Bill No. 22 of 2013

MARRIED PERSONS PROPERTY BILL, 2013
(Published on 25th October, 2013)

MEMORANDUM

1. A draft of the above Bill, which it is intended to present to the National Assembly, is set out below.

2. The objects of the Bill is to re-enact the Married Persons Property Act with amendments which include —

   (a) introducing the concept of change of property regime and providing for safeguards. What is being proposed will enable spouses, after the solemnisation of their marriage, to change the property regime they opted for, before marriage. The change has to be done within the given safeguards, so as to ensure that, among others, third parties are not prejudiced, considering that third parties, like financial institutions may have an interest in the properties of the spouses.

   (b) introducing a Form as proof for an out of community of property regime, for persons whose properties are not subject to customary law. The Act does not provide for a Form for out of community of property at this instance, as it was interpreted that the presumption for out of community of property prevails, and only proof will be required to show that one has opted against the presumption. This has proven problematic as on the ground, it has come to light that the proof actually required from spouses is that their property is held out of community of property, and because of lack of such proof, in order to acquire services, spouses have assumed the in-community of property regime, as proof of that is never required.

3. Clause 3 is a replica of section 9 of the repealed Act and has not been amended. The section restates the exemption provided in section 16 (3) of the Deeds Registry Act, which exempts Instruments made under this Act from preparation by Conveyancers, as is provided under that section.

4. Clause 4 is a replica of section 3 of the repealed Act, save for changes made by expressing the existing presumption, that all marriages solemnized under the Marriage Act are presumed to be out of community of property under this Act; and by providing a Form to be signed by spouses who are married out of community of property under this section.
5. Clause 5 is a replica of section 7 of the repealed Act. This section provides that the property of spouses who are married under the Marriage Act, but are subject to customary law, will be held, disposed of or devolve according to customary law, unless the spouses have, through this section, exempted their property from the application of customary law. This signifies that a marriage solemnized under the Marriage Act is governed by the civil law, only in so far as the marriage is concerned, but for purposes of the matrimonial property, the property will remain under customary law for persons who are subject to customary law, unless they express exemption from such. This Bill restates the position in the repealed Act. The clause also restates the provision in the repealed Act, which subjects application of the foregoing to the provisions of the Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act, which Act exempts application of customary law (in the absence of an expression made under this Act), where it can be shown, by the lifestyle of the spouses, that application of customary law to the property will be unjustifiable. The provision has been recast to clear the doubt expressed by the Courts, in that this provision was drafted in uncertain terms and therefore capable of more than one meaning.

6. Clause 6 has provisions derived from sections 3 and 7 of the repealed Act, with an amendment by increasing the days for registration of instruments with the Deeds Registry from 90 days to 180 days. The rationale being that the 90 days specified in the repealed Act was insufficient, and as result some instruments were not registered within the stipulated period.

7. Clauses 7 and 8 are new provisions, where clause 8 provides for correction of errors on instruments, whilst clause 9 provides for the change of property regime.

8. Clause 9 is a replica of section 6 of the repealed Act, whilst clause 10 provides for validation of instruments which have not been registered with the Deeds Registry. Clause 10 is necessary as it has been shown that a number of instruments have not been registered with the Deeds Registry, and are therefore not valid. In order not to prejudice the parties concerned, this provision will enable the registration of the Instruments and validate the said instruments.

9. Clause 11 gives power to the Minister to make Regulations under the Act, whilst clauses 12 and 13 respectively, deal with repeal and savings provisions.

EDWIN J. BATSHU,
Minister of Labour and Home Affairs.
ARRANGEMENT OF SECTIONS

SECTION
1. Short title and commencement
2. Interpretation
3. Exclusion of section 16 of Cap. 33:02
4. Community of property excluded
5. Proprietary consequences of marriages of persons subject to customary law
6. Registration of instrument with Deeds Registry
7. Correction of errors on instrument
8. Change of property regime
9. Registration of instrument or notarial deed
10. Validation of certain instruments
11. Power of Minister to amend Schedule
12. Regulations
13. Repeal of Cap. 29:03
14. Savings provision
SCHEDULE

A BILL
—entitled—

An Act to provide for the property of married persons and for matters connected therewith or incidental thereto.

Date of Assent:
Date of Commencement:
ENACTED by the Parliament of Botswana.

1. This Act may be cited as the Married Persons Property Act, 2013, and shall come into operation on such a date as the Minister may, by Order published in the Gazette, appoint.

2. In this Act, unless the context otherwise requires —
   “community of property” means the community of property, profit and loss;
   “property regime” means a marital property regime which can either be in community of property or out of community of property;
   “Registrar” means the Registrar of Deeds; and
   “repealed Act” means the Married Persons Property Act repealed under section 13 of this Act.

4. (1) Subject to subsection (3), a marriage solemnized under the Marriage Act, where one of the spouses is domiciled in Botswana, is presumed to be out of community of property, profit and loss.

(2) In pursuance of subsection (1), spouses shall each sign an instrument in Form A set out in the First Schedule, in the presence of two persons, one of whom shall be —

(a) an administrative officer;
(b) a justice of the peace; or
(c) a commissioner of oaths,

who shall sign in that instrument as witness.

(3) Notwithstanding subsection (1), spouses who wish their property regime to be in community of property, shall each sign an instrument in Form B set out in the First Schedule, in the presence of two persons, one of whom shall be —

(a) an administrative officer,
(b) a justice of the peace, or
(c) a commissioner of oaths,

who shall sign in that instrument as witness.

5. (1) Notwithstanding that a marriage has been solemnized under the Marriage Act, the provisions of this Act shall not apply to the property of spouses who are subject to Botswana customary law.

(2) Subject to the provisions of this section and of the Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act, the property of spouses who are subject to customary law shall be held, disposed of, and devolve according to customary law, unless disposed of by will.

(3) Notwithstanding subsections (1) and (2), the spouses in a marriage between persons subject to customary law may, prior to the solemnisation of the marriage, express their wish to exclude customary law application to their proprietary rights, by an instrument in writing —

(a) signed by each of them; and
(b) in the presence of two persons, one of whom shall be —

(i) an administrative officer,
(ii) a justice of the peace, or
(iii) a commissioner of oaths,

who shall sign in that instrument as witness.

(4) An instrument under subsection (3) shall be as set out in the Second Schedule and shall state whether the spouses wish to avail themselves to the provisions of this Act, and by —

(a) Form A the spouses shall exclude the application of customary law, and opt for a marriage out of community of property; and
(b) Form B the spouses shall exclude the application of customary law, and opt for a marriage in community of property.
6. (1) An instrument signed under section 4 or 5 shall be registered in the Deeds Registry by the Registrar of Marriages, within 180 days after the execution of such instrument, and shall not be valid unless so registered.

(2) Where an instrument submitted for registration in accordance with subsection (1), has any defect, the Registrar shall return it to the Registrar of Marriages, setting out the defect and requiring the instrument to be rectified and returned to him or her, within a period which the Registrar may allow, which time shall not be less than 90 days.

(3) The instrument returned to the Registrar of Marriages under subsection (2) shall be registered by the Registrar, and shall be valid, notwithstanding that it was registered more than 180 days after execution.

7. The Registrar of Marriages or the spouses may apply to the High Court for an order directing the Registrar to correct an error on the instrument, where an error is discovered on an instrument after registration.

8. (1) A person, whether married before or after the commencement of this Act may, apply to the High Court for leave to change the property regime which applies to his or her marriage, and the court may, if satisfied —

(a) that there are sound reasons for the proposed change;
(b) that the continuation of the existing property regime is no longer economically and socially appropriate for either of the spouses;
(c) that the proposed change is not in bad faith;
(d) that sufficient notice of the proposed change has been given to all the creditors of each of the spouses;
(e) where the application is made by one spouse, that sufficient notice is given to the other spouse;
(f) that publication of the proposed change has been made in three consecutive issues of the Gazette and a newspaper of national circulation; and

(g) that no other person will be prejudiced by the proposed change, order that such property regime shall no longer apply to their marriage and authorise the spouses to enter into a notarial deed by which their future property regime is to be regulated, and on such terms as the court may think fit.

(2) A notarial deed entered into, under subsection (1) shall be registered in the Deeds Registry within 28 days after its execution, and shall not be valid, unless so registered.

(3) A property regime change under this section shall not be made more than twice, during the subsistence of a marriage.

(4) The Registrar shall, within a reasonable time notify the Registrar of Marriages of a change of regime made under this Act.
FORM B

EXCLUSION OF CUSTOMARY LAW AND OPTION FOR MARRIAGE IN COMMUNITY OF PROPERTY

(section 5 (4) (b))

We, the undersigned, A.B. of ................................................................. and C.D. of ................................................................. do hereby solemnly express our wish —

(a) that the proprietary consequences of our contemplated marriage should be regulated by the common law and not the customary law and in consequence we wish to be exempt from the provisions of section 5 (1) and 5 (2) of the Married Persons Property Act; and

(b) that we do not desire to avail ourselves of the provisions of the said Act and opt for a marriage in community of property.

Signature:  A.B. .................................................................

C.D. .................................................................

Witnesses:  1. .................................................................

2. .................................................................

N.B. One witness must be an administrative officer, a justice of the peace or a commissioner of oaths.

{ENDORSEMENT PAGE}

AGC 9/2/98 l(2)