

The Namibian laws are derived from various pieces of legislation i.e. The Child and Protection Act, the Immigration Control Act, the Namibian Citizenship Act and the Namibian Constitution.

What effect does a person's status have?

- A person's status refers to their overall legal position in relation to other people and community'. It is the totality of his or her various rights, duties and capacities. These are acquired by the operation of the law and therefore are also collectively referred to as legal capacity. This capacity is granted to every person regardless of their age or status, simply by virtue of their legal personality.
- However, even though all persons have legal capacity, that legal capacity does not extend equally because while some have full capacity, others have limited capacity because persons who have limited capacity do not have certain rights and duties. Therefore, there is a distinction drawn between persons with full or limited legal capacity.
- To determine whether or not a person has full or limited legal capacity will depend on the absence of or existence of factors such as age, domicile, mental incapacity, insolvency, prodigality, intoxication, etc.
- A person's legal capacity usually includes the following;
 - capacity to act or to enter into contracts;
 - capacity to sue or be sued, also known as the capacity to litigate; and
 - capacity to be held accountable for crimes and delicts.

Capacity to act

- The capacity of a person to perform certain legally binding acts is referred to as the capacity to act. Before the law can confer on a person the capacity to act, they must have reached a certain level of intellectual development; that is why children under the age of seven are regarded not to have the capacity to act.

Capacity to litigate

- This is also referred to as *locus standi in iudicio*. It is the capacity to appear in a court as a party to a law suit. Capacity to act and capacity to litigate are closely connected. Therefore, a person who does not have the capacity to act will usually not have the capacity to litigate.

Capacity to be held accountable for crimes and delicts

- In order for a person to be held accountable for any crime committed or in delict, their mental condition has to be established. This is required because of the element of fault which is a requirement for delictual or criminal liability. Accountability usually coincides with the capacity to act and litigate.

What effect does a person's domicile have?

- It is important to determine which legal system determines the status of a person. The position is that a person's status will be determined by the country of their domicile. A person's domicile is the country which is regarded by the law to be their permanent home. This will usually be the country in which he or she exercises rights and fulfills obligations, even when they are factually absent. It is important to establish a person's domicile because:
 - a person's domicile will usually determine which legal system is applicable to them;
 - domicile is also a ground upon which a court has jurisdiction

- to hear a case involving matters such as divorce, custody or guardianship.
- domicile also determines whether a judgment of a foreign court will be recognized and given effect to in Namibia;
- a child's legitimacy is also determined by the child's domicile of origin;
- domicile is used to determine what law governs a marriage and the validity and consequences of adoption of a child;
- domicile also plays an important role in the law of succession:
- the domicile of a person who dies intestate or who dies without having made a Will, will determine what law to apply to dispose of their assets;
- the capacity to dispose of an estate in a Will is also determined by the testator's domicile at the time of executing the Will;
- domicile also determines the law to be used in interpreting a Will; and domicile may also dictate the matrimonial property regime of parties

Types of Domicile

- There are principally three types of domicile, namely domicile of origin, domicile of dependence and domicile of choice.

Domicile of Origin

This is the domicile acquired automatically at birth. In the past the position was that if the child is legitimate, their domicile of origin would be that of their fathers at the time of their birth; however, if they were illegitimate, that child's domicile of origin would be that of the mother's. With the advent of the Child Care and Protection Act 2016 (Act 3 of 2016), the position is that a child born outside of marriage is considered to be domiciled at the place or in the country with which he or she has the closest connection. The domicile of origin ensures that a person starts life with a domicile which remains in place until replaced by another. It also revives if a new domicile which was acquired is lost and none was chosen to replace it. This is to guarantee that a person is never without domicile.

Domicile of Dependence

In the past, women and minors were regarded to have a domicile of dependence. The domicile of a married woman shall not by virtue only of the marriage be considered to be the same as that of her husband, but shall be ascertained by reference to the same factors as apply in the case of any other individual capable of acquiring a domicile of choice. The domicile of a child shall be the place with which that child is most closely connected. This has the effect that all children whether born outside or within a marriage have the domicile of the place to which they are closely connected and married women no longer take the domicile of their husbands automatically but the domicile applicable to them will be determined individually with reference to the same factors applied to husbands when determining their domiciles.

Domicile of Choice

A person who has the necessary capacity to act may exercise their free will and choose for themselves a domicile by establishing residence in a place with the intention of remaining there permanently. This is referred to as the domicile of choice and is regarded as the most important domicile. Therefore, a person who is 18 or older or someone who has attained the status of a major, who also has the mental capacity to make a rational choice, may acquire a domicile of their choice.

What effect does a person's age have?

A factor that fundamentally influences a person's status and capacities is that of age. The legal viewpoint is that only persons who have a reasonable understanding and judgment should have the capacity to act. Therefore, the capacity to act is only conferred

on persons who can understand the nature and consequences of their legal acts. Young people are therefore protected by the law through the limitation of their capacities to partake in legal interaction. All persons under the age of 18 are therefore deemed to have neither the intellectual ability nor experience to participate independently in legal and commercial dealings.

- The rights and duties of a person who has full, limited or no capacity are illustrated in the table below:

Age	Capacity
Infants 0-7 years of age	<ul style="list-style-type: none">● Children below the age of 7 have no capacity to act.● They can therefore not be held criminally or delictually liable for their act.
Minors 7-14 years of age	<ul style="list-style-type: none">● They are presumed to be criminally or delictually liable.● However, this presumption is rebuttable.● A child of 10 years and above may consent to his or her adoption.● If the child is under the age of 10 years, he or she must have sufficient maturity and state of development to understand the effect of giving consent.
Children 17-21 years of age	<ul style="list-style-type: none">● They have limited capacity to act.● They can only enter into transactions with the assistance of their parents or guardians.
Persons above the age of 16	<ul style="list-style-type: none">● In terms of the Wills Act 7 of 1953 a person must be 16 or older in order to make a Will.● However, they may be witnesses to a Will at the age of 14.
Persons under the age of 18 years and Persons under the age of 21	<ul style="list-style-type: none">● No boy or girl shall be capable of contracting a valid marriage except with the consent of the parents or guardians or written permission of the Minister of Home Affairs or any staff member in the public service authorised by the Minister of Home Affairs to do so.● A person who is under the age of 21 years requires the consent of his or her parents or guardian to enter into a marriage, unless that person has been previously married or emancipated by an order of court.● A child below the age of 18 cannot give consent for a medical procedure.● Such consent must be given by the parent(s).● In the case of an emergency, consent can be obtained from the Medical Superintendent or a senior official at the Ministry of Health.● In the case of parents refusing medical treatment for a minor, especially in emergency situations, the Police must be informed for consent to be obtained from a court.
Majority 18 years of age and above	<ul style="list-style-type: none">● A person has full capacity, unless he or she is mentally ill, or is a prodigal and cannot manage his or her own affairs (a curator must be appointed); or is under the influence of alcohol and drugs (for example, the contract is void as it was entered into while he or she could not control his or her actions).

NOTE: There are other rights and prohibitions aimed at protecting minors which are provided for by the Namibian Constitution and legislation.

For more information and help on this QuickLaw topic you can talk to a Legal Counsellor at your nearest LegalWise Branch or email windhoek@legalwise.na / oshakati@legalwise.na /

¹Belinda Van Heerden et al Boberg's Law of Persons and the Family (2nd edition) 1999 65 Juta.

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Glossary of terms:

CRIME: a crime may be simply defined as an unlawful blameworthy conduct (either an act or omission) that constitutes an offense which is punishable by the State. The offense is normally prosecuted by the State and is punishable by law. The punishment may be imprisonment or a fine.

DELICT: a delict is the act of a person which in a wrongful and culpable way causes harm to another person. The requirements or elements of a delict are an act, wrongfulness, fault, harm and causation (cause). For a conduct to be classified as a delict all the five requirements must be present. In this case, it is said that the person who has committed this wrongful act is delictually liable. In other words, a delictual liability has been established.

DOMICILE: means the place where a person has his or her home or permanent residence or to which such person returns as his or her permanent abode, and not merely for a special or temporary purpose. In terms of section 22 of the Immigration Control Act, 1993 (Act 7 of 1993), a person acquires the status of a domicile if such a person is a Namibian citizen; if he or she is entitled to reside and resides in Namibia, in terms of the provisions of section 7(2)(a) of the Namibian Citizenship Act, 1990 (Act 14 of 1990); is ordinarily resident in Namibia by virtue of a marriage entered into with a Namibian citizen in good faith as contemplated in Article 4(3) of the Namibian Constitution and in the case of any other person, if he or she is lawfully resident in Namibia for a continuous period of two years.

EXECUTE A WILL: means the process and the act of completing a will by signing it in the manner prescribed by the law.

INTESTATE: a person who has died without having made a will.

LEGAL PERSONALITY: is the capacity (legal capacity) granted by the law to a natural person or a juristic entity (an artificial person) to have legal rights and duties, such as to enter into contracts, sue, and be sued.

LOCUS STANDI IN JUDICIO: the right to bring an action to be heard in court, to challenge it or to address the Court on a matter before it.

MATRIMONIAL PROPERTY REGIME: the system of property ownership, provided for and recognised by the law, between spouses providing for the creation or absence of a marital estate and if created, what properties are included in that estate, how and by whom it is managed, and how it will be divided and inherited at the end of the marriage.

TESTATOR: is a person who dies leaving a Will.

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