



The Law in Botswana Regarding, Marriage , Divorce & Children

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Education

B.A. (University of Cape Town) 1978

LL.B (University of Natal) 1981

Diploma Advanced Property Practice (Milpark Business School) 1998

Diploma Trial Advocacy Instruction (University of Washington) 2011

Professional Qualifications

Admitted as an Attorney of the High Court of Botswana 1987

Fellow of the Botswana Institute of Arbitrators

Professional Memberships

Member of the Botswana Law Society



Patient “Pepsi” Thuto



Education

B.L. (Hons) University of Zimbabwe 1986

LLB University of Zimbabwe 1987

Certificate in Mediation & Arbitration (IMMSA) 1995

Certificate in Trial Advocacy Instruction (S.A.) 2001

Diploma Trial Advocacy Instruction (University of Washington) 2011

Professional Qualifications

Admitted as a legal practitioner (Attorney, Notary and Conveyancer) in the High Court of Zimbabwe, January 1988

Admitted an Attorney, Notary and Conveyancer of Botswana, May 1991

Professional Memberships

Member of the Botswana Law Society



MARRIAGES IN BOTSWANA



CHANGE OF MARRIAGE REGIMES

A couple may change their marriage regime from “*in community of property*” to “*out of community of property*” or vice versa, twice.

STATUTES

Ante-Nuptial Contracts Act

Married Persons Property Act (New)

Abolition of Marital Powers Act

Marriage Act

Affiliation Proceedings Act





Types of Recognised Marriages



CUSTOMARY MARRIAGES

- Customary Marriages generally take place in customary courts (Kgotlas) where lawyers have no access.



ISLAMIC AND HINDU MARRIAGES



Section 23 of the Marriage Act; Registration of Customary, Muslim, Hindu and other religious marriages

(1) Parties to a Customary, Muslim, Hindu and other religious marriages shall ensure that their marriage is registered within two months of contracting such marriage.

(2) Either spouse may apply to the Registrar of Marriages for the registration of his marriage and must furnish him with the prescribed information and any additional information which the Registrar may require in order to satisfy himself as to the existence of the marriage.

(3) The Registrar shall, if satisfied that the spouses concluded a valid Customary, Muslim, Hindu or other religious marriage, register the marriage by recording the identity of the spouses, the date of the marriage or property in cash or in kind which a prospective spouse undertakes to give to the other prospective spouse's family in consideration of such marriage (referred to as "bogadi" in vernacular) and any other particulars prescribed.

(4) Any person, who contravenes the provisions of subsection (1) shall be guilty of an offence and liable to a fine not exceeding P800 or to imprisonment for a term not exceeding one year, or to both.



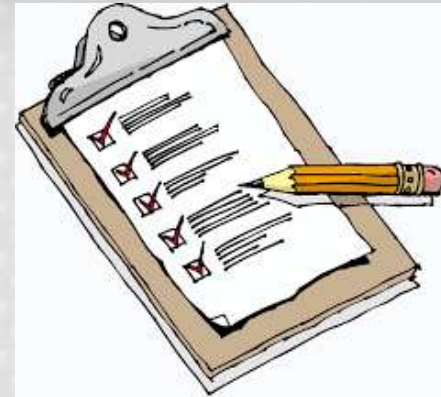
DIVORCE





Procedure

- Divorce must be instituted by way of action.
- Divorce can **only** be instituted in the High Court, which has original jurisdiction
- Service of divorce summons outside the jurisdiction must be made by way of edictal citation. (**Order 10 High Court Rules**)
- Service of divorce summons **MUST** be personal.





Jurisdiction

- Jurisdiction is two pronged;
 1. Residence
 2. Domicile
- **Domicile** must be established in order to establish jurisdiction.
- A court will have the jurisdiction to preside over a divorce of a foreign couple where either spouse has been continuously **resident** for a period of at least three years
- Couples married in Botswana **must** have been married for at least **two years** before divorce proceedings can be instituted.



Proof of Irretrievable Breakdown



- Botswana is still very much a fault based system; **irretrievable breakdown** of the marriage must be proven.



- **Four** grounds for proving irretrievable breakdown of the marriage:
 1. Unreasonable behaviour
 2. Adultery
 3. Desertion for a period in excess of two years
 4. Living apart for a period in excess of two years



Applying Foreign Law

- Where jurisdiction has been established by the court to entertain the divorce of a foreign marriage, reference must be made to the law of the country where the couple was domiciled at the time of their marriage.
- Such foreign law will only be applied in so far as **division of the joint estate** of the couple is concerned, or where either of the spouses claim that they were never married to begin with.



CHILDREN



Protection of Children



- The High Court is the “Upper Guardian” of all minor children.
- The **Children's Act** makes provision for ;


“the promotion and protection of the rights of the child; for the promotion of the physical, emotional, intellectual and social development and general well-being of children; for the protection and care of children; for the establishment of structures to provide for the care, support, protection and rehabilitation of children”





Travel



- Travel Affidavits- Difficulties often arise when one parent refuses to sign travel documents 





Adoption

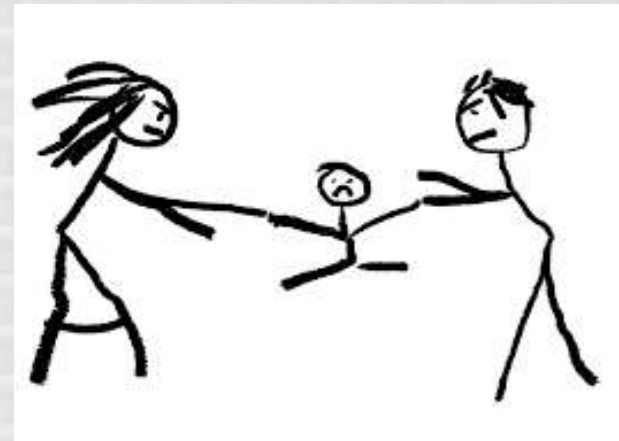


- The Magistrate Court is referred to as the Children's Court when it hears cases involving children. The Magistrate Court gives priority to children's cases, therefore these types of cases do not queue with other matters before the court.
- The Magistrate court has the authority to grant an adoption.
- While the court is under no legal obligation to involve social workers in children's issues, they typically do.
- No person under the age of 25 can adopt, and no person can adopt a child who is 16 years or older unless both parents are at least 25 years older than the child. **(Subject to 2 exceptions)**





Abduction

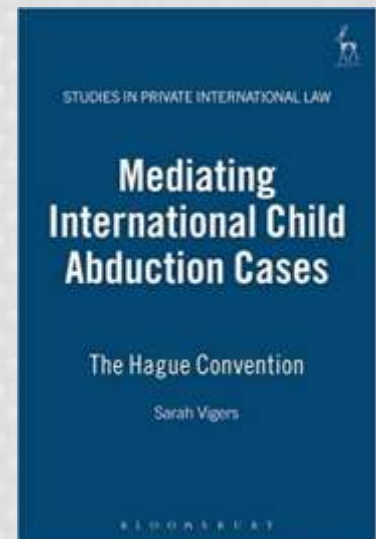
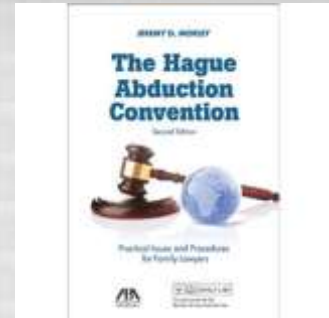


- Child abduction has increased in recent years in Botswana, mostly due to more incidences of marriage breakdown, faster and easier means of communication between countries, and a larger number of marriages of person of different nationalities.
- When the marriage breaks down , problems arise when each parent wants sole custody.
- In some cases one of the parents will relocate to another country with the children without the consent or prior knowledge of the other parent, and despite a custody order granted to the other spouse.



Retrieval of an Abducted Child

- Botswana is not a signatory to the Hague Convention.
- Therefore the best way to try and retrieve an abducted child is to obtain a court order in Botswana, for the return of the said child or children, and then proceed to try and get that court order recognised in country which the children reside.
- Botswana needs to embrace international legal codes on child abduction. These Codes must address the issues of jurisdiction and the recognition and enforcement of foreign custody orders and the mechanism for the speedy return of abducted children to their lawful custodians.





THE END



THANK YOU!



Ms Thuto & Mrs Keevil