

CHAPTER 29:07
ABOLITION OF MARITAL POWER
ARRANGEMENT OF SECTIONS

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Act 34, 2004,
S.I. 30, 2005.

An Act to provide for the abolition of marital power, to amend the matrimonial property law of marriages, to provide for the domicile of married women, to provide for the domicile and guardianship of minor children and to provide for matters incidental thereto.

[Date of Commencement: 1st May, 2005]

PART I

Preliminary (ss 1-3)

- 1. Short title**

This Act may be cited as the Abolition of Marital Power Act.

2. Interpretation

In this Act, unless the context otherwise requires-

"**court**" means a magistrate's court or the High Court; and

"**joint estate**" means the estate of a husband and wife married in community of property.

3. Application of the Act

This Act shall not apply to customary and religious marriages.

PART II

Abolition of Marital Power (ss 4-5)

4. Abolition of marital power

(1) Subject to the provisions of this Act-

- (a) the common law rule in terms of which a husband acquires the marital power over the person and property of his wife is hereby abolished; and
- (b) the marital power which a husband had over the person and property of his wife immediately before the commencement of this Act is hereby abolished.

(2) The abolition of the marital power under subsection (1)(b) shall not affect the legal consequences of any act done, omission or fact existing before such abolition.

5. Effect of abolition of marital power

The effect of the abolition of marital power is to remove the restrictions which the marital power places on the legal capacity of a wife and abolishes the common law position of the husband as head of the family.

PART III

Provisions Regarding Marriages in Community of Property (ss 6-13)

6. Application of this Part

The provisions of this Part shall-

- (a) apply to every marriage in community of property, irrespective of the date on which the marriage was entered into; and
- (b) not apply to property bequeathed or donated to a spouse where by condition of the bequest or donation the property is excluded from the community of property.

7. Equal powers of spouses married in community of property

Subject to the provisions of this Part, a husband and wife married in community of property shall have equal capacity to-

- (a) dispose of the assets of the joint estate;
- (b) contract debts for which the joint estate is liable; and
- (c) administer the joint estate.

8. Spouse's juristic act not subject to other spouse's consent

Subject to section 9, a spouse married in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

9. Acts requiring consent of spouse

A spouse married in community of property 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, debenture, debenture bonds, insurance policies, mortgage bonds, deposits or any investment by or on behalf of the other spouse, forming part of the joint estate;
- (d) alienate, pledge or hypothecate any livestock, borehole, motor vehicle, jewellery, coins, stamps, paintings or other assets forming part of the joint estate;

- (e) alienate, pledge, hypothecate or otherwise burden any furniture or other effects of the common household forming part of the joint estate;
- (f) bind himself or herself as surety or enter into any loan or hypothecation agreement;
- (g) receive any money due or accruing to the other spouse or the joint estate by way of-
 - (i) remuneration, earnings, bonus, allowance, royalty, pension or gratuity by virtue of the other spouse's employment, profession, trade, business or services rendered by the other spouse;
 - (ii) compensation for loss of any income contemplated in sub- paragraph (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; or
 - (vi) the proceeds of any insurance policy or annuity in favour of the other spouse;
- (h) deal with or dispose of moneys received under paragraph (g); or
- (i) donate to another person any asset of the joint estate.

10. Consequences of act performed without the required consent

(1) An act performed in contravention of section 9 may be set aside at the instance of the spouse who suffered prejudice as a result of the act.

(2) Notwithstanding the provisions of subsection (1), where a spouse married in community of property performs an act in contravention of section 9 and without leave of court under section 12 and as a result of the act, the joint estate suffers loss, an adjustment shall effect in favour of the other spouse-

- (a) upon division of the joint estate; or
- (b) upon demand by the other spouse at any time during the subsistence of the marriage.

(3) The court shall in determining whether or not a joint estate has suffered any loss as a result of an act under subsection (2), consider not only the economic value of the property in question but shall also have regard to any sentimental value which at the time of alienation of the property, such property had to the spouse without whose consent the property was alienated.

(4) Where a spouse makes a demand in accordance with subsection 2(b) and an amount is determined to be payable to the spouse in settlement of such adjustment, the amount shall be recovered from the separate estate of the other spouse.

(5) Where the other spouse referred to in subsection (4) has no separate estate, the amount shall be recovered from the joint estate:

Provided that there shall upon a subsequent division of the joint estate, be allocated to the spouse to whom payment was made and as a first charge against the value of the assets available for distribution, such an amount as that spouse may have contributed to the said adjustment by virtue of his or her interest in the joint estate.

(6) An amount paid or assets transferred to a spouse in accordance with a demand made under subsection (2)(b), including any proceeds derived thereon, shall form a separate estate of such spouse.

(7) Where there is a sequestration of the joint estate, property acquired in accordance with subsection (2)(b) shall vest in the trustee of the insolvent estate as if an adjustment in accordance with subsection (6) had not been effected.

11. Acts not requiring other spouse's consent

A spouse married in community of property may without the consent of the other spouse-

- (a) sell, cede or pledge listed securities on a stock exchange in order to buy other listed securities; and
- (b) perform acts required to be performed in the ordinary course of his or her profession,

trade, occupation or business.

12. Want of consent and suspension of power of spouse

(1) A court may on application by a spouse married in community of property, grant the spouse leave to perform an act without the required consent under this Part, where the court is satisfied that-

- (a) in the case where the consent is withheld, such withholding is unreasonable; or
- (b) there is good reason to dispense with the consent.

(2) A court may on application by a spouse, suspend for a definite or indefinite period, any power that the other spouse may exercise under this Part where the court is satisfied that it is essential for the protection of the interest of the applicant.

(3) A suspension under subsection (2) may be general or in relation to a particular act as the court may specify in the order.

13. Litigation by or against spouses

(1) A spouse married in community of property shall not, without the written consent of the other spouse, institute or defend legal proceedings against another person except legal proceedings-

- (a) in respect of his or her separate property;
- (b) for the recovery of damages, other than damages for patrimonial loss, by reason of the commission of a delict against his or her person;
- (c) in respect of a matter relating to his or her separate profession, trade, occupation 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 consent under subsection (1).

(3) Where costs are awarded against a spouse in legal proceedings instituted or defended by the spouse without the consent required in accordance with subsection (1), the court may, with regard to the interest of the other spouse and the reasons for the want of consent, order that cost be recovered from the separate estate of the first mentioned spouse.

(4) Where a spouse against whom costs have been awarded under subsection (3) has no separate estate, the court may order that costs be recovered from the joint estate and the provisions of section 10(5), (6) and (7) shall *mutatis mutandis* apply.

(5) Where a debt is recoverable from a joint estate, the spouse who incurred the debt may be sued individually or both spouses may be sued jointly.

(6) Where a debt has been incurred for necessaries for the joint household, the spouses may be sued jointly or severally.

(7) An application for the surrender of a joint estate shall be made by both spouses.

(8) An application for the sequestration of a joint estate shall be made by 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 where the applicant satisfies the court that despite reasonable steps taken by him or her, he or she was unable to establish whether the debtor is married in community of property or the name and address of the spouse of the debtor.

PART IV

Provisions Regarding Marriages Out of Community of Property (ss 14-15)

14. Liability for household necessaries

(1) Spouses married out of community of property shall be jointly and severally liable to third parties for all debts incurred by either of them in respect of necessaries for the joint household.

(2) A spouse married out of community of property has a right of recourse against the other spouse in so far as he or she has contributed more in respect of necessaries for the joint household than for which he or she is liable.

15. Joint acquisition of property

(1) Where spouses married out of community of property acquire property jointly, Part III of this Act shall, in respect of the property, apply as if the marriage is in community of property.

(2) A spouse married out of community of property has a right of recourse against the other spouse in so far as he or she has contributed to the acquisition of property by that other spouse.

PART V

Provisions regarding Domicile of Married Women and Domicile and Guardianship of Minor Children (ss 16-20)

16. Domicile of married women

The domicile of a married woman shall not by virtue 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 to any individual capable of acquiring a domicile of choice.

17. Domicile of minor children

(1) The domicile of a minor child shall be the place with which the child is most closely connected.

(2) Notwithstanding the generality of subsection (1), where a child resides with his or her parents or with one of the parents, it shall be presumed, unless the contrary is shown, that the child's domicile is where he or she so resides.

18. Guardianship of minor children

(1) Parents shall have equal guardianship over a minor child and such guardianship shall with respect to rights, powers and duties be equal to the guardianship which a guardian immediately before the commencement of this Act had under the common law in respect of his or her minor child.

(2) The consent of both parents shall be required in respect of-

- (a) the contracting of a marriage by a minor child;
- (b) the adoption of a minor child;
- (c) the removal of the minor child from Botswana by either of the parents or any other person;
- (d) the application for the inclusion of the name of the minor child in the passport issued or to be issued to any one of the parents;
- (e) the alienation or encumbrance of immovable property or any right to immovable property vesting in the minor child; and
- (f) the place and field of education of the minor child.

PART VI

General Provisions (ss 19-20)

19. Transitional Provisions

The Minister may make regulations providing for such transitional arrangements as shall be necessary for the coming into force of this Act.

20. Regulations

The Minister may make regulations prescribing anything under this Act which is necessary or convenient to be prescribed for the better carrying out of the objects and purpose of this Act, or to give force and effect to its provisions.