Civil Union Act 17 of 2006 (background cases):
      - *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) and 2003 (4) SA 266 (CC)
      - *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000



(1) BCLR 39 (CC)

- *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA)
- *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and others* 2006 (1) SA 524 (CC)
- *Gory v Kolver NO and Others (Starke and others intervening)* 2007 (3) BCLR 249 (CC)
- Post-Civil Union Act 17 of 2006
  - H Kruuse 'Conscientious Objection to Performing Same-Sex Marriage in South Africa' *Journal of Law, Policy and the Family* (2014) 1-27.

### 3. ENGAGEMENT

Heaton - Chapter 2

(a) Nature, definition and current status

- *Sepheri v Scanlan* 2008 (1) SA 322 (C)  
(criticism)
- *Van Jaarsveld v Bridges* 2010 (4) SA 558  
(SCA) (*obita dicta*)
- *Cloete v Maritz* 2013 (5) SA 448 (WCC)  
(special plea)

(b) Are there any consequences for a termination of engagement presently?  
(contractual and delictual)

- Previous status quo: *Guggenheim v Rosenbaum* 1961 4 SA 21 (W).

(c) Seduction

- *M No v M* 1991 (4) SA 587 (D).
- Constitutionality of claim?

## 4. LEGAL REQUIREMENTS

### 4.1 Civil Marriages

Heaton - Chapter 3

#### (a) Capacity

- Prodigals
- Mentally ill persons
  - *Prinsloo 's Curator Bonis v Crawford and Prinsloo* 1905 TS 660
- Persons under curatorship
- Minors: Consent requirements
  - *Allcock v Allcock* 1969 (1) SA 427 (N)
  - *B v B* 1983 (1) SA 496 (N)
  - *Kruger v Fourie* 1969 (4) SA 469 (O)

#### (b) Consensus

- Mistake
- Misrepresentation
- Duress
  - *Smith v Smith* 1948 (4) SA 61 (N)
- Undue influence

#### (c) Lawfulness

- Minors
- Already Married
- Adoptive parents and children
- Prohibited degrees of relationship

#### (d) Compliance with statutory formalities

- Marriage Act 25 of 1961
  - *Santos v Santos* 1987 (4) SA 150 (W)
  - *Ex parte Dow* 1987 (3) SA 829 (D)

### 4.2 Miscellaneous legal requirements in other legally recognised relationships:

- **Customary Marriages**
  - Recognition of Customary Marriages Act s3-4

- **Muslim Marriages**
  - Draft Muslim Marriages Bill (supra) & Heaton - p231
- **Civil Unions**
  - Civil Union Act 17 of 2006

## 5. VOID AND VOIDABLE MARRIAGES

Heaton - Chapter 4

- (a) Difference between void and voidable marriages
- (b) Grounds upon which a marriage may be void or voidable
  - *Stander v Stander* 1929 AD 349
  - *W v W* 1959 (4) SA 183 (C)
  - *Venter v Venter* 1949 (4) SA 123 (W)
  - *Van Niekerk v Van Niekerk* 1959 (4) SA 658 (GW)
- (c) Consequences of void marriage
  - Claims for damages
    - *Arendse v Roode* 1989 (1) SA 763 (C)
  - Putative marriages
    - *Moola v Aulsebrook* 1983 (1) SA 687 (N)
    - *Solomons v Abrams* 1991 (4) SA 437 (W)
    - *Ngubane v Ngubane* 1983 (2) SA 770 (T)
- (d) Consequences of voidable marriage
  - Difference between annulment and divorce

## 6. INVARIABLE CONSEQUENCES OF MARRIAGE

Heaton - Chapter 5

- (a) Legal status of spouses
- (b) Spouses' capacity to act
- (c) *Consortium omnis vitae*
  - Previous status of adultery action: *Wiese v Moolman* 2009 (3) SA 122 (T)
  - Current status of adultery action: *RH v DE* 2014 (6) SA 436 (SCA) & *DE v RH* (CCT 182/14) [2015] ZACC 18 (19 June 2015)

- (d) Reciprocal duty of support
  - the right to maintenance and the enforcement thereof
    - Maintenance Act 99 of 1998
    - *Reyneke v Reyneke* 1990 (3) SA 927 (E)
    - *Chamani v Chamani* 1979 (4) SA 804 (W)
    - *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T)
    - *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC)
  - household necessities
    - *Reloomel v Ramsay* 1920 TPD 371
    - *Voortrekkewinkels (Ko-operatief) Bpk v Pretorius* 1951 (1) SA 730 (T)
  - the matrimonial home
    - *Lovell v Lovell* 1980 (4) SA 90 (T) (E)
    - *Afzal v Kalim* 2013 (6) SA 176 (ECP)
- (e) Donations between spouses
- (f) Parental responsibilities and rights
- (g) Family name
- (h) Headship of family

## 7. VARIABLE CONSEQUENCES OF MARRIAGE

### 7.1 Introduction to matrimonial property law

Heaton (ed) Chapter 4

Heaton - pg 65

Skelton – Chapter 5

- (a) Different matrimonial property systems
- (b) Advantages and disadvantages of each system

## 7.2 Marriage in community of property

Heaton - Chapter 6

Visser and Potgieter - Chapter 8

Heaton (ed) 109-112

Matrimonial Property Act 88 of 1984 ss11-20

- (a) When will a marriage be in community of property?
- (b) The general nature of universal community
  - *Ex parte Menzies et Uxor* 1993 (3) SA 799 (C)
- (c) Assets of the joint estate
  - *Badenhorst v Bekker* 1994 (2) SA 155 (N)
  - *Du Plessis v Pienaar and Others* 2003 (1) SA 671 (SCA)
- (d) Liabilities of the joint estate
  - *Nedbank v Van Zyl* 1990 (2) SA 469 (A)
- (e) The old regime - marital power
- (f) The new regime - equal management of the joint estate
  - acts for which consent of both spouses is required
  - acts for which consent is unnecessary
  - protection of third parties ( s15(9)(a) MPA)
    - *Distillers Corporation Ltd v Modise* 2001 (4) SA 1071 (O)
    - *Bopape v Moloto* 2000 (1) SA 383 (T)
    - *Visser v Hull* 2010 (1) SA 521 (WCC)
  - protection of spouses (*action Pauliana utilis*)
    - *Nel v Cockcroft* 1972 (3) SA 592 (T)
    - *Reyneke v Reyneke* 1990 (3) SA 927 (E)
  - capacity to litigate
    - *Zake v Nedcor Bank Ltd* 1999 (3) SA 767 (SE)
- (g) Litigation between spouses
  - *Van der Merwe v Road Accident Fund and Another* 2006 (4) SA 230 (CC);
  - s18 of the Matrimonial Property Act 88 of 1984 (amended by the Judicial Matters Amendment Act 66 of 2008)

### 7.3 Marriage out of community of property

Heaton - Chapter 7

Heaton (ed) pgs 112-114

- (a) Antenuptial contracts
  - Nature and purpose
  - Formalities
    - *Ex parte Spinazzze* 1985 (3) SA 650 (A)
  - Minors
    - *Edelstein v Edelstein* 1952 (3) SA 1 (A)
  - Contents
    - *Cumming v Cumming* 1984 (4) SA 585 (T)
  - Cancellation and amendment
    - *Ex parte Dunn* 1989 (2) SA 429 (NK)
    - *Ex parte Coetzee* 1984 (2) SA 363 (W)
- (b) Matrimonial property systems excluding community of property and including community of profit and loss
- (c) Matrimonial property system excluding community of property and excluding community of profit and loss
  - *Robloff v Ocean Accident and Guarantee Corp Ltd* 1960 (2) SA 291 (A)
- (d) The accrual system
  - Matrimonial Property Act ss2-10
  - Accrual claim calculations (see annexure A)

### 7.4 Changing the matrimonial property system

Heaton (ed) pgs 67-69

Heaton - Chapter 8

Matrimonial Property Act s21

- *Ex parte Krös* 1986 (1) SA 641 (NC)
- *Ex parte Oosthuizen* 1990 (4) SA 15 (E)
- *Ex parte Burger* 1995 (1) SA 140 (D)
- *Honey v Honey* 1992 (3) SA 609 (W)

## 8. DISSOLUTION OF MARRIAGE

### 8.1 Dissolution by death

Heaton - Chapter 10

- (a) Marriages in community of property
- (b) Marriages out of community of property
- (c) Customary and Muslim marriages
- (d) Maintenance of spouses
  - Maintenance of Surviving Spouses Act 27 of 1990
    - *Daniels v Campbell supra*
    - *Volks NO v Robinson and Another supra*
    - *Hassam supra*

### 8.2 Dissolution by divorce

Heaton - Chapters 11, 12 and 13

Skelton – Chapter 10

Divorce Act 70 of 1979 [NB see also Jurisdiction of Regional Courts Amendment Act 31 of 2008]

- (a) General
  - Jurisdiction
    - *Vermeulen v Vermeulen, Buffel v Buffel* 1989 (2) SA 771 (NK)
  - Instituting a divorce
  - Procedure
    - *Ex parte Inkeley and Inkeley* 1995 (3) SA 528 (C)
- (b) Grounds for divorce
  - Irretrievable breakdown of marriage
    - *Schwartz v Schwartz* 1984 (4) SA 467 (A)
    - *Naidoo v Naidoo* 1985 (1) SA 366 (T)
    - *Swart v Swart* 1980 (4) 364 (O)
    - *Coetzee v Coetzee* 1991 (4) SA 702 (C)
  - Incurable mental illness or continuous unconsciousness
    - *Dickinson v Dickinson* 1981 (3) SA 856 (W)

- *Krige v Smit* 1981 (4) SA 409 (C)
  - *Smit v Smit* 1982 (4) SA 34 (O)
  - *Ott v Raubenheimer* 1985 (2) SA 851 (O)
- (c) Defences against an action for divorce
- (d) Court's discretion to refuse to grant a divorce
- *Smit v Smit supra*
  - *Schwartz v Schwartz supra*
  - *Levy v Levy* 1991 (3) SA 614 (A)
  - *Amar v Amar* 1999 (3) SA 604 (W)
  - *Raik v Raik* 1993 (2) SA 617 (W)
- (e) Patrimonial Consequences of divorce
- Settlement agreements
    - *Kotze v Kotze* 2003 (3) SA 628 (T)
    - *Odgers v De Gersigny* 2007 (2) SA 305 (SCA)
  - General patrimonial consequences
    - *Van Onselen v Kgengwenyane* 1997 (2) SA 423 (B)
  - Forfeiture of patrimonial benefits
    - *PY v YL* 2013 (6) SA 28 (ECG)
    - *Wijker v Wijker* 1993 (4) SA 720 (A)
    - *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C)
    - *Botha v Botha* 2006 2 All SA 221 (SCA)
    - *Soupionas v Soupionas* 1983 (3) SA 757 (T)
    - *Singh v Singh* 1983 (1) SA 781 (C)
    - *JW v SW* 2011 (1) SA 545 (GNP)
    - E Bonthuys 'Forfeiture of Benefits at Divorce and the rule that a spouse cannot forfeit what she or he has contributed: an argument for change' (2014) 131 *SALJ* 439.
  - Redistribution of assets
    - *Beaumont v Beaumont* 1987 (1) SA 967 (A)
    - *Kritzinger v Kritzinger* 1989 (1) SA 67 (A)
    - *Kirkland v Kirkland* [2005] 3 All SA 353 (C)
    - *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA)



- *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA); [2006] 2 All SA 363 (SCA)
  - A Barratt "Whatever I acquire will be mine and mine alone:" Marital agreements not to share in constitutional South Africa' (2013) 130 *SALJ* 688.
- (f) Maintenance of spouses (see especially Heaton (ed) Chap 5)
- The maintenance order
    - *Grasso v Grasso* 1987 (1) SA 48 (C)
    - *Kroon v Kroon* 1986 (4) SA 616 (E)
    - *Kooverjee v Kooverjee* 2006 (6) SA 127 (C)
    - *Botha v Botha* 2009 (3) SA 89 (W)
    - *EH v SH* 2012 (4) SA 164 (SCA)
  - Pension interests upon divorce (esp Heaton (ed) pgs 74-80)
    - s7(7)(a) and (8) of the Divorce Act
    - s37D(4)(c)(ii) of the Pension Funds Act 24 of 1956
  - Rescission, suspension and variation of maintenance orders
  - Termination of the maintenance order
- (g) Customary and Muslim marriages
- *Gumede (born Shange) v President of the Republic of South Africa and others* 2009 (3) BCLR 243 (CC)
  - *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC)
- (h) Civil Unions
- s13(2) of the Civil Union Act 17 of 2006

<b>ACCRUAL CLAIM CALCULATIONS</b>
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<b>Step 1: Calculate accrual of the husband's estate:</b>
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**Net value on dissolution**

(assets at dissolution of marriage minus liabilities at dissolution of marriage)

**MINUS**

**Net commencement value**

(assets at commencement of marriage minus liabilities at commencement of marriage – NB remember to adapt the commencement value in terms of the weighted average of the Consumer Price Index)

**MINUS**

**Assets excluded from the accrual**

(damages for non-patrimonial loss; assets excluded by spouses in their antenuptial contract; any inheritance/donation from a third party; any donation between spouses)

<b>Step 2: Calculate accrual of the wife's estate:</b>
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**Net values on dissolution**

**MINUS**

**Net commencement value**

**MINUS**

**Assets excluded from the accrual**

<b>Step 3: Calculate accrual claim</b>
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**Larger accrual** (as calculated above) **minus** **smaller accrual** (as calculated above)

**Divide answer by 2.**

**Ie – accrual claim = ½ (larger accrual – smaller accrual)**

## RELEVANT LEGISLATION

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### MARRIAGE ACT 25 OF 1961

(English text signed by the Governor-General)

*[Assented To: 19 April 1961]*

*[Commencement Date: 1 January 1962]*

#### as amended by:

Marriage Amendment Act 11 of 1964  
Marriage Amendment Act 19 of 1968  
Marriage Amendment Act 51 of 1970  
Marriage Amendment Act 26 of 1972  
Marriage Amendment Act 12 of 1973  
Marriage Amendment Act 45 of 1981  
Child Care Act 74 of 1983  
Matrimonial Property Act 88 of 1984  
Marriages, Births and Deaths Amendment Act 41 of 1986  
Application of Certain Laws to Namibia Abolition Act 112 of 1990  
Population Registration Act Repeal Act 114 of 1991  
Births and Deaths Registration Act 51 of 1992

### ACT

To consolidate and amend the laws relating to the solemnization of marriages and matters incidental thereto.

### ARRANGEMENT OF SECTIONS

1. Definitions
2. Ex officio marriage officers, and designation of persons in service of State as marriage officers

3. Designation of ministers of religion and other persons attached to churches as marriage officers
4. How designation as marriage officer to be made
5. Marriage officers under laws repealed by this Act
6. Certain persons may in certain circumstances be deemed to have been marriage officers
7. Effect of designation of certain ministers of religion as marriage officers
8. Change of name of religious denomination or organization and amalgamation of religious denominations or organizations
9. Revocation of designation as, or authority of, marriage officer and limitation of authority of marriage officer
10. Solemnization of marriages in country outside the Union
11. Unauthorised solemnization of marriage ceremonies forbidden
12. Prohibition of solemnization of marriage without production of identity document or prescribed declaration
- 13.-21 .....
22. Irregularities in publication of banns or notice of intention to marry or in the issue of special marriage licences
23. Objections to marriage
24. Marriage of minors
- 24A. Consequences and dissolution of marriage for want of consent of parents or guardian
25. When consent of parents or guardian of minor cannot be obtained
26. Prohibition of marriage of persons under certain ages
27. Proof of age of parties to proposed marriage
28. Marriage between person and relatives of his or her deceased or divorced spouse
29. Time and place for and presence of parties and witnesses at solemnization of marriage and validation of certain marriages
- 29A. Registration of marriages
30. Marriage formula
31. Certain marriage officers may refuse to solemnize certain marriages
32. Fees payable to marriage officers
33. Blessing of a marriage
34. Religious rules and regulations
35. Penalties for solemnizing marriage contrary to the provisions of this Act
36. Penalties for false representations or statements
37. Offences committed outside the Union
38. Regulations
- 38A. ....
39. Repeal of laws and savings
- 39A. ....
40. Short title and commencement

Schedule - Laws repealed

1. Definitions

In this Act, unless the context otherwise indicates -

**“Commissioner”** includes an Additional Commissioner, an Assistant Commissioner, a Native Commissioner, an Additional Native Commissioner and an Assistant Native Commissioner;  
 [Definition of “Commissioner” substituted by s. 1 of Act 51/70]

**“magistrate”** includes an additional and an assistant magistrate;

**“marriage officer”** means any person who is a marriage officer by virtue of the provisions of this Act;

**“Minister”** means the Minister of Home Affairs;  
[Definition of “Minister” substituted by s. 1 of Act 51/70 and s. 1 of Act 41/86]

**“prescribed”** means prescribed by this Act or by regulation made under this Act;

**“prior law”** means any law repealed by this Act or the Marriage Amendment Act, 1970, or any provision of any law declared by proclamation under section 39 (5) no longer to apply.  
[Definition of “prior law” substituted by s. 1 of Act 51/70]

**2. Ex officio marriage officers, and designation of persons in service of State as marriage officers**

- (1) Every magistrate, every special justice of the peace and every Commissioner shall by virtue of his office and so long as he holds such office, be a marriage officer for the district or other area in respect of which he holds office.
- (2) The Minister and any officer in the public service authorized thereto by him may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area.  
[Sub-s. (2) amended by s. 2 of Act 51/70 and substituted by s. 1 of Act 114/91]

**3. Designation of ministers of religion and other persons attached to churches as marriage officers**

- (1) 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.
- (2) A designation under subsection (1) may further limit the authority of any such minister of religion or person to the solemnization of marriages -
  - (a) within a specified area;
  - (b) for a specified period;
  - (c) .....[Para. (c) amended by s. 3 of Act 51/70 and deleted by s. 1 of Act 114/91]

**4. How designation as marriage officer to be made**

Every designation of a person as a marriage officer shall be by written instrument and the date as from which it shall have effect and any limitation to which it is subject shall be specified in such instrument.

**5. Marriage officers under laws repealed by this Act**

- (1) Any person who, at the commencement of this Act, or of the Marriage Amendment Act, 1970, is under the provisions of any prior law authorized to solemnize any marriages, shall continue to have authority to solemnize such marriages as if such law had not been repealed, but shall exercise such authority in accordance with the provisions of this Act.  
[Sub-s. (1) substituted by s. 4 of Act 51/70 and s. 1 of Act 112/90]

(2) Any such person shall be deemed to have been designated as a marriage officer under this Act.

(3) .....

[Sub-s. (3) added by s. 4 of Act 51/70 and deleted by s. 1 of Act 112/90]

6. Certain persons may in certain circumstances be deemed to have been marriage officers

(1) Whenever any person has acted as a marriage officer during any period or within any area in respect of which he was not a marriage officer under this Act or any prior law, and the Minister or any officer in the public service authorized thereto by the Minister is satisfied that such person did so under the bona fide belief that he was a marriage officer during that period or within that area, he may direct in writing that such person shall for all purposes be deemed to have been a marriage officer during such period or within such area, duly designated as such under this Act or such law, as the case may be.

(2) Whenever any person acted as a marriage officer in respect of any marriage while he was not a marriage officer and both parties to that marriage bona fide believed that such person was in fact a marriage officer, the Minister or any officer in the public service authorized thereto by him may, after having conducted such inquiry as he may deem fit, in writing direct that such person shall for all purposes be deemed to have been duly designated as a marriage officer in respect of that marriage.

(3) Any marriage solemnized by any person who is in terms of this section to be deemed to have been duly designated as a marriage officer shall, provided such marriage was in every other respect solemnized in accordance with the provisions of this Act or any prior law, as the case may be, and there was no lawful impediment thereto, be as valid and binding as it would have been if such person had been duly designated as a marriage officer.

(4) Nothing in this section contained shall be construed as relieving any person in respect of whom a direction has been issued thereunder, from the liability to prosecution for any offence committed by him.

(5) Any person who acts as a marriage officer in respect of any marriage, shall complete a certificate on the prescribed form in which he shall state that at the time of the solemnization of the marriage he was in terms of this Act or any prior law entitled to solemnize that marriage.

[S. 6 substituted by s. 1 of Act 45/81]

7. Effect of designation of certain ministers of religion as marriage officers

Any minister of religion who before or after the commencement of this Act was or is designated as a marriage officer while a minister of the “Nederduitse Gereformeerde Kerk in Suid-Afrika, Kaap”, or of the “Nederduitse Gereformeerde Kerk van Natal”, or of the “Nederduitse Gereformeerde Kerk in die Oranje-Vrystaat”, or of the former “Nederduitse Hervormde of Gereformeerde Kerk van Suid-Afrika, Transvaal”, or of the “Nederduitse Gereformeerde Kerk van Transvaal”, shall as from the date of such designation but subject to the provisions of this Act be deemed to have been or to be a marriage officer while he remained or remains a minister of any of the said churches.

**8. Change of name of religious denomination or organization and amalgamation of religious denominations or organizations**

(1) If a religious denomination or organization changes the name whereby it was known or amalgamates with any other religious denomination or organization, such change in name or amalgamation shall have no effect on the designation of any person as a marriage officer by

virtue of his occupying any post or holding any position in any such religious denomination or organization.

- (2) If a religious denomination or organization in such circumstances as are contemplated in subsection (1) changes the name whereby it was known or amalgamates with any other religious denomination or organization, it shall immediately advise the Minister thereof.

**9. Revocation of designation as, or authority of, marriage officer and limitation of authority of marriage officer**

- (1) The Minister or any officer in the public service authorized thereto by him may, on the ground of misconduct or for any other good cause, revoke in writing the designation of any person as a marriage officer or the authority of any other person to solemnize marriages under this Act, or in writing limit in such respect as he may deem fit the authority of any marriage officer or class of marriage officers to solemnize marriages under this Act.
- (2) Any steps taken by any officer in the public service under subsection (1) may be set aside by the Minister.

**10. Solemnization of marriages in country outside the Union**

- (1) Any person who is under the provisions of this Act authorized to solemnize any marriages in any country outside the Union -
  - (a) may so solemnize any such marriage only if the parties thereto are both South African citizens domiciled in the Union; and
  - (b) shall solemnize any such marriage in accordance with the provisions of this Act.
- (2) Any marriage so solemnized shall for all purposes be deemed to have been solemnized in the province of the Union in which the male party thereto is domiciled.

**11. Unauthorised solemnization of marriage ceremonies forbidden**

- (1) A marriage may be solemnized by a marriage officer only.
- (2) Any marriage officer who purports to solemnize a marriage which he is not authorized under this Act to solemnize or which to his knowledge is legally prohibited, and any person not being a marriage officer who purports to solemnize a marriage, shall be guilty of an offence and liable on conviction to a fine not exceeding four hundred rand or, in default of payment, to imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment.
- (3) Nothing in subsection (2) contained shall apply to any marriage ceremony solemnized in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid marriage.

**12. Prohibition of solemnization of marriage without production of identity document or prescribed declaration**

No marriage officer shall solemnize any marriage unless -

- (a) each of the parties in question produces to the marriage officer his or her identity document issued under the provisions of the Identification Act, 1986 (Act No. 72 of 1986); or  
[Para. (a) substituted by s. 1 of Act 112/90 and s. 1 of Act 114/91]

- (b) each of such parties furnishes to the marriage officer the prescribed affidavit; or
- (c) one of such parties produces his or her identity document referred to in paragraph (a) to the marriage officer and the other furnishes to the marriage officer the affidavit referred to in paragraph (b).

[S. 12 amended by s. 1 of Act 11/64 and substituted by s. 5 of Act 51/70]

13. ....

[S. 13 repealed by s. 6 of Act 51/70]

14. ....

[S. 14 repealed by s. 6 of Act 51/70]

15. ....

[S. 15 amended by s. 2 of Act 11/64 and repealed by s. 6 of Act 51/70]

16. ....

[S. 16 substituted by s. 1 of Act 19/68 and repealed by s. 6 of Act 51/70]

17. ....

[S. 17 repealed by s. 6 of Act 51/70]

18. ....

[S. 18 repealed by s. 6 of Act 51/70]

19. ....

[S. 19 amended by s. 2 of Act 19/68 and repealed by s. 6 of Act 51/70]

20. ....

[S. 20 repealed by s. 6 of Act 51/70]

21. ....

[S. 21 repealed by s. 6 of Act 51/70]

**22. Irregularities in publication of banns or notice of intention to marry or in the issue of special marriage licences**

If in the case of any marriage solemnized before the commencement of the Marriage Amendment Act, 1970, the provisions of any law relating to the publication of banns or notice of intention to marry or to the issue of special marriage licences, or the applicable provisions of any law of a country outside the Union relating to the publication of banns or the publication of notice of intention to marry were not strictly complied with but such marriage was in every other respect solemnized in accordance with the provisions of this Act or, as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided such marriage has not been dissolved or declared invalid by a competent court, and provided further that neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

[S. 22 substituted by s. 3 of Act 19/68, amended by s. 7 of Act 51/70 and substituted by s. 1 of Act 26/72]

**23. Objections to marriage**

- (1) Any person desiring to raise any objection to any proposed marriage shall lodge such objection in writing with the marriage officer who is to solemnize such marriage.



- (2) Upon receipt of any such objection the marriage officer concerned shall inquire into the grounds of the objection and if he is satisfied that there is no lawful impediment to the proposed marriage, he may solemnize the marriage in accordance with the provisions of this Act.
- (3) If he is not so satisfied he shall refuse to solemnize the marriage.  
[S. 23 substituted by s. 8 of Act 51/70]

24. Marriage of minors

- (1) No marriage officer shall solemnize a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing.
- (2) For the purposes of subsection (1) a minor does not include a person who is under the age of twenty-one years and previously contracted a valid marriage which has been dissolved by death or divorce.

24A. Consequences and dissolution of marriage for want of consent of parents or guardian

- (1) Notwithstanding anything to the contrary contained in any law or the common law a marriage between persons of whom one or both are minors shall not be void merely because the parents or guardian of the minor, or a commissioner of child welfare whose consent is by law required for the entering into of a marriage, did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the marriage is made -
  - (a) by a parent or guardian of the minor before he attains majority and within six weeks of the date on which the parent or guardian becomes aware of the existence of the marriage; or
  - (b) by the minor before he attains majority or within three months thereafter.
- (2) A court shall not grant an application in terms of subsection (1) unless it is satisfied that the dissolution of the marriage is in the interest of the minor or minors.  
[S. 24A inserted by s. 34 of Act 88/84]

25. When consent of parents or guardian of minor cannot be obtained

- (1) If a commissioner of child welfare defined in section 1 of the Child Care Act, 1983, is after proper inquiry satisfied that a minor who is resident in the district or area in respect of which he holds office has no parent or guardian or is for any good reason unable to obtain the consent of his parents or guardian to enter into a marriage, such commissioner of child welfare may in his discretion grant written consent to such minor to marry a specified person, but such commissioner of child welfare shall not grant his consent if one or other parent of the minor whose consent is required by law or his guardian refuses to grant consent to the marriage.  
[Sub-s. (1) substituted by s. 62 of Act 74/83]
- (2) A commissioner of child welfare shall, before granting his consent to a marriage under subsection (1), enquire whether it is in the interests of the minor in question that the parties to the proposed marriage should enter into an antenuptial contract, and if he is satisfied that such is the case he shall not grant his consent to the proposed marriage before such contract has been entered into, and shall assist the said minor in the execution of the said contract.

- (3) A contract so entered into shall be deemed to have been entered into with the assistance of the parent or guardian of the said minor.
- (4) If the parent, guardian or commissioner of child welfare in question refuses to consent to a marriage of a minor, such consent may on application be granted by a judge of the Supreme Court of South Africa: Provided that such a judge shall not grant such consent unless he is of the opinion that such refusal of consent by the parent, guardian or commissioner of child welfare is without adequate reason and contrary to the interests of such minor.

26. Prohibition of marriage of persons under certain ages

- (1) No boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage except with the written permission of the Minister or any officer in the public service authorized thereto by him, which he may grant in any particular case in which he considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted.
- (2) If any person referred to in subsection (1) who was not capable of contracting a valid marriage without the written permission of the Minister or any officer in the public service authorized thereto by him, in terms of this Act or a prior law, contracted a marriage without such permission and the Minister or such officer, as the case may be, considers such marriage to be desirable and in the interests of the parties in question, he may, provided such marriage was in every other respect solemnized in accordance with the provisions of this Act, or, as the case may be, any prior law, and there was no other lawful impediment thereto, direct in writing that it shall for all purposes be a valid marriage.
- (3) If the Minister or any officer in the public service authorized thereto by him so directs it shall be deemed that he granted written permission to such marriage prior to the solemnization thereof.

[S. 26 amended by s. 9 of Act 51/70 and substituted by s. 2 of Act 45/81]

27. Proof of age of parties to proposed marriage

If parties appear before a marriage officer for the purpose of contracting a marriage with each other and such marriage officer reasonably suspects that either of them is of an age which debars him or her from contracting a valid marriage without the consent or permission of some other person, he may refuse to solemnize a marriage between them unless he is furnished with such consent or permission in writing or with satisfactory proof showing that the party in question is entitled to contract a marriage without such consent or permission.

28. Marriage between person and relatives of his or her deceased or divorced spouse

Any legal provision to the contrary notwithstanding it shall be lawful for -

- (a) any widower to marry the sister of his deceased wife or any female related to him through his deceased wife in any more remote degree of affinity than the sister of his deceased wife, other than an ancestor or descendant of such deceased wife;
- (b) any widow to marry the brother of her deceased husband or any male related to her through her deceased husband in any more remote degree of affinity than the brother of her deceased husband, other than an ancestor or descendant of such deceased husband;

- (c) any man to marry the sister of a person from whom he has been divorced or any female related to him through the said person in any more remote degree of affinity than the sister of such person, other than an ancestor or descendant of such person; and
- (d) any woman to marry the brother of a person from whom she has been divorced or any male related to her through the said person in any more remote degree of affinity than the brother of such person, other than an ancestor or descendant of such person.

**29. Time and place for and presence of parties and witnesses at solemnization of marriage and validation of certain marriages**

- (1) A marriage officer may solemnize a marriage at any time on any day of the week but shall not be obliged to solemnize a marriage at any other time than between the hours of eight in the morning and four in the afternoon.
- (2) A marriage officer shall solemnize any marriage in a church or other building used for religious service, or in a public office or private dwelling-house, with open doors and in the presence of the parties themselves and at least two competent witnesses, but the foregoing provisions of this subsection shall not be construed as prohibiting a marriage officer from solemnizing a marriage in any place other than a place mentioned therein if the marriage must be solemnized in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties.

(3) Every marriage -

- (a) which was solemnized in the Orange Free State or the Transvaal before the commencement of this Act in any place other than a place appointed by a prior law as a place where for the purposes of such law a marriage shall be solemnized; or
- (b) which by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties was solemnized before the commencement of the Marriage Amendment Act, 1968, in a place other than a place appointed by subsection (2) of this section as a place where for the purposes of this Act a marriage shall be solemnized.

shall, provided such marriage has not been dissolved or declared invalid by a competent court and provided further that neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if it had been solemnized in a place appointed therefor by the applicable provisions of the prior law or, as the case may be, of this Act.

- (4) No person shall under the provisions of this Act be capable of contracting a valid marriage through any other person acting as his representative.

[S. 29 substituted by s. 4 of Act 19/68]

**29A. Registration of marriages**

- (1) The marriage officer solemnizing any marriage, the parties thereto and two competent witnesses shall sign the marriage register concerned immediately after such marriage has been solemnized.
- (2) The marriage officer shall forthwith transmit the marriage register and records concerned, as the case may be, to a regional or district representative designated as such under section 21 (1) of the Identification Act, 1986 (Act No. 72 of 1986).

[S. 29A inserted by s. 33 of Act 51/92]

30. Marriage formula

- (1) In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:

“Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?”,

and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words:

“I declare that A.B. and C.D. here present have been lawfully married.”.

[Sub-s. (1) substituted by s. 1 of Act 12/73]

- (2) Subject to the provisions of subsection (1), a marriage officer, if he is a minister of religion or a person holding a responsible position in a religious denomination or organization, may in solemnizing a marriage follow the rites usually observed by his religious denomination or organization.
- (3) If the provisions of this section or any former law relating to the questions to be put to each of the parties separately or to the declaration whereby the marriage shall be declared to be solemnized or to the requirement that the parties shall give each other the right hand, have not been strictly complied with owing to -
- (a) an error, omission or oversight committed in good faith by the marriage officer; or
  - (b) an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties,

but such marriage has in every other respect been solemnized in accordance with the provisions of this Act or, as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided further that such marriage, if it was solemnized before the commencement of the Marriage Amendment Act, 1970 (Act 51/70), has not been dissolved or declared invalid by a competent court and neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

[Sub-s. (3) added by s. 2 of Act 26/72]

[S. 30 substituted by s. 10 of Act 51/70]

31. Certain marriage officers may refuse to solemnize certain marriages

Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organization to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organization.

32. Fees payable to marriage officers

- (1) No marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him as marriage officer in terms of this Act: Provided that a minister of religion or a person holding a responsible position in a religious denomination or organization may, for or by reason of any such thing done by him, receive -
  - (a) such fees or payments as were immediately prior to the commencement of this Act ordinarily paid to any such minister of religion or person in terms of the rules and regulations of his religious denomination or organization, for or by reason of any such thing done by him in terms of a prior law; or
  - (b) such fee as may be prescribed.
- (2) Any marriage officer who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or, in default of payment, to imprisonment for a period not exceeding six months.

33. Blessing of a marriage

After a marriage has been solemnized by a marriage officer, a minister of religion or a person holding a responsible position in a religious denomination or organization may bless such marriage according to the rites of his religious denomination or organization.

34. Religious rules and regulations

Nothing in this Act contained shall prevent -

- (a) the making by any religious denomination or organization of such rules or regulations in connection with the religious blessing of marriages as may be in conformity with the religious views of such denomination or organization or the exercise of church discipline in any such case; or
- (b) the acceptance by any person of any fee charged by such religious denomination or organization for the blessing of any marriage,

provided the exercise of such authority is not in conflict with the civil rights and duties of any person.

35. Penalties for solemnizing marriage contrary to the provisions of this Act

Any marriage officer who knowingly solemnizes a marriage in contravention of the provisions of this Act shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or, in default of payment, to imprisonment for a period not exceeding six months.

36. Penalties for false representations or statements

Any person who makes for any of the purposes of this Act, any false representation or false statement knowing it to be false, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.

37. Offences committed outside the Union

If any person contravenes any provision of this Act in any country outside the Union the Minister of Justice shall determine which court in the Union shall try such person for the offence committed thereby, and such court shall thereupon be competent so to try such person, and for all purposes

incidental to or consequential on the trial of such person, the offence shall be deemed to have been committed within the area of jurisdiction of such court.

38. Regulations

- (1) The Minister may make regulations as to -
  - (a) the form and content of certificates, notices, affidavits and declarations for the purposes of this Act;
  - (b) the fees payable for any certificate issued or any other act performed in terms of this Act,

and, generally, as to any matter which by this Act is required or permitted to be prescribed or which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that the provisions of this Act may be effectively administered.

[Sub-s. (1) amended by s. 11 of Act 51/70]

- (2) Such regulations may prescribe penalties for a contravention thereof, not exceeding, in the case of a fine, fifty rand or, in the case of imprisonment, a period of three months.
- (3) Different and separate regulations may be made under subsection (1) in respect of different areas or in respect of persons belonging to different population groups, and regulations made under subsection (1) (b) shall be made in consultation with the Minister of Finance.

[Sub-s. (3) added by s. 11 of Act 51/70]

**38A.** .....

[S. 38A inserted by s. 12 of Act 51/70 and repealed by s. 2 of Act 41/86]

39. Repeal of laws and savings

- (1) Subject to the provisions of subsections (2) to (4) inclusive, the laws specified in the Schedule are hereby repealed to the extent set out in the fourth column thereof.  
[Sub-s. (1) substituted by s. 1 of Act 112/90]
- (2) Anything done under any provision of a law repealed by subsection (1) shall be deemed to have been done under the corresponding provision of this Act (if any).
- (3) Any marriage which is validated by or is valid in terms of any law repealed by subsection (1) shall not be effected by such repeal.
- (4) Any provision of a law repealed by subsection (1) which applies only in respect of non-white persons or a particular class of non-white persons shall, notwithstanding the provisions of this Act, but subject to the provisions of subsection (5), continue to apply in respect of any Black and any Asiatic in respect of whom it is applicable.

- (5) .....

[Sub-s. (5) deleted by s. 3 of Act 41/86]

**39A.** .....

[S. 39A inserted by s. 13 of Act 51/70 and repealed by s. 1 of Act 112/90]

40. Short title and commencement

This Act shall be called the Marriage Act, 1961, and shall come into operation on a date to be fixed by the Governor-General by proclamation in the *Gazette*.

### Schedule

#### LAWS REPEALED

Province or union	No. and Year of Law	Title or Subject Matter	Extent of Repeal
Cape of Good Hope	Marriage Order in Council, 7th September, 1838	Amendment of Marriage Laws	The whole
	Order in Council, 20th February, 1839	Construction of Marriage Order in Council, 7th September, 1838, in certain respects	The whole
	Order in Council, 3rd April, 1840	Amendment of Marriage Order in Council, 7th September, 1838	The whole
	Ordinance No. 4 of 1848	Ordinance for rendering legal certain Marriages supposed to be invalid	The whole
	Act No. 13 of 1857	Act for Removing all Doubts regarding the Validity of the Marriages of certain Military Settlers	The whole
	Act No. 16 of 1860	“Marriage Act, 1860”	The whole
	Act No. 9 of 1882	“The Marriage Licence Act, 1882”	The whole
	Act No. 40 of 1892	“The Marriage Law Amendment Act, 1892”	The whole
	Act No. 11 of 1906	“The Marriage Law Amendment Act, 1906”	The whole
Natal	Ordinance No. 17 of 1846	“Ordinance to amend the Law regarding marriages within the District of Natal”	The whole
	Law No. 2 of 1876	“To provide for the signing of Marriage Licences”	The whole
	Law No. 19 of 1881	“To provide for the appointment of Marriage Officers for the Solemnization of Marriages of persons professing the Jewish faith, and of persons professing the Mohammedan faith”	The whole
	Law No. 46 of 1887	“To regulate the Marriage of Blacks by Christian Rites”	The whole, subject to the provisions of subsection (4) of section thirty-nine of this Act
	Law No. 7 of 1889	“The Marriage Licence Law,	The whole

		1889”	
	Law No. 25 of 1891	“Indian Immigration Law, 1891”	Sections sixty-five to seventy-two inclusive, seventy-five and eighty-one, subject to the provisions of subsection (4) of section thirty-nine of this Act
	Act No. 45 of 1898	“To repeal and re-enact with certain amendments, Act No. 15 of 1897, entitled “Act for removing a certain Restriction upon Marriage within the Colony of Natal”	The whole
	Act No. 44 of 1903	“To amend the Law relating to Marriages of Blacks by Christian Rites”	The whole, subject to the provisions of subsection (4) of section thirty-nine of this Act
Orange Free State	Law No. 22 of 1898	“Over Assistent Landdrosten	The whole
	Law No. 26 of 1889	“De Huwelijkswet”	The whole
	Ordinance No. 27 of 1902	“Validation of Marriages Ordinance, 1902”	The whole
	Ordinance No. 31 of 1903	“Marriage (Prohibited Degrees) Ordinance, 1903”	The whole
Transvaal	Law No. 3 of 1871	“Huwelijks Ordonnantie”	The whole
	Volksraad Resolution, 15th May, 1883, Art. 74	Legalization of certain Marriages	The whole
	Volksraad Resolution, 7th May, 1885, Art. 53	Legalization of certain Marriages	The whole
	First Volksraad Resolution, 10th December, 1896, Art. 2286	“Recht tot huwelijksbevestiging door de Hollandsche Consuls en Consulaire ambtenaren in de Z.A.R.”	The whole
	Law No. 3 of 1897	“Regelende de huwelijken van Kleurlingen binnen de Zuid-Afrikaansche Republiek”	The whole, subject to the provisions of subsection (4) of section thirty-nine of this Act
	Proclamation No. 6 of 1900	Black Marriages by Christian Rites	The whole, subject to the provisions of subsection (4) of section thirty-nine of this Act
	Proclamation No. 2 of 1901	Amendment of Marriage Laws as to officer granting special licences	The whole
	Proclamation No. 25 of 1902	Amending Law No. 3 of 1897	The whole



	Proclamation No. 31 of 1902	“Legalization of Marriages Proclamation, 1902”	The whole
	Ordinance No. 26 of 1902	“Legalization of Marriages Ordinance, 1902”	The whole
	Ordinance No. 29 of 1903	Legalization of Marriages of Coloured Persons Ordinance, 1903	The whole
	Ordinance No. 39 of 1904	Marriage Law Amendment Ordinance, 1904	The whole
	Ordinance No. 33 of 1905	The Legalization of Marriages Ordinance, 1905	The whole
	Act No. 13 of 1909	Marriage Law Amendment Act, 1909	The whole
Union	Act No. 20 of 1913	Marriage Laws Amendment Act, 1913	The whole
	Act No. 43 of 1916	Marriage Officers Act, 1916	The whole
	Act No. 11 of 1920	Natal and Transvaal Marriage Law Amendment Act, 1920	The whole
	Act No. 17 of 1921	Marriage Law Amendment Act, 1921	The whole
	Act No. 41 of 1927	Orange Free State Marriage Law Amendment Act, 1927	The whole
	Act No. 7 of 1934	Births, Marriages and Deaths Registration Amendment Act, 1934	Sections ten and eleven
	Act No. 8 of 1935	Marriage Law Amendment Act, 1935	The whole
	Act No. 21 of 1943	Black Administration (Amendment) Act, 1943	Section twelve
	Act No. 13 of 1945	Publication of Banns Amendment Act, 1945	The whole
	Act No. 32 of 1952	General Law Amendment Act, 1952	Section seven
	Act No. 25 of 1954	Marriage Officers Amendment Act, 1954	The whole
	Act No. 68 of 1957	General Law Amendment Act, 1957	Section eight

# RECOGNITION OF CUSTOMARY MARRIAGES ACT 120 OF 1998

(English text signed by the President)

*[Assented To: 20 November 1998]*

*[Commencement Date: 15 November 2000]*

[\[Proc. R66 / GG 21700 / 20001101\]](#)

**as amended by:**

Judicial Matters Amendment Act 42 of 2001

Jurisdiction of Regional Courts Amendment Act 31 of 2008

[with effect from 9 August 2010]

## ACT

To make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith.

## ARRANGEMENT OF SECTIONS

### 1. Definitions

### 2. Recognition of customary marriages

### 3. Requirements for validity of customary marriages

### 4. Registration of customary marriages

### 5. Determination of age of minor

### 6. Equal status and capacity of spouses

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#### [Schedule](#)

1. Definitions

In this Act, unless the context otherwise indicates -

**“court”** means a High Court or a court for a regional division contemplated in [section 29\(1B\)](#) of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);

[Definition of “court” substituted by s. 19 of Act 42/2001 and s. 10 of Act 31/2008]

**“customary law”** means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples;

**“customary marriage”** means a marriage concluded in accordance with customary law;

**“lobolo”** means the property in cash or in kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka or by any other name, 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;

**“Minister”** means the Minister of Home Affairs;

**“prescribed”** means prescribed by regulation made under [section 11](#);

**“registering officer”** means any person appointed as registering officer for purposes of this Act by the Minister or an officer acting under the Minister’s written authorization;

**“this Act”** includes the regulations;

**“traditional leader”** means any person who in terms of customary law or any other law holds a position in a traditional ruling hierarchy.

## **2. Recognition of customary marriages**

- (1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.
- (2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.
- (3) If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.
- (4) If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.

## **3. Requirements for validity of customary marriages**

- (1) For a customary marriage entered into after the commencement of this Act to be valid -
  - (a) the prospective spouses -
    - (i) must both be above the age of 18 years; and
    - (ii) must both consent to be married to each other under customary law; and
  - (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.
- (2) Save as provided in [section 10](#) (1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act No. 25 of 1961), during the subsistence of such customary marriage.
- (3) (a) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage.
  - (b) If the consent of the parent or legal guardian cannot be obtained, [section 25](#) of the Marriage Act, 1961, applies.
- (4) (a) Despite subsection (1) (a) (i), the Minister or any officer in the public service authorised in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into a customary marriage if the Minister or the said officer considers such marriage desirable and in the interests of the parties in question.

(b) Such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all the other requirements prescribed by law.

(c) If a person under the age of 18 years has entered into a customary marriage without the written permission of the Minister or the relevant officer, the Minister or the officer may, if he or she considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with this Act, declare the marriage in writing to be a valid customary marriage.

(5) Subject to subsection (4), [section 24A](#) of the Marriage Act, 1961, applies to the customary marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(6) The prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law.

#### **4. Registration of customary marriages**

(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.

(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.

(3) A customary marriage -

(a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*; or

(b) entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*.

(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.

(b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.

- (5) (a) If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.
- (b) If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).
- (6) If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.
- (7) A court may, upon application made to that court and upon investigation instituted by that court, order -
- (a) the registration of any customary marriage; or
- (b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.
- (8) A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes prima facie proof of the existence of the customary marriage and of the particulars contained in the certificate.
- (9) Failure to register a customary marriage does not affect the validity of that marriage.

## **5. Determination of age of minor**

- (1) A registering officer may, in respect of a person who allegedly is a minor, accept a birth certificate, an identity document, a sworn statement of a parent or relative of the minor or such other evidence as the registering officer deems appropriate as proof of that person's age.
- (2) If the age of a person who allegedly is a minor is uncertain or is in dispute, and that person's age is relevant for purposes of this Act, the registering officer may in the prescribed manner submit the matter to a magistrate's court established in terms of the Magistrates' Court Act, 1944 (Act No. 32 of 1944), which must determine the person's age and issue the prescribed certificate in regard thereto, which constitutes proof of the person's age.

## **6. Equal status and capacity of spouses**

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.

## **7. Proprietary consequences of customary marriages and contractual capacity of spouses**

(1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.

(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 antenuptial contract which regulates the matrimonial property system of their marriage.

(3) [Chapter III](#) and [sections 18, 19, 20](#) and [24](#) of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), apply in respect of any customary marriage which is in community of property as contemplated in subsection (2).

(4) (a) Spouses in a customary marriage entered into before the commencement of this

Act may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage or marriages and the court may, if satisfied that -

(i) there are sound reasons for the proposed change;

(ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the *Gazette*; and

(iii) no other person will be prejudiced by the proposed change, order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

(b) In the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses, must be joined in the proceedings.

(5) [Section 21](#) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984) is applicable to a customary marriage entered into after the commencement of this Act in which the husband does not have more than one spouse.

(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.

8. Dissolution of customary marriages



(1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.

(2) A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

(3) The Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) and [section 6](#) of the Divorce Act, 1979 (Act No. 70 of 1979), apply to the dissolution of a customary marriage.

(4) A court granting a decree for the dissolution of a customary marriage -

(a) has the powers contemplated in [sections 7, 8, 9](#) and [10](#) of the Divorce Act, 1979, and [section 24](#) (1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984);

(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) 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.

(5) Nothing in this section 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.

## **9. Age of majority**

Despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act No. 57 of 1972).

## **10. Change of marriage system**

(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No. 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.

(2) When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) [Chapter III](#) and [sections 18, 19, 20](#) and [24](#) of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), apply in respect of any marriage which is in community of property as contemplated in subsection (2).

(4) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage.

## **11. Regulations**

(1) The Minister of Justice, in consultation with the Minister, may make regulations -

(a) relating to -

(i) the requirements to be complied with and the information to be furnished to a registering officer in respect of the registration of a customary marriage;

(ii) the manner in which a registering officer must satisfy himself or herself as to the existence or the validity of a customary marriage;

(iii) the manner in which any person including any traditional leader may participate in the proof of the existence or in the registration of any customary marriage;

(iv) the form and content of certificates, notices, affidavits and declarations required for the purposes of this Act;

(v) the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of customary marriages or of any document prescribed in terms of the regulations;

(vi) any matter that is required or permitted to be prescribed in terms of this Act; and

(vii) any other matter which is necessary or expedient to provide for the effective registration of customary marriages or the efficient administration of this Act; and

(b) prescribing the fees payable in respect of the registration of a customary marriage and the issuing of any certificate in respect thereof.

(2) Any regulation made under subsection (1) must, before publication thereof in the *Gazette*, be submitted to Parliament.

(3) Any regulation made under subsection (1) which may result in financial expenditure for the State or regulations made under subsection (1) (b) must be made in consultation with the Minister of Finance.

(4) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

## 12. Amendment of laws

(1) Section 17 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), is hereby amended by the substitution for paragraph (b) of subsection (2) of the following paragraph:

“(b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, state whether the marriage was contracted in or out of community of property or whether the matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act, 1998;”.

(2) Section 45bis of the Deeds Registries Act, 1937, is hereby amended -

(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:

“(b) forms or formed an asset in a joint estate, and a court has made an order, or has made an order and given an authorization, under [section 20](#) or [21](#) (1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or under [section 7](#) of the Recognition of Customary Marriages Act, 1998, as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses,”; and

(b) by the substitution for paragraph (b) of subsection (1A) of the following paragraph:

“(b) forms or formed an asset in a joint estate and a court has made an order, or has made an order and given an authorization under [section 20](#) or [21](#) (1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or under [section 7](#) of the Recognition of Customary Marriages Act, 1998, as the case may be, in terms of which the property, lease or bond is awarded to both spouses in undivided shares,”.

## 13. Repeal of laws

The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

## 14. Short title and commencement

This Act is called the Recognition of Customary Marriages Act, 1998, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

### Schedule REPEAL OF LAWS(Section 12)

No. and year of Law	Short title	Extent of Repeal
Act No. 38 of 1927	Black Administration Act, 1927	Sections 11 (3) (b), 22 (1) to (5) and 22bis
Act No. 21 of 1978	Transkei Marriage Act, 1978 (Transkei)	Sections 3, 29, 37, 38 and 39
Act No. 16 of 1985	KwaZulu Act on the Code of Zulu Law, 1985	Sections 22 and 27 (3)
Proclamation No. R151 of 1987	Natal Code of Zulu Law, 1987	Section 27 (3)

## CIVIL UNION ACT 17 OF 2006

(English text signed by the President)

*[Assented to: 29 November 2006]*

*[Commencement date: 30 November 2006]*

### ACT

To provide for the solemnisation of civil unions, by way of either a marriage or civil partnership; the legal consequences of civil unions; and to provide for matters incidental thereto.

### PREAMBLE

1. Definitions
2. Objectives of Act
3. Relationships to which Act applies
4. Solemnisation of civil union
5. Designation of ministers of religion and other persons attached to religious denomination or organisation as marriage officers
6. Marriage officer not compelled to solemnise civil union
7. Prohibition of solemnisation of civil union without production of identity document or prescribed affidavit
8. Requirements for solemnisation and registration of civil union
9. Objections to civil union
10. Time and place for and presence of parties and witnesses at solemnisation and registration of civil union
11. Formula for solemnisation of marriage or civil partnership
12. Registration of civil union
13. Legal consequences of civil union
14. Offences and penalties
15. Regulations
16. Short title and commencement

### PREAMBLE

**WHEREAS** section 9(1) of the Constitution of the Republic of South Africa, 1996, provides that everyone is equal before the law and has the right to equal protection and benefit of the law;

**AND WHEREAS** section 9(3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;

**AND WHEREAS** section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected;

**AND WHEREAS** section 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion;

**AND WHEREAS** the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom;

**AND NOTING** that the family law dispensation as it existed after the commencement of the Constitution did not provide for same-sex couples to enjoy the status and the benefits coupled with the responsibilities that marriage accords to opposite-sex couples,

**BE IT THEREFORE ENACTED** by the Parliament of the Republic of South Africa, as follows: -

**1. Definitions**

In this Act, unless the context otherwise indicates –

“**civil union**” means the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others;

“**civil union partner**” means a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of this Act;

“**Customary Marriages Act**” means the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);

“**Identification Act**” means the Identification Act, 1997 (Act No. 68 of 1997);

“**Marriage Act**” means the Marriage Act, 1961 (Act No. 25 of 1961);

“**marriage officer**” means -

- (a) a marriage officer *ex officio* or so designated by virtue of section 2 of the Marriage Act; or
- (b) any minister of religion, or any person holding a responsible position in any religious denomination or organisation, designated as marriage officers under section 5 of this Act;

“**Minister**” means the Cabinet member responsible for the administration of Home Affairs;

“**prescribed**” means prescribed by this Act or by regulation made under this Act; and

“**this Act**” includes the regulations.

**2. Objectives of Act**

The objectives of this Act are -

- (a) to regulate the solemnisation and registration of civil unions, by way of either a marriage or a civil partnership; and
- (b) to provide for the legal consequences of the solemnisation and registration of civil unions.

**3. Relationships to which Act applies**

This Act applies to civil union partners joined in a civil union.

**4. Solemnisation of civil union**

- (1) A marriage officer may solemnise a civil union in accordance with the provisions of this Act.
- (2) Subject to this Act, a marriage officer has all the powers, responsibilities and duties, as conferred upon him or her under the Marriage Act, to solemnise a civil union.

**5. Designation of ministers of religion and other persons attached to religious denomination or organisation as marriage officers**

- (1) Any religious denomination or organisation may apply in writing to the Minister to be designated as a religious organisation that may solemnise marriages in terms of this Act.
- (2) The Minister may designate such a religious denomination or organisation as a religious institution that may solemnise marriages under this Act, and must, from time to time, publish particulars of all religious institutions so designated in the *Gazette*.
- (3) The Minister may, on request of any designated religious institution referred to in subsection (2), revoke the designation under that subsection and must publish such revocation in the *Gazette*.
- (4) The Minister and any officer in the public service authorised thereto by him or her may designate, upon receiving a written request from any minister of religion or any person holding a responsible position in any designated religious institution to be, as long as he or she is such a minister or occupies such position, a marriage officer for the purpose of solemnising marriages, in accordance with this Act, and according to the rites of that religion.
- (5) Every designation of a person as a marriage officer under subsection (4) shall be by written instrument and the date as from which it shall have effect and any limitation to which it is subject shall be specified in such instrument.
- (6) The Minister and any officer in the public service authorised thereto by him or her may, upon receiving a written request from a person designated as a marriage officer under subsection (4), revoke, in writing, the designation of such person as a marriage officer for purposes of solemnising marriages under this Act.

**6. Marriage officer not compelled to solemnise civil union**

A marriage officer, other than a marriage officer referred to in section 5, may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union.

**7. Prohibition of solemnisation of civil union without production of identity document or prescribed affidavit**

No marriage officer may solemnise a civil union unless -

- (a) each of the parties in question produces to the marriage officer his or her identity document issued under the provisions of the Identification Act;
- (b) each of such parties furnishes to the marriage officer the prescribed affidavit; or
- (c) one of such parties produces his or her identity document referred to in paragraph (a) to the marriage officer and the other furnishes to the marriage officer the affidavit referred to in paragraph (b).

**8. Requirements for solemnisation and registration of civil union**

- (1) A person may only be a spouse or partner in one marriage or civil partnership, as the case may be, at any given time.

- (2) A person in a civil union may not conclude a marriage under the Marriage Act or the Customary Marriages Act.
- (3) A person who is married under the Marriage Act or the Customary Marriages Act may not register a civil union.
- (4) A prospective civil union partner who has previously been married under the Marriage Act or Customary Marriages Act or registered as a spouse in a marriage or a partner in a civil partnership under this Act, must present a certified copy of the divorce order, or death certificate of the former spouse or partner, as the case may be, to the marriage officer as proof that the previous marriage or civil union has been terminated.
- (5) The marriage officer may not proceed with the solemnisation and registration of the civil union unless in possession of the relevant documentation referred to in subsection (4).
- (6) A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or Customary Marriages Act.

## **9. Objections to civil union**

- (1) Any person desiring to raise any objection to any proposed civil union must lodge such objection in writing with the marriage officer who is to solemnise such civil union.
- (2) Upon receipt of any such objection the marriage officer concerned must inquire into the grounds of the objection and if he or she is satisfied that there is no lawful impediment to the proposed civil union, he or she may solemnise the civil union.
- (3) If he or she is not so satisfied, he or she must refuse to solemnise the civil union and record the reasons for such refusal in writing,

## **10. Time and place for and presence of parties and witnesses at solemnisation and registration of civil union**

- (1) A marriage officer may solemnise and register a civil union at any time on any day of the week, but is not obliged to solemnise a civil union at any other time than between the hours of eight in the morning and four in the afternoon.
- (2) A marriage officer must solemnise and register a civil union in a public office or private dwelling-house or on the premises used for such purposes by the marriage officer, with open doors and in the presence of the parties themselves and at least two competent witnesses, but the foregoing provisions of this subsection do not prohibit a marriage officer to solemnise a civil union in any place other than a place mentioned herein, if the civil union must be solemnised in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties.
- (3) No person is competent to enter into a civil union through any other person acting as his or her representative.

## **11. Formula for solemnisation of marriage or civil partnership**

(1) A marriage officer must inquire from the parties appearing before him or her whether their civil union should be known as a marriage or a civil partnership and must thereupon proceed by solemnising the civil union in accordance with the provisions of this section.

(2) In solemnising any civil union, the marriage officer must put the following questions to each of the parties separately, and each of the parties must reply thereto in the affirmative:

“Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage/civil partnership with CD. here present, and that you call all here present to witness that you take CD. as your lawful spouse/civil partner?”, and thereupon the parties must give each other the right hand and the marriage officer concerned must declare the marriage or civil partnership, as the case may be, solemnised in the following words:

“I declare that A.B. and CD. here present have been lawfully joined in a marriage/civil partnership.”.

(3) If the provisions of this section relating to the questions to be put to each of the parties separately or to the declaration whereby the marriage or civil partnership shall be declared to be solemnised, or to the requirement that the parties must give each other the right hand, have not been strictly complied with owing to -

(a) an error, omission or oversight committed in good faith by the marriage officer;

(b) an error, omission or oversight committed in good faith by the parties; or

(c) the physical disability of one or both of the parties,

and such civil union has in every other respect been solemnised in accordance with the provisions of this Act, that civil union shall, provided there was no other lawful impediment thereto, be valid and binding.

## **12. Registration of civil union**

(1) The prospective civil union partners must individually and in writing declare their willingness to enter into the civil union with one another by signing the prescribed document in the presence of two witnesses.

(2) The marriage officer and the two witnesses must sign the prescribed document to certify that the declaration made in terms of section 11(2) was made in their presence.

(3) The marriage officer must issue the partners to the civil union with a registration certificate stating that they have, under this Act, entered into a marriage or a civil partnership, depending on the decision made by the parties in terms of section 11(1).

(4) The certificate contemplated in subsection (3) is *prima facie* proof that a valid civil union exists between the partners referred to in the certificate.

(5) Each marriage officer must keep a record of all civil unions conducted by him or her.

(6) The marriage officer must transmit the civil union register and records concerned to the official in the public service with the delegated responsibility for the population register in the area in question.

(7) Upon receipt of the said register the official referred to in subsection (6) must cause the particulars of the civil union concerned to be included in the population register in accordance with the provisions of section 8(e) of the Identification Act.



**13. Legal consequences of civil union**

- (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.
- (2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to -
  - (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
  - (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.

**14. Offences and penalties**

- (1) Any marriage officer who purports to solemnise a civil union which he or she is not authorised under this Act to solemnise or which to his or her knowledge is legally prohibited, and any person not being a marriage officer who purports to solemnise a civil union, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding 12 months.
- (2) Any marriage officer who demands or receives any fee, gift or reward for or by reason of anything done by him or her as marriage officer in terms of this Act, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months.
- (3) Any marriage officer who knowingly solemnises a civil union in contravention of the provisions of this Act, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months.
- (4) Any person who, for the purposes of this Act, makes any false representation or false statement knowing it to be false, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.

**15. Regulations**

- (1) The Minister may make regulations relating to -
  - (a) the form and content of certificates, notices, affidavits and declarations for the purposes of this Act;
  - (b) the fees payable for any certificate issued or any other act performed in terms of this Act; and
  - (c) generally, any matter which by this Act is required or permitted to be prescribed or which he or she considers necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that the provisions of this Act may be effectively administered.
- (2) Such regulations may prescribe penalties for a contravention thereof, of -
  - (a) a fine not exceeding the amount that, in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), may be imposed as an alternative to imprisonment for a period of six months; or

- (b) in lieu of payment of a fine referred to in paragraph (a), imprisonment for a period not exceeding six months.
- (3) Any regulation made under the Marriage Act shall, in the absence of a regulation made under subsection (1), apply to the extent that it is practicable and necessary, in order to promote or facilitate the application of this Act: Provided that this subsection shall lapse after a period of one year from the date of the commencement of this Act.

**16. Short title and commencement**

This Act is called the Civil Union Act, 2006, and comes into operation on 30 November 2006 or an earlier date fixed by the President by proclamation in the *Gazette*.

# MATRIMONIAL PROPERTY ACT 88 OF 1984

(Afrikaans text signed by the State President)

*[Assented To: 3 July 1984]*  
*[Commencement Date: 1 November 1984]*

**as amended by:**

Matrimonial Property Amendment Act 91 of 1986  
Intestate Succession Act 81 of 1987  
Marriage and Matrimonial Property Law Amendment Act 3 of 1988  
Insolvency Amendment Act 122 of 1993  
General Law Fourth Amendment Act 132 of 1993  
Guardianship Act 192 of 1993  
Justice Laws Rationalisation Act 18 of 1996  
National Credit Act 34 of 2005  
**Judicial Matters Amendment Act 66 of 2008**

**ACT**

**To amend the matrimonial property law and to provide for matters connected therewith.**

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### 1. Definitions

In this Act, unless the context indicates otherwise -

**“banking institution”** means a banking institution as defined in section 1 of the Banks Act, 1965 (Act No. 23 of 1965);

**“building society”** means a building society as defined in section 1 of the Building Societies Act, 1965 (Act No. 24 of 1965);

**“court”** means a provincial or local division of the Supreme Court of South Africa or a divorce court instituted under section 10 of the Black Administration Act, 1927, Amendment Act, 1929 (Act No. 9 of 1929), and includes, for the purposes of section 16, a judge in chambers, and, for the purposes of section 16 (1), a magistrate’s court which has jurisdiction in the matter concerned;

**“financial institution”** means a financial institution as defined in section 1 of the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984);

**“joint estate”** means the joint estate of a husband and a wife married in community of property;

**“listed securities”** means securities as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985);

[Definition of “listed securities” amended by s. 4 of Act 18/96]

“separate property” means property which does not form part of a joint estate.

## CHAPTER I

### ACCRUAL SYSTEM

#### 2. Marriages subject to accrual system

Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this Chapter, except in so far as that system is expressly excluded by the antenuptial contract.

#### 3. Accrual system

- (1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.
- (2) Subject to the provisions of [section 8](#) (1), a claim in terms of subsection (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.

#### 4. Accrual of estate

- (1)
  - (a) The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.
  - (b) In the determination of the accrual of the estate of a spouse -
    - (i) any amount which accrued to that estate by way of damages, other than damages for patrimonial loss, is left out of account;
    - (ii) an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as any other asset which he acquired by virtue of his possession or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage;
    - (iii) the net value of that estate at the commencement of his marriage is calculated with due allowance for any difference which may exist in the value of money at the commencement and dissolution of his marriage, and for that purpose the weighted average of the consumer price index as published from time to time in the *Gazette* serves as *prima facie* proof of any change in the value of money.
- (2) The accrual of the estate of a deceased spouse is determined before effect is given to any testamentary disposition, donation *mortis causa* or succession out of that estate in terms of the law of intestate succession.

#### 5. Inheritances, legacies and donations excluded from accrual

- (1) An inheritance, a legacy or a donation which accrues to a spouse during the subsistence of his marriage, as well as any other asset which he acquired by virtue of his possession or former possession of such inheritance, legacy or donation, does not form part of the accrual of his estate, except in so far as the spouses may agree otherwise in their antenuptial contract or in so far as the testator or donor may stipulate otherwise.
- (2) In the determination of the accrual of the estate of a spouse a donation between spouses, other than a donation *mortis causa*, is not taken into account either as part of the estate of the donor or as part of the estate of the donee.

## **6. Proof of commencement value of estate**

- (1) Where a party to an intended marriage does not for the purpose of proof of the net value of his estate at the commencement of his marriage declare that value in the antenuptial contract concerned, he may for such purpose declare that value before the marriage is entered into or within six months thereafter in a statement, which shall be signed by the other party, and cause the statement to be attested by a notary and filed with the copy of the antenuptial contract of the parties in the protocol of the notary before whom the antenuptial contract was executed.
- (2) A notary attesting such a statement shall furnish the parties with a certified copy thereof on which he shall certify that the original is kept in his protocol together with the copy of the antenuptial contract of the parties or, if he is not the notary before whom the antenuptial contract was executed, he shall send the original statement by registered post to the notary in whose protocol the antenuptial contract is kept, or to the custodian of his protocol, as the case may be, and the last-mentioned notary or that custodian shall keep the original statement together with the copy of the antenuptial contract of the parties in his protocol.
- (3) An antenuptial contract contemplated in subsection (1) or a certified copy thereof, or a statement signed and attested in terms of subsection (1) or a certified copy thereof contemplated in subsection (2), serves as prima facie proof of the net value of the estate of the spouse concerned at the commencement of his marriage.
- (4) The net value of the estate of a spouse at the commencement of his marriage is deemed to be nil if -
  - (a) the liabilities of that spouse exceed his assets at such commencement;
  - (b) that value was not declared in his antenuptial contract or in a statement in terms of subsection (1) and the contrary is not proved.

## **7. Obligation to furnish particulars of value of estate**

When it is necessary to determine the accrual of the estate of a spouse or a deceased spouse, that spouse or the executor of the estate of the deceased spouse, as the case may be, shall within a reasonable time at the request of the other spouse or the executor of the estate of the other spouse, as the case may be, furnish full particulars of the value of that estate.

## **8. Power of court to order division of accrual**

- (1) A court may on the application of a spouse whose marriage is subject to the accrual system and who satisfies the court that his right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this Chapter or on such other basis as the court may deem just.

- (2) A court making an order under subsection (1) may order that the accrual system applicable to the marriage be replaced by a matrimonial property system in terms of which accrual sharing as well as community of property and community of profit and loss are excluded.
- (3) When an order is made under subsection (2), the registrar shall send a copy thereof to the registrar of deeds concerned, who shall cause an appropriate reference to the new matrimonial property system to be made on the registry duplicate of the antenuptial contract concerned and on every copy thereof tendered to him for endorsement.
- (4) A registrar of deeds who receives notice of a new matrimonial property system in terms of subsection (3), shall notify all other registrars of deeds accordingly and furnish each of them with a copy of the court order, and every registrar of deeds so notified shall cause an appropriate reference to the new matrimonial property system to be endorsed on the copy, if any, of the antenuptial contract concerned filed in his registry and on every copy thereof tendered to him for endorsement.

**9. Forfeiture of right to accrual sharing**

The right to share in the accrual of the estate of a spouse in terms of this Chapter is a patrimonial benefit which may on divorce be declared forfeit, either wholly or in part.

**10. Deferment of satisfaction of accrual claim**

A court may on the application of a person against whom an accrual claim lies, order that satisfaction of the claim be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just.

**CHAPTER II**

**ABOLITION OF MARITAL POWER**

**11. Abolition of marital power**

- (1) The common law rule in terms of which a husband obtains the marital power over the person and property of his wife is hereby repealed.
- (2) Any marital power which a husband has over the person and property of his wife immediately prior to the date of coming into operation of this subsection, is hereby abolished.
- (3) The provisions of Chapter III shall apply to every marriage in community of property irrespective of the date on which such marriage was entered into.
- (4) The abolition of the marital power by subsection (2) shall not affect the legal consequences of any act done or omission or fact existing before such abolition.

[S. 11 substituted by s. 29 of Act 132/93]

**12. Effect of abolition of marital power**

Subject to the provisions of this Act, the effect of the abolition of the marital power is to do away with the restrictions which the marital power places on the capacity of a wife to contract and to litigate.

**13. ....**

### CHAPTER III

#### MARRIAGES IN COMMUNITY OF PROPERTY

##### 14. Equal powers of spouses married in community

Subject to the provisions of this Chapter, a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act.

##### 15. Powers of spouses

- (1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.
- (2) Such a spouse shall not without the written consent of the other spouse -
  - (a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;
  - (b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate;
  - (c) alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate;
  - (d) alienate or pledge any jewellery, coins, stamps, paintings or any other assets forming part of the joint estate and held mainly as investments;
  - (e) withdraw money held in the name of the other spouse in any account in a banking institution, a building society or the Post Office Savings Bank of the Republic of South Africa;
  - (f) enter, as a consumer, into a credit agreement to which the provisions of the National Credit Act, 2005 apply, as 'consumer' and 'credit agreement' are respectively defined in that Act, but this paragraph does not require the written consent of a spouse before incurring each successive charge under a credit facility, as defined in that Act;  
[Para. (f) substituted by s. 172 of Act 34/2005]
  - (g) as a purchaser enter into a contract as defined in the Alienation of Land Act, 1981 (Act No. 68 of 1981), and to which the provisions of that Act apply;
  - (h) bind himself as surety.
- (3) A spouse shall not without the consent of the other spouse -
  - (a) alienate, pledge or otherwise burden any furniture or other effects of the common household forming part of the joint estate;
  - (b) receive any money due or accruing to that other spouse or the joint estate by way of -



- (i) remuneration, earnings, bonus, allowance, royalty, pension or gratuity, by virtue of his profession, trade, business, or services rendered by him;
  - (ii) damages for loss of income contemplated in subparagraph (i);
  - (iii) inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse;
  - (iv) income derived from the separate property of the other spouse;
  - (v) dividends or interest on or the proceeds of shares or investments in the name of the other spouse;
  - (vi) the proceeds of any insurance policy or annuity in favour of the other spouse;
- (c) donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate, and which is not contrary to the provisions of subsection (2) or paragraph (a) of this subsection.
- (4) The consent required for the purposes of paragraphs (b) to (g) of subsection (2), and subsection (3) may, except where it is required for the registration of a deed in a deeds registry, also be given by way of ratification within a reasonable time after the act concerned.
- (5) The consent required for the performance of the acts contemplated in paragraphs (a), (b), (f), (g) and (h) of subsection (2) shall be given separately in respect of each act and shall be attested by two competent witnesses.
- (6) The provisions of paragraphs (b), (c), (f), (g) and (h) of subsection (2) do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business.
- (7) Notwithstanding the provisions of subsection (2) (c), a spouse may without the consent of the other spouse -
- (a) sell listed securities on the stock exchange and cede or pledge listed securities in order to buy listed securities;
  - (b) alienate, cede or pledge -
    - (i) a deposit held in his name at a building society or banking institution;
    - (ii) building society shares registered in his name.
- (8) In determining whether a donation or alienation contemplated in subsection (3) (c) does not or probably will not unreasonably prejudice the interest of the other spouse in the joint estate, the court shall have regard to the value of the property donated or alienated, the reason for the donation or alienation, the financial and social standing of the spouses, their standard of living and any other factor which in the opinion of the court should be taken into account.
- (9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and -

- (a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;
- (b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.

**16. Want of consent, and suspension of powers of spouse**

- (1) When a spouse withholds the consent required in terms of subsection (2) or (3) of [section 15](#), or [section 17](#), or when that consent can for any other reason not be obtained, a court may on the application of the other spouse give him leave to enter into the transaction without the required consent if it is satisfied, in the case where the consent is withheld, that such withholding is unreasonable or, in any other case, that there is good reason to dispense with the consent.
- (2) If a court is satisfied that it is essential for the protection of the interest of a spouse in the joint estate, it may on the application of that spouse suspend for a definite or an indefinite period any power which the other spouse may exercise under this Chapter.

**17. Litigation by or against spouses**

- (1) A spouse married in community of property shall not without the written consent of the other spouse institute legal proceedings against another person or defend legal proceedings instituted by another person, except legal proceedings -
  - (a) in respect of his separate property;
  - (b) for the recovery of damages, other than damages for patrimonial loss, by reason of the commission of a delict against him;
  - (c) in respect of a matter relating to his profession, trade or business.
- (2) A party to legal proceedings instituted or defended by a spouse may not challenge the validity of the proceedings on the ground of want of the consent required in terms of subsection (1).
- (3) If costs are awarded against a spouse in legal proceedings instituted or defended by him without the consent required in terms of subsection (1), the court may, with due regard to the interest of the other spouse in the joint estate and the reason for the want of consent, order that those costs be recovered from the separate property, if any, of the first-mentioned spouse and, in so far as those costs cannot be so recovered, that they be recovered from the joint estate, in which case the court may order that upon the division of the joint estate an adjustment shall be effected in favour of the other spouse.
- (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 applicant 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.

[Sub-s. (4) substituted by s. 11 of Act 122/93]

- (5) Where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for necessaries for the joint household, the spouses may be sued jointly or severally therefor.

## CHAPTER IV

### GENERAL PROVISIONS

#### **18. Certain damages excluded from community and recoverable from other spouse**

Notwithstanding the fact that a spouse is married in community of property-

- (a) any amount recovered by him or her by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him or her, does not fall into the joint estate but becomes his or her separate property;
- (b) he or she may recover from the other spouse damages in respect of bodily injuries suffered by him or her and attributable either wholly or in part to the fault of that spouse and these damages do not fall into the joint estate but become the separate property of the injured spouse.

[S. 18 substituted by s. 21 of Act 66/2008]

#### **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 from a spouse 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.

#### **20. Power of court to order division of joint estate**

- (1) A court may on the application of a spouse, if it is satisfied that the interest of that spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the joint estate in equal shares or on such other basis as the court may deem just.
- (2) A court making an order under subsection (1) may order that the community of property be replaced by another matrimonial property system, subject to such conditions as it may deem fit.

#### **21. Change of matrimonial property system**

- (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.

- (2) (a) Notwithstanding anything to the contrary in any law or the common law contained, but subject to the provisions of paragraphs (b) and (c), the spouses to a marriage out of community of property -
  - (i) entered into before the commencement of this Act in terms of an antenuptial contract by which community of property and community of profit and loss are excluded; or
  - (ii) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22 (6) of the Black Administration Act, 1927 (Act No. 38 of 1927), as it was in force immediately before its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

may cause the provisions of Chapter I of this Act to apply in respect of their marriage by the execution and registration in a registry within two years after the commencement of this Act or, in the case of a marriage contemplated in subparagraph (ii) of this paragraph, within two years after the commencement of the said Marriage and Matrimonial Property Law Amendment Act, 1988, as the case may be, or such longer period, but not less than six months, determined by the Minister by notice in the *Gazette*, of a notarial contract to that effect.

[Para. (a) substituted by s. 1 of Act 91/86 and s. 3 of Act 3/88]

- (b) The provisions of Chapter I apply in such a case from the date of the conclusion of the marriage of the spouses or from the date of the execution of the notarial contract concerned, as the spouses may declare in that contract.
- (c) For the purpose of proof of the net value of the respective estates of the spouses on the date on which the provisions of Chapter I so apply, they may declare that value either in the notarial contract concerned or in a statement as contemplated in [section 6](#), and in the last-mentioned case the provisions of the said section 6 apply *mutatis mutandis* in respect of that statement.  
[Para. (c) substituted by s. 1 of Act 91/86]
- (d) For the purposes of section 4 (1) the commencement of the marriage concerned is deemed to be the date contemplated in paragraph (b).
- (e) The inclusion of an asset in a statement contemplated in section 6 does not serve as proof of any right of any person with regard to that asset or for the purpose of any release contemplated in [section 21](#) (1) of the Insolvency Act, 1936 (Act No. 24 of 1936).

**22. Donations between spouses permissible**

Subject to the provisions of the Insolvency Act, 1936 (Act No. 24 of 1936), no transaction effected before or after the commencement of this Act is void or voidable merely because it amounts to a donation between spouses.

**23. Liability of spouses for household necessities**

- (1) Any right of recourse which a spouse may have against the other spouse in terms of the common law or any law which is in force at the commencement of this Act or which was in force before that commencement, in respect of contributions made for necessities for the joint household of the spouses, lapses, subject to the provisions of subsections (3) and (4), at that commencement.
- (2) A spouse married out of community of property before or after the commencement of this Act is liable to contribute to necessities for the joint household pro rata according to his financial means, and is deemed to have been so liable for the period from the beginning of his marriage until that commencement.
- (3) A spouse married out of community of property before the commencement of this Act has a right of recourse against the other spouse in so far as he has contributed more in respect of necessities for the joint household than that for which he was liable in terms of subsection (2).
- (4) In the absence of any agreement to the contrary between spouses, a spouse does not have a right of recourse against the other spouse to whom he was married out of community of property after the commencement of this Act with regard to any contribution which he made in respect of necessities for the joint household.
- (5) Spouses married out of community of property are jointly and severally liable to third parties for all debts incurred by either of them in respect of necessities for the joint household.
- (6) Subsection (1) shall not be construed as conferring on a spouse a right to reclaim anything that he has already paid at the commencement of this Act in satisfaction of a right of recourse, and subsection (3) shall not be construed as conferring on a spouse a right to exercise the right of recourse referred to in that subsection in respect of any period with regard to which he has already exercised a right of recourse on any other ground.

**24. Distribution of matrimonial property upon dissolution of marriage for want of consent of parents or guardian**

- (1) If a court dissolves a marriage to which a minor is a party on the ground of want of consent of the parents or guardian of that minor, or a commissioner of child welfare whose consent is by law required for the entering into of a marriage, it may make such order with regard to the division of the matrimonial property of the spouses as it may deem just.
- (2) If such a marriage is not dissolved, the patrimonial consequences of the marriage are the same as if the minor were of age when the marriage was entered into and any antenuptial contract in terms of which the accrual system is included and which has been executed with a view to such a marriage is deemed to have been validly executed.

**25. Application of Chapters II and III**

- (1) .....

[Sub-s. (1) deleted by s. 4 of Act 3/88]

- (2) Notwithstanding anything to the contrary in any law or the common law contained, the spouses to a marriage entered into before the commencement of this Act and in respect of which the matrimonial property system was not governed by section 22 of the Black Administration Act, 1927 (Act No. 38 of 1927), may -
- (a) if they are married in community of property, cause the provisions of Chapters II and III of this Act to apply to their marriage; or
  - (b) if they are married out of community of property and the wife is subject to the marital power of the husband, cause the provisions of Chapter II of this Act to apply to their marriage,

by the execution and registration in a registry within two years after the said commencement or such longer period, but not less than six months, determined by the Minister by notice in the *Gazette*, of a notarial contract to that effect, and in such a case those provisions apply from the date on which the contract concerned was so registered.

[Sub-s. (2) substituted by s. 2 of Act 91/86 and s. 4 of Act 3/88]

- (3) Notwithstanding anything to the contrary in any law or the common law contained, the spouses to a marriage entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, and in respect of which the matrimonial property system was governed by section 22 of the Black Administration Act, 1927 (Act No. 38 of 1927), may -
- (a) if they are married in community of property, cause the provisions of Chapters II and III of this Act to apply to their marriage; or
  - (b) if they are married out of community of property and the wife is subject to the marital power of the husband, cause the provisions of Chapter II of this Act to apply to their marriage,

by the execution and registration in a registry within two years after the said commencement or such longer period, but not less than six months, determined by the Minister by notice in the *Gazette*, of a notarial contract to that effect, and in such a case those provisions apply from the date on which the contract was so registered.

[Sub-s. (3) added by s. 4 of Act 3/88]

26. ....

[S. 26 substituted by s. 5 of Act 3/88 and repealed by s. 31 of Act 132/93]

27. ....

[S. 27 repealed by s. 2 of Act 81/87]

**28. Amendment of section 3 of Act 47 of 1937, as substituted by section 2 of Act 87 of 1965 and amended by section 1 of Act 41 of 1977, section 1 of Act 92 of 1978, section 1 of Act 44 of 1980 and section 3 of Act 27 of 1982**

Section 3 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), is hereby amended by the substitution for paragraph (k) of subsection (1) of the following paragraph:

“(k) register antenuptial contracts, including orders under section 20, and contracts contemplated in section 21, of the Matrimonial Property Act, 1984, and register such notarial deeds of donation (including a donation to be held in trust) and such other notarial deeds having reference to persons and property within the area served by the registry in question as are required or permitted by law to be registered;”.

29. Substitution of section 17 of Act 47 of 1937, as amended by section 1 of Act 15 of 1953, section 8 of Act 43 of 1957, section 8 of Act 43 of 1962 and section 5 of Act 3 of 1972

The following section is hereby substituted for section 17 of the Deeds Registries Act, 1937:

“17. Registration of immovable property in name of married persons

- (1) From the commencement of the Matrimonial Property Act, 1984, immovable property, real rights in immovable property and notarial deeds which would upon transfer, cession or registration thereof form part of a joint estate shall be registered in the name of the husband and the wife, excluding agricultural land as defined in the Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970), unless that transfer, cession or registration takes place only in the name of a partnership, and the husband or wife is involved therein only in the capacity of partner in that partnership.
- (2) Every deed executed or attested by a registrar, or attested by a notary public and required to be registered in a deeds registry, and made by or on behalf of or in favour of any person, shall -

  - (a) state the full name and marital status of the person concerned;
  - (b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, state whether the marriage was contracted in or out of community of property;
  - (c) where the person concerned is married in community of property, state the full name of his spouse; and
  - (d) where the marriage concerned is governed by the law of any other country, state that the marriage is governed by the law of that country.
- (3) Where a marriage in community of property has been dissolved by the death of one of the spouses before property which on transport or cession thereof would have formed part of the joint estate could be transferred or ceded, that property shall be transferred or ceded to the joint estate of the spouses, pending the administration thereof, and is, subject to the provisions of any disposition with regard to that property, deemed to be the joint property of the surviving spouse and of the estate of the deceased spouse.
- (4) If immovable property forming part of a joint estate is registered in a deeds registry in the name of either the husband or the wife, the registrar shall on the written application of the husband or the wife, as the case may be, if he is satisfied as to the relevant facts, make a note on the title deed of that property, or if the title deed can for any reason not be produced to him, only on the registry duplicate thereof, and in the appropriate registers, to the effect that it is property in respect of which the provisions of section 15 (2) (a) of the Matrimonial Property Act, 1984, apply.
- (5) The registration of a right to a mineral in the name of a husband and a wife according to the provisions of subsection (1) shall not be construed as constituting the division of any right to any mineral or minerals in respect of any land between that husband and wife into undivided shares, or an increase in the number of holders of undivided shares in any right to any mineral or minerals in respect of any land as contemplated in section 2 of the Mineral Laws Supplementary Act, 1975 (Act No. 10 of 1975).
- (6) A woman married out of community of property shall be assisted by her husband in executing any deed or other document required or permitted to be registered in any deeds registry or required or permitted to be produced in connection with any such

deed or document, unless the marital power has been excluded or unless the assistance of the husband is in terms of this Act or on other grounds deemed by the registrar to be unnecessary.”.

**30. Amendment of section 25 of Act 47 of 1937, as amended by section 10 of Act 43 of 1962**

Section 25 of the Deeds Registries Act, 1937, is hereby amended by the substitution in subsection (3) for the expression “subsection (3) of section seventeen” of the expression “section 17 (1)”.

**31. Amendment of section 45 of Act 47 of 1937, as amended by section 20 of Act 43 of 1957 and section 19 of Act 43 of 1962**

Section 45 of the Deeds Registries Act, 1937, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) If immovable property or a lease under any law relating to land settlement or a bond is registered in a deeds registry in the name of the survivor of two spouses who were married in community of property, or in the name of the joint estate of such spouses, or in the name of both such spouses, and **[such survivor]** the surviving spouse as law fully acquired the share of the deceased spouse in the property, lease or bond, the registrar shall on written application by the executor in the estate of the deceased spouse and by **[such survivor]** the surviving spouse save where **[such survivor]** the surviving spouse has signed as executor, accompanied by such other documents as may be prescribed, endorse on the title deeds of the property or on the deed of lease or on the bond that the **[survivor]** surviving spouse is entitled to deal with such property, lease or bond, and thereupon **[such survivor]** he shall be entitled to deal therewith as if he had taken formal transfer or cession into his own name of the share of the deceased spouse in the property, lease or bond.”.

**32. Insertion of section 89 in Act 47 of 1937**

The following section is hereby inserted in the Deeds Registries Act, 1937, after section 88:

“89. Registration of postnuptial contracts

(1) The provisions of sections 86 and 87 shall *mutatis mutandis* apply in respect of-

- (a) an order under section 20 of the Matrimonial Property Act, 1984, as if that order were a notarial deed;
- (b) a contract in terms of section 21 or 25 (2) of the Matrimonial Property Act, 1984.

(2) Where a contract in terms of section 21 or 25 (2) (b) of the Matrimonial Property Act, 1984, replaces or amends an existing antenuptial contract, the contract to be registered shall be accompanied by the existing contract or a certified copy thereof.

(3) Upon the registration of a contract contemplated in section 21 or 25 (2) (b) of the Matrimonial Property Act, 1984, the existing antenuptial contract, if any, shall be cancelled or endorsed appropriately, as the case may be, and for that purpose the registrar shall notify the registrar of the registry where the existing contract is registered and every registrar in whose registry a copy thereof is filed in terms of section 87 (3).”.



**33. Amendment of section 2 of Act 34 of 1956, as amended by section 1 of Act 58 of 1971**

Section 2 of the Apportionment of Damages Act, 1956, (Act No. 34 of 1956), is hereby amended-

(a) by the substitution for subsection (1A) of the following subsection:

“(1A) **[Subject to the provisions of the first proviso to subsection (6) (a)]** 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.”; and

(b) by the deletion of the first proviso to subsection (6) (a).

**34. Insertion of section 24A in Act 25 of 1961**

The following section is hereby inserted in the Marriage Act, 1961 (Act No. 25 of 1961), after section 24:

“24A. Consequences and dissolution of marriage for want of consent of parent or guardian

(1) Notwithstanding anything to the contrary contained in any law or the common law a marriage between person of whom one or both are minors shall not be void merely because the parents or guardian of the minor, or a commissioner of child welfare whose consent is by law required for the entering into of a marriage, did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the marriage is made-

(a) by a parent or guardian of the minor before he attains majority and within six weeks of the date on which the parent or guardian becomes aware of the existence of the marriage; or

(b) by the minor before he attains majority or within three months thereafter.

(2) A court shall not grant an application in terms of subsection (1) unless it is satisfied that the dissolution of the marriage is in the interest of the minor or minors.”.

**35. Amendment of section 29 of Act 32 of 1944, as substituted by section 27 of Act 94 of 1974 and amended by section 1 of Act 56 of 1984**

Section 29 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), is hereby amended by the insertion after paragraph (e) of the following paragraph:

“(eA) actions in terms of section 16 (1) of the Matrimonial Property Act, 1984, where the claim or the value of the property in dispute does not exceed R5 000;”

**36. Amendment of section 7 of Act 70 of 1979**

Section 7 of the Divorce Act, 1979 (Act No. 70 of 1979), is hereby amended-

(a) by the substitution for subsection (2) of the following subsection:

“(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration

of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.”; and

(b) by the addition of the following subsections:

“(3) A court granting a decree of divorce in respect of a marriage out of community of property entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded, may, subject to the provisions of subsection (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.

(4) An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.

(5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3) the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account -

- (a) the existing means and obligations of the parties;
- (b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;
- (c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and
- (d) any other factor which should in the opinion of the court be taken into account.

(6) A court granting an order under subsection (3) may, on application by the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just.”.

### 37. Repeal of laws

The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

**38. Short title and commencement**

- (1) This Act shall be called the Matrimonial Property Act, 1984 and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.
- (2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.

**Schedule**

<b>No. and year of law</b>	<b>Title or subject</b>	<b>Extent of repeal</b>
The Perpetual Edict of 4 October 1540	The Perpetual Edict	Section 17 in so far as it is in force in the Republic
The Political Ordinance of 1 April 1580	The Political Ordinance	Sections 3 and 13 in so far as they are in force in the Republic
Law No. 13 of 1883 (Natal)	To amend the Law of Divorce	Sections 10 and 11
Act No. 37 of 1953	Matrimonial Affairs Act, 1953	Section 3
Act No. 13 of 1976	Matrimonial Affairs Amendment Act, 1976	The whole

## MAINTENANCE OF SURVIVING SPOUSES ACT 27 OF 1990

(Afrikaans text signed by the State President)

*[Assented To: 23 March 1990]*  
*[Commencement Date: 1 July 1990]*

as amended by:

Estate Affairs Amendment Act 1 of 1992

### ACT

To provide the surviving spouse in certain circumstances with a claim for maintenance against the estate of the deceased spouse; and to provide for incidental matters.

### ARRANGEMENT OF SECTIONS

1. Definitions
2. Claim for maintenance against estate of deceased spouse
3. Determination of reasonable maintenance needs
4. Short title and commencement

#### 1. Definitions

In this Act, unless the context otherwise indicates -

“**court**” means a court as defined in section 1 of the Administration of Estates Act, 1965 (Act No. 66 of 1965);

“**executor**” means an executor as defined in section 1 of the Administration of Estates Act, 1965, or any person who liquidates and distributes an estate on the instructions of the Master;

“**Master**” means a Master as defined in section 1 of the Administration of Estates Act, 1965;

“**own means**” includes any money or property or other financial benefit accruing to the survivor in terms of the matrimonial property law or the law of succession or otherwise at the death of the deceased spouse;

“**survivor**” means the surviving spouse in a marriage dissolved by death.

#### 2. Claim for maintenance against estate of deceased spouse

- (1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.
- (2) The survivor shall, in respect of a claim for maintenance, not have a right of recourse against any person to whom money or property has been paid, delivered or transferred in terms of section 34 (11) or 35 (12) of the Administration of Estates Act, 1965 (Act No. 66 of 1965), or pursuant to an instruction of the Master in terms of section 18 (3) or 25 (1) (a) (ii) of that Act.

- (3) (a) The proof and disposal of a claim for maintenance of the survivor shall, subject to paragraphs (b), (c) and (d), be dealt with in accordance with the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965).
- (b) The claim for maintenance of the survivor shall have the same order of preference in respect of other claims against the estate of the deceased spouse as a claim for maintenance of a dependent child of the deceased spouse has or would have against the estate if there were such a claim, and, if the claim of the survivor and that of a dependent child compete with each other, those claims shall, if necessary, be reduced proportionately.
- (c) In the event of a conflict between the interests of the survivor in his capacity as claimant against the estate of the deceased spouse and the interests in his capacity as guardian of a minor dependent child of the deceased spouse, the Master may defer the claim for maintenance until such time as the court has decided on the claim.
- (d) The executor of the estate of a deceased spouse shall have the power to enter into an agreement with the survivor and the heirs and legatees having an interest in the agreement, including the creation of a trust, and in terms of the agreement to transfer assets of the deceased estate, or a right in the assets, to the survivor or the trust, or to impose an obligation on an heir or legatee, in settlement of the claim of the survivor or part thereof.

[Para. (d) substituted by s. 2 of Act 1/92]

### **3. Determination of reasonable maintenance needs**

In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account:

- (a) The amount in the estate of the deceased spouse available for distribution to heirs and legatees;
- (b) the existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage; and
- (c) the standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse.

### **4. Short title and commencement**

This Act shall be called the Maintenance of Surviving Spouses Act, 1990, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

# DIVORCE ACT 70 OF 1979

(Afrikaans text signed by the State President)

*[Assented To: 8 June 1979]*  
*[Commencement Date: 1 July 1979]*

## as amended by:

Matrimonial Property Act 88 of 1984  
Transfer of Powers and Duties of the State President Act 97 of 1986  
Mediation in Certain Divorce Matters Act 24 of 1987  
Marriage and Matrimonial Property Law Amendment Act 3 of 1988  
Divorce Amendment Act 7 of 1989  
Domicile Act 3 of 1992  
Divorce Amendment Act 44 of 1992  
Justice Laws Rationalisation Act 18 of 1996  
Films and Publications Act 65 of 1996  
Divorce Amendment Act 95 of 1996  
Divorce Courts Amendment Act 65 of 1997  
Judicial Matters Second Amendment Act 55 of 2003  
[with effect from 31 March 2005 – Proc. R13/GG 27406/20050322]

## ACT

To amend the law relating to divorce and to provide for incidental matters.

## ARRANGEMENT OF SECTIONS

1. Definitions
  2. Jurisdiction
  3. Dissolution of marriage and grounds of divorce
  4. Irretrievable break-down of marriage as ground of divorce
  5. Mental illness or continuous unconsciousness as grounds of divorce
  - 5A. Refusal to grant divorce
  6. Safeguarding of interests of dependent and minor children
  7. Division of assets and maintenance of parties
  8. Rescission, suspension or variation of orders
  9. Forfeiture of patrimonial benefits of marriage
  10. Costs
  11. Procedure
  12. Limitation of publication of particulars of divorce action
  13. Recognition of certain foreign divorce orders
  14. Abolition of orders for restitution of conjugal rights and judicial separation
  15. Application of Act
  16. Amendment of section 5 of Act 37 of 1953, as amended by section 2 of Act 13 of 1966
  17. Amendment of section 72 of Act 66 of 1965, as amended by section 7 of Act 54 of 1970
  18. Repeal of laws
  19. Short title and commencement
- Schedule

### 1. Definitions

- (1) In this Act, unless inconsistent with the context -

**“court”** means any High Court as contemplated in section 166 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), or a divorce court established under section 10 of the Administration Amendment Act, 1929 (Act No. 9 of 1929), which has jurisdiction with respect to a divorce action;

[Definition of “court” substituted by s. 4 of Act 65/97]

**“divorce action”** means an action by which a decree of divorce or other relief in connection therewith is applied for, and includes -

- (a) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
- (b) an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application;

**“pension fund”** means a pension fund as defined in section 1 (1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), irrespective of whether the provisions of that Act apply to the pension fund or not;

[Definition of “pension fund” added by s. 1 of Act 7/89]

**“pension interest”**, in relation to a party to a divorce action who -

- (a) is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office;
- (b) is a member of a retirement annuity fund which was bona fide established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party’s contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1 (2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), for the purposes of that Act;

[Definition of “pension interest” added by s. 1 of Act 7/89]

**“rules”**, in relation to a pension fund, means rules as defined in section 1 (1) of the Pension Funds Act, 1956.

[Definition of “rules” added by s. 1 of Act 7/89]

- (2) For the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of court, as the case may be.

## 2. Jurisdiction

- (1) A court shall have jurisdiction in a divorce action if the parties are or either of the parties is -
  - (a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
  - (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.

[Subs. (1) substituted by s. 6 of Act 3/92]

- (2) A court which has jurisdiction in terms of subsection (1) shall also have jurisdiction in respect of a claim in reconvention or a counter-application in the divorce action concerned.  
[Subs. (2) amended by s. 6 of Act 3/92]
- (3) A court which has jurisdiction in terms of this section in a case where the parties are or either of the parties is not domiciled in the Republic shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in the area of jurisdiction of the court concerned on the date on which the divorce action was instituted.  
[Subs. (3) substituted by s. 6 of Act 3/92]
- (4) The provisions of this Act shall not derogate from the jurisdiction which a court has in terms of any other law or the common law.

### **3. Dissolution of marriage and grounds of divorce**

A marriage may be dissolved by a court by a decree of divorce and the only grounds on which such a decree may be granted are -

- (a) the irretrievable break-down of the marriage as contemplated in section 4;
- (b) the mental illness or the continuous unconsciousness, as contemplated in section 5, of a party to the marriage.

### **4. Irretrievable break-down of marriage as ground of divorce**

- (1) A court may grant a decree of divorce on the ground of the irretrievable break-down of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.
- (2) Subject to the provisions of subsection (1), and without excluding any facts or circumstances which may be indicative of the irretrievable break-down of a marriage, the court may accept evidence -
  - (a) that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;
  - (b) that the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship; or
  - (c) that the defendant has in terms of a sentence of a court been declared an habitual criminal and is undergoing imprisonment as a result of such sentence,
 as proof of the irretrievable break-down of a marriage.
- (3) If it appears to the court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings in order that the parties may attempt a reconciliation.
- (4) Where a divorce action which is not defended is postponed in terms of subsection (3), the court may direct that the action be tried de novo, on the date of resumption thereof, by any other judge of the court concerned.



## **5. Mental illness or continuous unconsciousness as grounds of divorce**

- (1) A court may grant a decree of divorce on the ground of the mental illness of the defendant if it is satisfied -
  - (a) that the defendant in terms of the Mental Health Act, 1973 (Act No. 18 of 1973) -
    - (i) has been admitted as a patient to an institution in terms of a reception order;
    - (ii) is being detained as a State patient at an institution or other place specified by the Minister of Correctional Services; or  
[Subpara. (ii) amended by s. 4 of Act 18/96]
    - (iii) is being detained as a mentally ill convicted prisoner at an institution,  
[Subpara. (iii) amended by s. 4 of Act 18/96]and that he has, for a continuous period of at least two years immediately prior to the institution of the divorce action, not been discharged unconditionally as such a patient, State patient or mentally ill prisoner; and
  - (b) after having heard the evidence of at least two psychiatrists, of whom one shall have been appointed by the court, that the defendant is mentally ill and that there is no reasonable prospect that he will be cured of his mental illness.  
[Subs. (1) amended by s. 4 of Act 18/96]
- (2) A court may grant a decree of divorce on the ground that the defendant is by reason of a physical disorder in a state of continuous unconsciousness, if it is satisfied -
  - (a) that the defendant's unconsciousness has lasted for a continuous period of at least six months immediately prior to the institution of the divorce action; and
  - (b) after having heard the evidence of at least two medical practitioners, of whom one shall be a neurologist or a neurosurgeon appointed by the court, that there is no reasonable prospect that the defendant will regain consciousness.
- (3) The court may appoint a legal practitioner to represent the defendant at proceedings under this section and order the plaintiff to pay the costs of such representation.
- (4) The court may make any order it may deem fit with regard to the furnishing of security by the plaintiff in respect of any patrimonial benefits to which the defendant may be entitled by reason of the dissolution of the marriage.
- (5) For the purposes of this section the expressions "institution", "mental illness", "patient", "State patient" and "reception order" shall bear the meaning assigned to them in the Mental Health Act, 1973.  
[Subs. (5) amended by s. 4 of Act 18/96]

### **5A. Refusal to grant divorce**

If it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed,

has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just.

[S. 5A inserted by s. 1 of Act 95/96]

## **6. Safeguarding of interests of dependant and minor children**

- (1) A decree of divorce shall not be granted until the court -
  - (a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependant child of the marriage are satisfactory or are the best that can be effected in the circumstances; and
  - (b) if an enquiry is instituted by the Family Advocate in terms of section 4 (1) (a) or (2) (a) of the Mediation in Certain Divorce Matters Act, 1987, has considered the report and recommendations referred to in the said section 4 (1).  
[Subs. (1) substituted by s. 6 of Act 24/87]
- (2) For the purposes of subsection (1) the court may cause any investigation which it may deem necessary, to be carried out and may order any person to appear before it and may order the parties or any one of them to pay the costs of the investigation and appearance.
- (3) A court granting a decree of divorce may, in regard to the maintenance of a dependant child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.
- (4) For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.

## **7. Division of assets and maintenance of parties**

- (1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.
- (2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.  
[Subs. (2) substituted by s. 36 of Act 88/84]
- (3) A court granting a decree of divorce in respect of a marriage out of community of property -

- (a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or
- (b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22 (6) of the Black Administration Act, 1927 (Act No. 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.

[Subs. (3) added by s. 36 of Act 88/84 and substituted by s. 2 of Act 3/88]

- (4) An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.

[Subs. (4) added by s. 36 of Act 88/84]

- (5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3), the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account -

- (a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3) (b) of this section may have in terms of section 22 (7) of the Black Administration Act, 1927 (Act No. 38 of 1927);
- (b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;
- (c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and
- (d) any other factor which should in the opinion of the court be taken into account.

[Subs. (5) added by s. 36 of Act 88/84 and substituted by s. 2 of Act 3/88]

- (6) A court granting an order under subsection (3) may, on application by the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just.

[Subs. (6) added by s. 36 of Act 88/84]

- (7) (a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.
- (b) The amount so deemed to be part of a party's assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph (a), in a previous divorce -
  - (i) was paid over or awarded to another party; or

- (ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.
- (c) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.  
[Subs. (7) added by s. 2 of Act 7/89]
- (8) Notwithstanding the provisions of any other law or of the rules of any pension fund -
  - (a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that -
    - (i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;
    - (ii) the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification;  
[Subpara. (ii) substituted by s. 11 of Act 55/2003]
  - (b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply *mutatis mutandis* with regard to the right of that other party in respect of that part of the pension interest concerned.  
[Subs. (8) added by s. 2 of Act 7/89]
- (9) When a court grants a decree of divorce in respect of a marriage the patrimonial consequences of which are according to the rules of the South African private international law governed by the law of a foreign state, the court shall have the same power as a competent court of the foreign state concerned would have had at that time to order that assets be transferred from one spouse to the other spouse.  
[Subs. (9) added by s. 1 of Act 44/92]

## 8. Rescission, suspension or variation of orders

- (1) A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4 (1) (b) or (2) (b) of the Mediation in Certain Divorce Matters Act, 1987, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in the said section 4 (1) have been considered by the court.  
[Subs. (1) substituted by s. 7 of Act 24/87]
- (2) A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such

first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.

- (3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply with reference to any order referred to in subsection (1) given by a court in a divorce action before the commencement of this Act.

#### **9. Forfeiture of patrimonial benefits of marriage**

- (1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.
- (2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.

#### **10. Costs**

In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.

#### **11. Procedure**

The procedure applicable with reference to a divorce action shall be the procedure prescribed from time to time by rules of court.

#### **12. Limitation of publication of particulars of divorce action**

- (1) Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgment or order of the court, no person shall make known in public or publish for the information of the public or any section of the public any particulars of a divorce action or any information which comes to light in the course of such an action.
- (2) The provisions of subsection (1) shall not apply with reference to the publication of particulars or information -
  - (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
  - (c) for the advancement of or use in a particular profession or science.
- (3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry instituted by a Family Advocate in terms of the Mediation in Certain Divorce Matters Act, 1987.

[Subs. (3) substituted by s. 8 of Act 24/87]

- (4) Any person who in contravention of this section publishes any particulars or information shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

**13. Recognition of certain foreign divorce orders**

- (1) The validity of a divorce order or an order for the annulment of a marriage or for judicial separation granted in a court of a foreign country or territory shall be recognized by a court in the Republic if, on the date on which the order was granted, either party to the marriage -
- (a) was domiciled in the country or territory concerned, whether according to South African law or according to the law of that country or territory;
- (b) was ordinarily resident in that country or territory; or
- (c) was a national of that country or territory.

[S. 13 amended by s. 46 and s. 47 of Act 97/86 and substituted by s. 7 of Act 3/92]

**14. Abolition of orders for restitution of conjugal rights and judicial separation**

It shall not be competent for a court to issue an order for the restitution of conjugal rights or for judicial separation.

**15. Application of Act**

This Act shall not apply with reference to a divorce action or proceedings for the restitution of conjugal rights or for judicial separation instituted before the commencement of this Act.

**16. Amendment of section 5 of Act 37 of 1953, as amended by section 2 of Act 13 of 1966**

Section 5 of the Matrimonial Affairs Act, 1953, is hereby amended –

- (a) by the substitution for subsection (1) of the following subsection:

“(1) Any provincial or local division of the Supreme Court or any judge thereof may, on the application of either parent of a minor whose parents are divorced or are living apart, in regard to the custody or guardianship of, or access to, the minor, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.”;

- (b) by the substitution for subsection (2) of the following subsection:

“(2) An order under subsection (1) in regard to a minor whose parent are living apart shall, if the parents become reconciled and live together again as husband and wife, lapse with effect from the date on which the parents commence to live together again.”;

- (c) by the substitution for subsection (3) of the following subsection:

“(3) Subject to any order of court –

- (a) a parent to whom the sole guardianship or custody of a minor has been granted under subsection (1) or the Divorce Act, 1979, or a father or a mother upon whom a children's court has under section 60 (1) of the Children's Act, 1960 (Act No. 33 of 1960), conferred the exclusive right to exercise any parental powers in regard to a minor, may by testamentary disposition appoint any person to be the sole guardian or to be vested with the sole custody of the minor, as the case may be; and
- (b) the father of a minor to whom the sole guardianship of the minor has not been granted under subsection (1) or the Divorce Act, 1979, or upon whom a children's court has not conferred the exclusive right to exercise any parental powers in regard to the minor, shall not be entitled by testamentary disposition to appoint any person as the guardian of the minor in any other manner than to act jointly with the mother.”; and
- (d) by the substitution for subsection (6) of the following subsection –
  - “(6) If an order under section 60 of the Children's Act, 1960, is rescinded, or if an order under subsection (1) of this section or under the Divorce Act, 1979, granting the sole guardianship or custody of a minor to a parent, lapses or is rescinded or is varied in such a manner that the parent is no longer the sole guardian or vested with the sole custody of the minor, any disposition under subsection (3)(a) shall lapse.”.

**17. Amendment of section 72 of Act 66 of 1965, as amended by section 7 of Act 54 of 1970**

Section 72 of the Administration of Estates Act, 1965, is hereby amended by the substitution for that part of subsection (1) which precedes paragraph (b) thereof, of the following:

- “(1) The Master shall, subject to the provisions of subsection (3) and to any applicable provision of section 5 of the Matrimonial Affairs Act, 1953 (Act No. 37 of 1953), and section 4 of the Matrimonial Affairs Ordinance, 1955 (Ordinance No. 25 of 1955), of the territory, or any order of court made under any such provision or any provision of the Divorce Act, 1979, on the written application of any person -
  - (a) who has been nominated by will or written instrument -
    - (i) by the father of a legitimate minor, who has not been deprived, as a result of an order under subsection (1) of the said section 5 or subsection (1) of the said section 4 or the Divorce Act, 1979, of the guardianship of such minor, or under section 60 of the Children's Act, 1960 (Act No. 33 of 1960), or section 58 of the Children's Ordinance, 1961 (Ordinance No. 31 of 1961), of the territory, of his parental powers over him; or
    - (ii) by the mother of an illegitimate minor or of a legitimate minor whose father is dead, who has not been so deprived of the guardianship of such minor or of her parental powers over him; or
    - (iii) by the parent to whom the sole guardianship of a minor has been granted under subsection (1) of the said section 5 or under subsection (1) of the said section 4 or under the Divorce Act, 1979, or on whom the exclusive right to exercise parental powers in regard to a minor has been conferred under the said section 60 or the said section 58,

to administer the property of such minor and to take care of his person as tutor, or to take care of or administer his property as curator; or”.

**18. Repeal of laws**

The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

**19. Short title and commencement**

This Act shall be called the Divorce Act, 1979, and shall come into operation on 1 July, 1979.

**Schedule**

<b>No. and year of law</b>	<b>Short title</b>	<b>Extent of repeal</b>
Act No. 32 of 1935	Divorce Laws Amendment Act, 1935	The whole
Act No. 22 of 1939	Matrimonial Causes Jurisdiction Act, 1939	The whole
Act No. 17 of 1943	Matrimonial Causes Jurisdiction Amendment Act, 1943	The whole
Act No. 35 of 1945	Matrimonial Causes Jurisdiction Act, 1945	The whole
Act No. 37 of 1953	Matrimonial Affairs Act, 1953	Sections 6, 7, 8, 9 and 10
Act No. 70 of 1968	General Law Amendment Act, 1968	Sections 21, 22 and 23
Act No. 42 of 1974	.....	.....

[Schedule amended by s. 33 of Act 65/96]



## PENSION FUNDS ACT 24 OF 1956

(English text signed by the Governor-General)

*[Assented To: 28 April 1956]*  
*[Commencement Date: 1 January 1958]*

### 37D. Fund may make certain deductions from pension benefits

#### (1) A registered fund may -

a) deduct any amount due on the benefit in question by the member in accordance with the Income Tax Act, 1962 (Act No. 58 of 1962), and any amount due to the fund in respect of-

(i) a loan granted to a member in terms of [section 19\(5\)](#); or

(ii) any amount for which the fund becomes liable under a guarantee furnished in respect of a member for a loan granted by some other person to the member in terms of [section 19\(5\)](#), from-

(aa) the amount of the benefit to which the member or a beneficiary becomes entitled in terms of the rules of the fund;

(bb) in the case of a transfer of the member to another fund, the amount of the benefit which the fund is so entitled to transfer, if the board of the transferor fund is satisfied that it is not otherwise reasonably possible to negotiate the repayment or to transfer the loan or the guarantee; or

(cc) in the case of default on the repayment of any such loan by the member concerned in circumstances where his or her membership of the fund is not terminated, the amount of the benefit which the member would have received on termination of membership on the date of default, if such a deduction is only effected as a last resort after the board of the fund is satisfied that no other arrangement for the required repayment can be made;

[Para. (a) substituted by s. 4 of Act 65/2001]

(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of -

(i)

(aa) a loan granted by the employer to the member for any purpose referred to in [section 19\(5\)\(a\)](#); or

(bb) any amount for which the employer is liable under a guarantee furnished in respect of a loan by some other person to the member for any purpose referred to in [section 19\(5\)\(a\)](#),

to an amount not exceeding the amount which in terms of the Income Tax Act, 1962, may be taken by a member or beneficiary as a lump sum benefit as defined in the Second Schedule to that Act; or

(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which -

(aa) the member has in writing admitted liability to the employer; or

(bb) judgment has been obtained against the member in any court, including a magistrate's court,

from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned;

(c) deduct any amount which the fund has paid or will pay by arrangement with, and on behalf of, a member or beneficiary in respect of -

(i) such member's or beneficiary's subscription to a medical scheme, registered otherwise than provisionally in terms of the [Medical Schemes Act, 1998](#) (Act No. 131 of 1998);  
[Subpara. (i) substituted by s. 28 of Act 11/2007]

(ii) any insurance premium payable by such member or beneficiary to a long-term insurer registered in terms of the [Long-term Insurance Act, 1998](#) (Act No. 52 of 1998);  
[Subpara. (ii) substituted by s. 28 of Act 11/2007]

(iii) any purpose approved by the registrar, on the conditions determined by him, upon a request in writing from the fund,

from the benefit to which the member or beneficiary is entitled in terms of the rules of the fund, and pay such amount, if due, to such medical scheme, insurer or person concerned, as the case may be.  
[Para (c) substituted by s. 14 of Act 80/78]

(d) deduct from a member's or deferred pensioner's benefit, member's interest or minimum individual reserve, or the capital value of a pensioner's pension after retirement, as the case may be-  
[Words preceding subpara. (i) substituted by s. 52 of Act 45/2013 w.e.f. 28 February 2014]

(i) any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under [section 7\(8\)\(a\)](#) of the Divorce Act, 1979 (Act No. 70 of 1979) or in terms of any order made by a court in respect of the division of assets of a marriage under Islamic law pursuant to its dissolution;  
[Subpara. (i) substituted by s. 52 of Act 45/2013 w.e.f. 28 February 2014]

(iA) any amount payable in terms of a maintenance order as defined in [section 1](#) of the Maintenance Act, 1998 (Act No. 99 of 1998); and

(ii) .....  
[Para. (d) added by s. 28 of Act 11/2007 and substituted by s. 4 of Act 35/2007, s. 16 of Act 22/2008 and s. 3 of Act 60/2008 w.e.f. 1 November 2008 and deleted by s. 52 of Act 45/2013 w.e.f. 28 February 2014]

(e) deduct from a member's or deferred pensioner's benefit, interest or minimum individual reserve, as the case may be, employees' tax required to be deducted or withheld in terms of the [Fourth Schedule](#) to the Income Tax Act, 1962 (Act No. 58 of 1962), as a result of a deduction referred to in this subsection.  
[Para. (e) added by s. 28 of Act 11/2007, amended by s. 4 of Act 35/2007, deleted by s. 16 of Act 22/2008 and added by s. 52 of Act 45/2013 w.e.f. 28 February 2014]

(2) For the purposes of paragraph (a)(ii)(bb) and (cc) of subsection (1), the amounts so deducted shall be deemed to be a benefit to which the member becomes entitled on termination of his or her membership of the fund for reasons other than as a result of retirement or death arising at the date of the transfer or the default.  
[Subs. (2) added by s. 4 of Act 65/2001]

(3)  
(a) Any amount that may be deducted in terms of subsection (1)(d) or (6) may only be deducted after the amount of member's or deferred pensioner's benefit of minimum individual reserve available has been reduced by any loan amount or guarantee amount referred to in subsection (1)(a), where such a loan or guarantee was granted prior to the granting of the court orders, irrespective of the fact that that amount is

due and payable or not: Provided that the aggregate of all amounts deducted in terms of this subsection may not exceed the member's pension interest available at any given time.

[Para. (a) substituted by s. 52 of Act 45/2013 w.e.f. 28 February 2014]

(b) In the event that more than one of the court orders referred to in subsection (1)(d) provides for the deduction of amounts from a member's benefit or minimum individual reserve, as the case may be, at the same time, the court orders must be dealt with in accordance with the following hierarchy-

(i) any maintenance order referred to in subsection (1)(d)(iA);

[Subpara. (i) substituted by s. 3 of Act 60/2008 w.e.f. 1 November 2008]

(ii) any decrees of divorce or for the dissolution of a customary marriage.

[Subs. (3) added by s. 16 of Act 22/2008]

(4)

(a) For purposes of [section 7](#)(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of a customary marriage is granted, and, on the written submission of the court order by the non-member spouse-

(i) must be deducted by -

(aa) the pension fund or pension funds named in or identifiable from the decree;

(bb) the pension fund or pension funds to which the pension fund referred to in item (aa) transferred the pension interest referred to in the decree;

(ii) must be deducted on the date on which an election is made or, if no election is made within the period referred to in paragraph (b)(ii), the date on which that period expires; and

[Subpara. (ii) substituted by s. 52 of Act 45/2013 w.e.f. 28 February 2014]

(iii) must reduce the member's accrued benefits or minimum individual reserve at the date of the decree.

(b)

(i) The pension fund must, within 45 days of the submission of the court order by the non-member spouse, request the non-member spouse to elect if the amount to be deducted must be paid directly to him or her, or if it must be transferred to a pension fund on his or her behalf.

(ii) The non-member spouse must within 120 days of being requested to make an election-

(aa) inform the pension fund of how the amount referred to in subparagraph (i) must be dealt with; and

(bb) if he or she elects that the amount must be paid to him or her directly, provide the pension fund with the details of how that payment must be effected; or

(cc) if he or she elects that the amount must be transferred to a pension fund on his or her behalf, provide the pension fund with the details of that pension fund.

(iii) The pension fund must pay or transfer the amount within 60 days of being informed of how the amount must be dealt with in accordance with the non-member spouse's election.

(iv) In the event that the non-member spouse fails to make an election or identify the pension fund to which the amount should be transferred within the period referred to in subparagraph (ii), the pension fund must pay the amount directly to the non-member spouse within 30 days of the expiry of that period.

(v) Despite subparagraph (iv), in the event that the pension fund cannot reasonably ascertain how the payment to the non-member spouse must be effected, the pension fund must retain the amount and any fund return referred to in paragraph (c)(ii) in the pension fund until such time as details of how that payment must be effected is made available to the pension fund by the member, the non-member spouse or any other person.

(c) A non-member spouse-

(i) is not a member or beneficiary in relation to the pension fund; and

(ii) is entitled to the accrual of fund return from the date of the deduction contemplated in paragraph (a)(ii) until payment or transfer thereof, but not to any other interest or growth.  
[Subpara. (ii) substituted by s. 52 of Act 45/2013 w.e.f. 28 February 2014]

(d) Any portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage granted prior to 13 September 2007 are for purposes of any law other than the Income Tax Act, 1962, including, but not limited to, [section 7\(8\)\(a\)](#) of the Divorce Act, 1979, deemed to have accrued to the member on 13 September 2007 and must be paid or transferred in accordance with paragraphs (a) and (b).  
[Subs. (4) added by s. 16 of Act 22/2008]

(5) Despite paragraph (b) of the definition of “pension interest” in [section 1\(1\)](#) of the Divorce Act, 1979, the total amount of annual simple interest payable in terms of the definition may not exceed the fund return on the pension interest assigned to the non-member spouse in terms of a decree granted in terms of [section 7\(8\)\(a\)](#) of the Divorce Act, 1979.  
[Subs. (5) added by s. 16 of Act 22/2008]

(6) Despite paragraph (b) of the definition of “pension interest” in [section 1\(1\)](#) of the Divorce Act, 1979 (Act No. 70 of 1979), the portion of the pension interest of a member or a deferred pensioner of a pension preservation fund or provident preservation fund, that is assigned to a non-member spouse, refers to the equivalent portion of the benefits to which that member would have been entitled to in terms of the rules of the fund if his or her membership of the fund terminated, or the member or the deferred pensioner retired on the date on which the decree was granted.  
[Subs. (6) added by s. 16 of Act 22/2008 and substituted by s. 52 of Act 45/2013 w.e.f. 28 February 2014]  
[S. 37D inserted by s. 14 of Act 94/77]

**END OF COURSE HANDOUT**