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DIVORCE



When can spouses get a divorce?

Namibia's current divorce law is based on the fault doctrine inherited from South Africa at independence. This means that one spouse must prove that the other spouse did something wrong – usually some form of desertion or adultery.

- Under the current law, one spouse must accuse the other spouse of some wrongdoing – such as having an affair, or leaving the family home, or making life so unbearable that it is no longer possible to live in the same house. Even if both spouses want the divorce, one of them will still have to go through the requisite legal processes of accusing the other spouse of wrongdoing.
- There are also special grounds of divorce that apply when one spouse is a habitual criminal or incurably insane.

What will happen to the children upon divorce?

No divorce can become final unless the arrangements for custody and access to the children are in the best interest of the child.

The court prefers for parents to create their own plan for custody and access rights.

- If no agreement can be reached between the spouses, the court will use a set of factors to determine what is in the best interest of the child.
- These factors include the wishes of the parents, the mental and physical health of all parties, whether a parent has been convicted of abuse or neglect of the child or domestic violence and the ability of the parents to get along. The question is not who the better parent is but what is in the best interest of the child.

How will the property be divided upon divorce?

Most civil marriages in Namibia are in community of property.

- If one wants to be married out of community of property one must enter into a contract before one gets married.
- This contract is called an ante-nuptial contract.
- The ante-nuptial contract must be registered at the office of the Registrar of Deeds.
- Marriages, that take place between "Africans" who live north of the old "Police Zone", in the areas known as Owamboland, Kavango and Caprivi, on or after 1 August 1950, are out of community of property.
- Division of property can be agreed upon by both spouses.
- If no agreement can be reached between the spouses, the property must be divided according to whether the spouses were married in community of property or out of community of property.
- Property will only be divided in the event of parties married in community of property or where parties purchased the property together.
- Property can either be sold to a third party, and the parties sharing in the profit or in the alternative one party can purchase the other parties half share.

How can a person get a divorce?

Under the current law, all divorces must take place in the High Court in **Windhoek** and **Oshakati**.

- A spouse who wants to get a divorce starts the procedure by serving a summons on the other spouse.
- The other spouse can either agree to the divorce or defend the divorce.
- But before the divorce proceedings in the High Court commence, the parties are encouraged to settle their dispute through an alternative dispute resolution procedure, known as mediation.

Glossary of terms:

IN COMMUNITY OF PROPERTY: The concept of a marriage in community of property can best be explained by the legal consequences of such marriage. Everything a husband and wife had before they were married becomes part of the joint estate. Everything earned or bought once married also becomes part of the joint estate. Each partner owns half of the joint estate. If one partner has a debt, money from the joint estate can be used to pay this debt. Both partners must agree to sell, give away or borrow money or property. Both partners must agree if they want to take out a large loan. If the couple divorce or if one partner dies, the property will be divided in half.

JOINT ESTATE: Means that all assets and debts are combined into one property which is managed by both spouses acting together during the marriage and divided in half when the marriage ends by death or divorce. It simply means the estate or the property is owned by both spouses.

MEDIATION: The mediation process is conducted by a mediator, who is a facilitator. He/she does not impose a decision upon the parties. Rather, the mediator's job is to encourage to keep the parties talking and to help move them through the more difficult points of contention. An additional advantage is that when the parties reach agreement in mediation, the dispute is over. But, if on the other hand, the parties fail to reach an agreement or fail to settle, the matter will have to be referred to the High Court for the judicial proceedings.

OUT OF COMMUNITY OF PROPERTY: This concept means that everything a husband and wife had before they were married remains their own. Once they are married they keep their own earnings. They are each responsible for their own loans and debts. The husband or the wife can buy or sell their belongings without asking the other person. They can each take out a loan without asking the other person.

However, not all costs are separate. The cost of household needs should be shared because a husband and a wife have a duty to maintain each other. If a couple wants a divorce, they each keep their own property and anything they bought together is divided in half. If one partner dies, it is only that partner's separate property which goes to the heirs.

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