

Property Rights of Spouses Bill

MEMORANDUM

The purpose of the Bill is to regulate the property rights of spouses in accordance with article 22 of the Constitution, particularly clauses (2) and (3).

The Constitution imposes an obligation on Parliament under article 22 to enact legislation to regulate the property rights of spouses. The Constitution has been in force since 7th January, 1993 and though the preparation of the Bill has been protracted, it is to fulfill the obligation of the supreme law that this Bill has been proposed in the best interest of spouses.

Article 22 (3) requires spouses to have equal access to property jointly acquired during marriage and for matrimonial property to be equitably distributed between the spouses upon termination of the marriage.

Until now, the determination of the property rights of spouses by the courts has not sufficiently reflected the more equitable and just regime guaranteed by article 22 of the Constitution. Different sets of rules using different principles and concepts have been used to determine the property rights of spouses. This state of affairs is largely attributable to the lack of a general standard fashioned on the philosophy of the constitutional provision on property rights of spouses.

This Bill establishes rules and workable standards for the courts and spouses for the realization of the provision of the Constitution on spousal property rights. The focus of the Bill is the property rights of spouses as defined in the Bill. The Bill is not intended to deal with the property rights between parents and children. Provision for the maintenance of children is made in the Children's Act, 1998 (Act 560) and the forum for a child maintenance order is a family tribunal.

The Bill seeks to ensure certainty in matters connected with the property rights of spouses. Proposals for the Bill came from diverse sources including the Law Reform Commission, various civil society groups, traditional rulers, legal experts and faith based organisations. Legislation from other Commonwealth jurisdictions like Jamaica, Tanzania and South Africa influenced the proposals. There was also a study tour to South Africa to find out how property rights between spouses are handled in that jurisdiction. It is expected that the passage of the Bill will ensure fairness in determining matters that pertain to the property rights of spouses.

Property Rights of Spouses Bill

The Constitutional provision under article 22 (3) which requires equal access by spouses to property jointly acquired during their marriage and fairness in the distribution of jointly acquired property when the marriage is dissolved is stated in clause 1.

Clause 2 provides the meaning of “spouse”. This is necessary because although the Constitution uses “spouse” in article 2, the word is neither defined in that article nor in article 295.

Clause 3 recognises persons who live together as husband and wife without formal ceremony, normally referred to as cohabitees. This concept includes a situation where customary marriage rites have commenced but have not been completed. This is in recognition of the fact that these persons may make contributions towards the acquisition of joint property during that relationship and should not lose their property rights merely because they have not completed or formalized their union.

Clause 4 provides for parties to a marriage and cohabitees to make an agreement referred to as a marital agreement to regulate their property rights.

Clause 5 states the requirements for the agreement. It may be oral or in writing, signed by both parties and witnessed by two persons chosen by the parties. Each party to an oral agreement is expected to have a witness. Where the oral agreement is to be used in court, it must be confirmed by affidavit. Issues to be dealt with in the agreement include the share of the property each party is entitled to and the method for the calculation of each party's share.

Clause 6 enjoins each party to obtain independent legal advice before making or entering into the agreement to forestall disputes. It also makes it mandatory for the person who provides the legal advice to spell out the implications of the agreement to the party and certify that this has been done.

Clause 7 gives the court the power not to enforce the agreement.

Clause 8 enables the court to make an enquiry into the agreement. Provision is also made in subclause (2) for a spouse, party or a person with interest in the subject matter of the agreement to apply to the court for an enquiry to be made where there are reasonable grounds to believe that the court may set aside the agreement.

Clause 9 states the factors that may vitiate the agreement. These are duress, undue influence, fraud, misrepresentation, illegality, lack of intention or any other vitiating factor such as the unequal bargaining position of a spouse.

Property Rights of Spouses Bill

Other grounds for the court to set aside the agreement are lack of full disclosure of assets by a party to the agreement and unconscionability.

Clause 10 defines joint property to include the matrimonial home if it is jointly acquired and other immovable property acquired by both spouses for the purpose of their marriage. Household property and other property acquired during the marriage also forms part of the joint property but separate property is excluded. The court is given power in this clause to restrain a spouse or third party from disposition of joint property.

Clause 11 excludes separate property from distribution and defines separate property. A spouse is given capacity to acquire and keep property during the subsistence of the marriage under the Bill. Separate property includes, among other things, property acquired before marriage or property acquired by bequest, devise, through inheritance or gift from a person other than the spouse. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship are separate property. The part of a settlement that represents those damages are also to be considered separate property. Property that the spouses have agreed is not to be included in the matrimonial property is obviously separate. Trust property is excluded except where it is a sham to deprive the vulnerable spouse of joint property.

Equal access to jointly acquired property is provided for in clause 12, whilst clause 13 provides for the equitable distribution of property. Under clause 13, the various conditions for the distribution of jointly acquired property are spelt out. These include the length of marriage and the contribution of the immediate family. Any contribution to the maintenance of the matrimonial home by the immediate family which facilitates the acquisition of the property is also included. The interpretation clause in the Bill defines immediate family to mean wife, husband and children. The need to make reasonable provision for other spouses and their children where the marriage is polygamous is also a condition for the distribution. The Bill recognises here that polygamous marriage involves multiple wives.

Under clause 14, the consent of the spouse is to be obtained before a transaction that relates to the matrimonial home that is the joint property of the spouses can be entered into. Sub-clause (2) enumerates the conditions under which consent may be dispensed with. These include mental incapacity of a spouse, determined by a mental health professional or psychiatrist, unknown whereabouts of a spouse for a period of seven years or any other good reason that the court considers appropriate.

Property Rights of Spouses Bill

Clause 15 provides for property settlement. The court is empowered to make an order for the alteration of a spouse's interest in property other than the matrimonial home if it is just and equitable to do so.

Clause 16 enables the court to set aside the order made in clause 15 if the order was obtained by fraud, duress, through false evidence or suppression of evidence.

The Bill in clause 17 takes cognizance of gifts between spouses during the subsistence of the marriage. The presumption is that the property in this situation belongs to the receiving spouse.

Similar recognition is given to debts incurred by a spouse prior to marriage in clause 18. A spouse is not liable for the debts of the other spouse incurred prior to the marriage unless there is an agreement to the contrary. Under clause 19, where a spouse incurs a debt during the subsistence of the marriage for the necessities of life for the immediate family with the consent of the other spouse, the debt is the liability of both spouses who incurred the debt is liable because these debts relate to separate property.

Clause 20 makes provision for the distribution of property between spouses in polygamous marriages. Matrimonial property acquired during the first marriage and before the second marriage was contracted is owned jointly by the parties.

Clause 21 deals with situations where the matrimonial home is rented premises. In such situations, the premises may be assigned to a party even though that party is not a party to the tenancy agreement. Notice is to be given to the owner of the rented property.

Clause 22 provides protection for a spouse who has made contribution towards the maintenance or improvement of property acquired by the other spouse before marriage or during the marriage. A spouse in this category acquires a beneficial interest in the property.

Clause 23 states the presumptions related to property acquired during marriage. Property acquired in the name of a spouse belongs to both spouses with the onus on the person who claims it is separate property to prove that claim.

The court is given power to grant a maintenance order in clause 24. Maintenance may be in the form of a lump sum payment or periodic payments over a specified time to be taken into consideration in the grant of maintenance.

Property Rights of Spouses Bill

The financial resources of the spouse seeking maintenance, including property apportioned to that spouse in the course of distribution is to be taken into consideration in the grant of maintenance. Reduced or lost earning capacity of the spouse seeking maintenance because that spouse gave up or delayed education, training, employment or other opportunities during the marriage is also to be taken into consideration. The contribution and services as a spouse, parent, wage earner and as a manager of the home are to be considered by the court. The career or career potential of the other spouse of the person who is seeking maintenance are also factors to be considered by the court. A maintenance order ends when the person receiving maintenance remarries or the person providing the maintenance dies.

Clause 25 empowers the District, Circuit and High Courts to hear and determine matters related to the property rights of spouses and requires that these matters should be heard in chambers to maintain the confidentiality of spouses. For spouses who cannot afford legal costs, an application can be made to the Legal Aid Scheme for assistance, clause 26. Provision is made for the settlement of disputes by alternative dispute resolution in clause 27.

Clause 28 provides for offences and these include the disposition of joint or household property without the consent of the other spouse, denying the other spouse use of the proceeds from the sale of joint property and destruction of joint property in order to defeat the purpose of the Act. The punishment for an offence is a fine of not more than four hundred and fifty penalty units or a term of imprisonment of not more than three years or both. In order to avoid conflict, sections 19, 20 and 21 of the Matrimonial causes Act, 1971 (Act 367) which provide for financial provisions in matrimonial causes are repealed.

Finally, clauses 30 and 31 provide for Regulations and interpretation respectively.

MRS. BETTY MOULD IDDRISU
Attorney-General and Minister for Justice

Date:

Property Rights of Spouses Bill

ARRANGEMENT OF SECTIONS

Section

Relationships

1. Property rights under the Constitution
2. Definition of spouse
3. Cohabitation

Marital Property Agreements and related matters

4. Marital property agreement
5. Form of agreement
6. Independent legal advice
7. Power of court not to enforce agreement
8. Enquiry by court
9. Court to set aside agreement

Property Rights

10. Joint property
11. separate property
12. Equal access
13. Distribution of property
14. Transactions related to matrimonial home
15. Alteration of property interest
16. Court to set aside order
17. Gifts
18. Debt of spouse incurred prior to marriage
19. Debt of spouse incurred during marriage
20. Polygamous marriage
21. Rented property
22. Spouse contributing to acquisition of property during marriage
23. Presumptions as to property acquired during marriage

Miscellaneous Matters

24. Maintenance
25. Jurisdiction

Property Rights of Spouses Bill

- 26. Application of Legal Aid Scheme Act
- 27. Settlement by alternative dispute resolution
- 28. Offences
- 29. Repeal of sections of Act 367
- 30. Regulations
- 31. Interpretation

Property Rights of Spouses Bill

A

BILL

ENTITLED

THE PROPERTY RIGHTS OF SPOUSES ACT, 2009

AN ACT to provide for and regulate the property rights of spouses during or upon termination of a marriage in accordance with article 22 of the Constitution, to provide for the property rights of cohabiting persons and for related matters.

ENACTED by the President and Parliament:

Relationships

Property rights under the Constitution

1. In accordance with article 22 of the Constitution,
 - (a) a spouse shall have equal access to property jointly acquired During marriage, and
 - (b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses on dissolution of the marriage.

Definition of spouse

2. (1) For the purposes of this Act a spouse means a man married to a woman or a woman married to a man under the Marriages Act, 1884 to 1985 which includes:
 - (a) the Marriage Ordinance (Cap. 127);
 - (b) Marriage of Mohammedans Ordinance Cap. 129); and
 - (c) Customary marriage.
- (2) A marriage under the Marriage Ordinance (Cap 27) is a monogamous union.
- (3) A marriage under Parts One and Two of the Marriages Act 1884 –1985 may be actually or potentially polygamous.

Property Rights of Spouses Bill

- (4) A marriage is actually polygamous if there is more than one wife.
- (5) A marriage is potentially polygamous if there is currently on wife but there could be others in the future.

Cohabitation

3. (1) Cohabitation refers to a situation in which a man and woman hold themselves out to the public to be man and wife.

(2) Persons who have cohabited for a period of five years or more shall be deemed to be spouses and have the rights of spouses for the purpose of this Act.

- (3) The rights conferred by this section on cohabitees are available only to persons who
 - (a) have the capacity to be married to each other under a marriage recognised under this Act,
 - (b) are eighteen years and above, and
 - (c) have held themselves out as husband and wife for a period of not less than five years.

Marital Property Agreements and related matters

Marital property agreement

4. (1) A man and a woman in contemplation of marriage or cohabitation or who are married or cohabitating may make an agreement with respect to

- (a) the ownership of the separate property of each spouse,
- (b) property acquired during the marriage or cohabitation, and
- (c) the distribution of property acquired during the marriage or cohabitation.

(2) Spouses may make an agreement during marriage or cohabitation as regards the ownership and distribution of property on dissolution of the marriage or termination of the cohabitation.

(3) The agreement may be for the settlement of any differences that may arise in relation to property owned by either or both spouses.

Property Rights of Spouses Bill

Form of agreement

- 5.** (1) An agreement under section 4 may
- (a) define the share of the property, or any part of the property to which each spouse is entitled on separation, dissolution of marriage, or termination of cohabitation, or
 - (b) provide for the calculation of the share and the method by which the property or part of the property may be divided.
- (2) The agreement may be oral or in writing.
- (3) Each party to an oral agreement shall have a witness and if an oral agreement is to be used in court, it shall be confirmed by affidavit.
- (4) The written agreement shall be signed by both parties and witnessed by one person each for each party and may be filed in court.
- (5) Where the agreement is filed in court, it may be amended or terminated only by an order of court on application by the parties witnessed by two persons chosen by the parties.
- (6) If a third party will be affected by the amendment or termination, the application shall be on notice to the third party.

Independent legal advice and certification of agreement

- 6.** (1) A party to an agreement under subsection (1) of section 4 may obtain independent legal advice before making or entering into the agreement.
- (2) A person who provides legal advice for a marital property shall certify that the implications of the agreement have been explained to the person who seeks to obtain the advice.

Power to court not to enforce agreement

- 7.** Subject to section 9, a marital property agreement is not enforceable where the court is of the opinion that it would be unjust to give effect to the agreement.
- 8.** (1) A court has jurisdiction to enquire into an agreement made under subsection (1) of section 4 during cohabitation or marriage or on the termination of cohabitation or dissolution of the marriage.
- (2) A spouse, party or any other person with interest in the subject matter of the agreement may apply to the court for an enquiry to be made where there are reasonable grounds to believe that the court may set the agreement aside under section 9.

Property Rights of Spouses Bill

(3) Where a spouse, party to the agreement or a person with interest in the subject matter of the agreement applies for an enquiry to be made, the court may make a declaration

- (a) that the agreement shall have effect in whole or in part; or
- (b) for a particular purpose if it is satisfied that the interest of a party has not been materially prejudiced by the action of a party to the agreement.

Court to set aside agreement

9. (1) Where a party to an agreement alleges that there was no intention to enter into the agreement or that the agreement

- (a) is illegal,
- (b) was entered into under
 - (i) duress,
 - (ii) undue influence,
 - (iii) fraud,
 - (iv) misrepresentation, or
 - (v) any other vitiating factor such as the unequal bargaining position of a spouse,

the court may set aside the agreement and make another order for the distribution of the property.

(2) An agreement may be set aside by the court for illegality or lack of full disclosure of assets by a party to the agreement.

(3) The Court may set aside or modify an agreement on the ground of unconscionability where it is satisfied that the purpose and effect of the agreement is contrary to conscience or that the agreement exploits the unequal bargaining position of a spouse.

Property Rights

Joint property

10. (1) Subject to section 11 (4) joint property of spouses is property however titled, acquired by one or both spouses during the marriage and may include:

- (a) the matrimonial home, and other immovable property;
- (b) household property;
- (c) any property other than separate property acquired during the marriage;
- (d) property which was separate property but which a spouse has made a contribution towards except where this relates to the sale of family land; and
- (e) a business for which seed money was provided by a spouse for its establishment.

Property Rights of Spouses Bill

(2) The court may by order restrain a spouse or a third party from permitting the disposition of joint property and the court may rescind a disposition of joint property made with the intention of defeating the financial provision of a spouse except if the disposition is to a purchaser for value in good faith.

(3) The court may make an order to preserve or maintain joint property while a case about the joint property is pending before the court.

Separate property

11. (1) A spouse may acquire and keep separate property during the subsistence of the marriage.

(2) Separate property shall not be taken into account for the purpose of the distribution of joint property under this Act unless there is an agreement to the contrary.

(3) Subsection (2) does not apply where a spouse proves contribution in cash or in kind to the acquisition or maintenance of the separate property.

(4) Separate property includes:

- (a) self-acquired property and the proceeds and profits from the self acquired property;
- (b) property acquired before marriage or property acquired by bequest, devise, inheritance or gift from a person other than the spouse;
- (c) property that was acquired by gift or inheritance from a third party after the date of the marriage;
- (d) income from property referred to in paragraph (c) if the giver or testator has expressly stated that it is to be excluded from the spouse's joint property;
- (e) damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages;
- (f) a lump sum payment provided under a personal or similar plan;
- (g) proceeds or right to proceeds of an insurance policy payable on the death of the insured person;
- (h) property that the spouses have agreed is not to be included in the joint property;
- (i) property which the spouses by agreement regard as separate property;
- (j) trust property except where the trust is a sham in which event the court may set the trust aside in the best interest of the vulnerable spouse; and
- (k) any other property that a spouse can prove is separate property.

Property Rights of Spouses Bill

(5) The onus of proving that property is separate property is on the person who makes the claim.

Equal access

12. (1) Spouses shall have equal access to joint property under the following circumstances where each spouse:

- (a) is entitled to the possession of the property;
- (b) has the same interest in the property;
- (c) has the same title; or
- (d) has the property for the same time.

(2) Equal access includes the right to the use of, the benefit of and to enter the joint property and where there is agreement between spouses, to the disposal of the joint property.

Distribution of property

13. (1) Where a marriage is being dissolved, the court that determines the property rights of the spouses, may make an order to equitably distribute property jointly acquired during the marriage without regard to the reasons for the breakdown of the marriage.

(2) Where cohabitation terminates, a cohabitee may apply to the court for an order for the distribution of their joint property.

(3) The court may make an order for the distribution of property jointly acquired during the cohabitation.

(4) The distribution of the property shall generally be in equal shares but a spouse may on notice to the other spouse apply to the court to give not more than one third of the value of the jointly acquired property to the other spouse.

(5) The court shall take into consideration the particular circumstances of each case when distributing the property and shall take into consideration:

Property Rights of Spouses Bill

- (a) the length of the marriage;
- (b) the age of the spouse;
- (c) the contribution of each spouse to the acquisition, maintenance or improvement of the property including the contribution of a spouse towards the upkeep or maintenance of the property in cash or kind;
- (d) the contribution of the immediate family or any contribution
 - (i) to the maintenance of the matrimonial home, or
 - (ii) which facilitated the acquisition of the property or matrimonial home by a spouse;
- (e) the economic circumstances of each spouse at the time of the distribution of the property including the desirability to award the matrimonial home to a particular spouse or the right of a spouse who has custody of a child to live in the matrimonial home for a reasonable period of time;
- (f) the need to make reasonable provision for other spouses and their children as regard joint property after another marriage where the marriage is polygamous;
- (g) the period of cohabitation;
- (h) whether there is an agreement related to the ownership and distribution of the property in the best interest of a vulnerable spouse;
- (i) financial misconduct or the wasting of assets; and
- (j) any other fact which in the opinion of the Court requires consideration.

(6) A monetary contribution shall not be presumed to be of greater value than a non-monetary contribution.

(7) The non-monetary contribution shall not be proved in monetary terms.

Transactions related to the matrimonial home

14. (1) A transaction that relates to the matrimonial home that is joint property shall require the consent of both spouses.

(2) Where the transaction relates to the matrimonial home which is not jointly acquired, the non-owning spouse shall be given not less than six months notice of the transaction.

(3) Despite section 1, the interest of a purchaser for value in good faith without notice shall not be prejudiced on account of the absence of consent of the other spouse to the transaction.

(4) The Court may dispense with the consent of a spouse required under subsection (1) where it is satisfied that the consent cannot be obtained because of

Property Rights of Spouses Bill

- (a) the mental incapacity of the spouse which has been determined by a mental health professional or psychiatrist,
- (b) the unknown whereabouts of the spouse for seven years as declared by the court in which case the rules of the Administration of Estates Act 1961, (Act 63) shall apply to the spouse presumed dead, or
- (c) any other good reason for which consent should be dispensed with.

(5) Subject to subsection (3), where a spouse enters into a transaction that relates to the jointly acquired matrimonial home without the consent of the other spouse, that transaction may be set aside by the court on an application by the other spouse.

(6) Where the court does not set aside a transaction, the spouse whose interest is defeated is entitled to claim out of the proceeds of the transaction, the value of that spouse's share in the matrimonial home.

(7) Where a transfer of the jointly acquired matrimonial home is ordered by the court and a spouse ordered to make the transfer or conveyance is either unable or unwilling to do so, the court may order the registrar of the court to execute the appropriate transfer or conveyance on the part of that spouse.

Property settlement

15. (1) In a proceeding related to property, the court may make an order to alter the interest of either spouse in the property including an order

- (a) for a settlement of property in substitution for an interest in the property, or
- (b) requiring either or both spouses to make, a settlement or transfer of property determined by the court for the benefit of either or both spouses.

(2) The court shall not make the order unless it is satisfied that it is just and equitable to do so.

(3) Where the court makes an order under subsection (1) it shall have regard to

- (a) the effect of the proposed order on the earning capacity of either spouse, and
- (b) any other order that has been made under this Act in respect of a spouse.

Court to set aside order

16. (1) Where the court is satisfied on an application made by a person affected by an order, that the order was obtained by fraud, duress, the giving of false evidence or the suppression of evidence, the court may set aside the order and make another order.

Property Rights of Spouses Bill

(2) The court shall have regard to the protection of the interest of a purchaser in good faith for value without notice in exercising its power under subsection (1).

Gifts

17. Where a spouse gives property as a gift to the other spouse during the subsistence of a marriage, there shall be a rebuttable presumption that the property belongs to the receiving spouse.

Debt of spouse incurred prior to marriage

18. Unless there is an agreement to the contrary, a spouse is not liable for a debt incurred by the other spouse prior to the marriage.

Debt of spouse incurred during marriage

19. Where during the subsistence of a marriage, a debt is incurred to acquire the necessities of life for the immediate family

- (a) with the consent of the other spouse, the debt shall become a family liability to be borne by both spouses equally, or
- (b) without the consent of the other spouse, the debt shall be borne by the spouse who incurred the debt unless agreed otherwise by the spouses.

Polygamous marriage

20. (1) Where a husband has more than one wife in a polygamous marriage, the ownership of the property shall be determined as follows:

- (a) joint property acquired during the first marriage and before the second marriage was contracted is owned by the husband and the first wife; and
- (b) any joint property acquired after the second marriage is owned by the husband and the co-wives and the same principle is applicable to a subsequent marriage.

(2) Despite subsection (1) (b), where it is clear either by agreement or through the conduct of the parties of the polygamous marriage that each has separate matrimonial property, each wife owns that separate matrimonial property separately without the inclusion of the other wives.

(3) A husband in a polygamous marriage who takes a subsequent wife or wives shall together with the existing wife or wives make a declaration as prescribed of their respective interest in the joint property.

(4) The provisions of section 5 shall apply to the declaration.

Rented property

21. (1) Where the parties to a marriage or cohabitees live in rented premises, the court may order the premises to be assigned to one of the parties on dissolution of the relationship even though that party is not a party to the tenancy agreement and shall take into consideration the best interest of any children of the marriage.

Property Rights of Spouses Bill

(2) Where an assignment is made under subsection (1) the party to whom the assignment is made shall be deemed to be a party to the tenancy agreement in replacement of the original tenant and shall attorn tenancy to the owner, despite the presence in the tenancy agreement of a covenant against non-assignment.

(3) After the assignment, the original tenant may be ordered to continue to pay the rent for the premises for a period of at least six months and the owner of the rented premises shall be given notice of the order of the court.

Spouse contributing to acquisition of property during marriage

22. Where a spouse acquires property before marriage or acquires property during marriage which is not joint property but the other spouse makes a contribution towards the maintenance or improvement of the property, that other spouse shall acquire a beneficial interest in the property equivalent to the contribution made by that spouse.

Presumptions as to property acquired during marriage

23. Where during the subsistence of a marriage any property is acquired

- (a) in the name of a spouse, there shall be a rebuttable presumption that the property is joint property with the onus on the person who claims that the property is separate property to prove that it is separate property; or
- (b) in the names of the spouses jointly, there shall be a rebuttable presumption that the beneficial interests of the spouses are equal.

Property Rights of Spouses Bill

Miscellaneous Matters

Maintenance

24. (1) The court may grant a maintenance order to a spouse in addition to or apart from the property distribution order under section 13, to provide for the reasonable needs of the spouse until death or re-marriage.

(2) The maintenance order may be a lump sum or in specified amounts and for periods of time that the court considers just after the court has considered.

- (a) the financial resources of the spouse seeking maintenance, including property apportioned to that spouse, under section 13;
- (b) the ability of the spouse to satisfy that spouse's needs independently;
- (c) the present and future earning capacity of both spouses including the time necessary to acquire sufficient education or training to enable the spouse who seeks maintenance to find appropriate employment;
- (d) the reduced or lost earning capacity of the spouse seeking maintenance because that spouse gave up or delayed education, training employment or career opportunities during the marriage;
- (e) the duration of the marriage;
- (f) the standard of living established during the marriage;
- (g) the age, physical and mental condition of the spouse who seeks maintenance;
- (h) the financial needs, obligations and responsibilities which each spouse has or is likely to have in the foreseeable future;
- (i) the children of the marriage in the custody of the spouse who seeks or needs maintenance;
- (j) the contribution and services
 - (i) as a spouse, parent, wage earner,
 - (ii) as a manager of the home, and
 - (iii) to the career or career potential of the other spouse of the person who is seeking maintenance;
- (k) the wasteful dissipation of joint property by a spouse;
- (l) a transfer or encumbrance made by a spouse in contemplation of a
suit for divorce without fair consideration; and
- (m) any other factor which the court may find to be just and equitable.

Property Rights of Spouses Bill

(3) Maintenance is not part of the chargeable income of a spouse and shall not be subject to tax.

Jurisdiction

25. (1) A District or Circuit Court or the \high Court may hear and determine a matter that arises under this Act.

(2) A matter arising under this Act shall be heard by the court in chambers.

Application of Legal Aid Scheme Act

26. (1) The Legal Aid Scheme Act, 1997 (Act 542) applies for the purpose of providing representation by a lawyer for a spouse who cannot afford the payment of legal fees.

(2) A lawyer provided by the Legal Aid Scheme shall take the spouses through mediation.

Settlement by alternative dispute resolution

27. (1) Spouses may agree to use alternative dispute resolution methods for the distribution of property acquired during a marriage before or after the institution of legal proceedings for the dissolution of a marriage but the agreement shall not oust the jurisdiction of the court.

(2) A mediator shall attempt to resolve a dispute through mediation thirty days after referral by a spouse and a spouse may be represented at the mediation by a representative of the spouse's choice.

(3) Upon resolution of the dispute by the mediation, the agreed terms shall be reduced to a written mediation agreement.

Property Rights of Spouses Bill

(4) the mediator shall submit the mediation agreement to a court seven days after the resolution of the dispute.

(5) If the mediation is unsuccessful, a spouse may resort to court action.

Offences

- 28.** (1) A spouse who
- (a) denies the other spouse an equal right to stay in the matrimonial home and to use the household property when a court has not determined the status of both spouses in relation to the use of the matrimonial home or household property;
 - (b) disposes of joint property or household property
 - (i) in order to pre-empt the decision of the court on a matter that relates to the spouse, or
 - (ii) without the consent of the other spouse;
 - (c) denies the other spouse use of the proceeds from the sale of joint property; or
 - (d) destroys joint property in order to defeat the purpose of this Act or the Matrimonial Causes Act, 1971 (Act 367), commits an offence and is liable on summary conviction to a fine of not more than four hundred and fifty penalty units or a term of imprisonment of not more than three years or both.

(2) The court may make an additional order for the restitution of property to the disadvantaged spouse and if restitution is not possible, the court may make an order for a right of recourse of the amount of the proceeds of the joint property upon the dissolution of the marriage.

Repeal of sections of Act 367

29. Sections 19, 20 and 21 of the Matrimonial Causes Act, 1971 (Act 367) are hereby repealed.

Regulations

- 30.** The Minister may by legislative instrument make Regulations on
- (a) the format and contents of an agreement,
 - (b) the forms to be used under this Act, and
 - (c) any other matter necessary for the effective implementation of this Act.

Interpretation

- 31.** In this Act unless the context otherwise requires
“agreement” means marital property agreement;

Property Rights of Spouses Bill

“attorn” means an agreement by a tenant to be a lawful party to a tenancy agreement although the tenant was not a party to the original agreement;

“cohabitation” means the relationship under section 3;

“contribution” includes

- (a) the payment of money or rendering of service for the acquisition of property;
- (b) the care of children, the aged or infirm, a relative or dependant of a spouse;
- (c) giving up a higher standard of living than would otherwise have been available;
- (d) giving of material assistance, support or otherwise by a spouse to the other which
 - (i) enables the other spouse to acquire a qualification, or
 - (ii) aids the other spouse to carry on that spouse’s occupation or business;
- (e) the management of the household and the performance of household duties;
- (f) the payment of money or rendering of service to maintain or increase the value of property; and
- (g) work on a spouse’s farm or business;

“customary marriage” means a marriage contracted under the customary law rules of one of the contracting parties;

“court” means a District Court, Circuit Court or the High Court;

“equal access” includes the right to the use of, the benefit of and the right to enter the joint property and where there is agreement between spouses, the disposal of the joint property;

“equitably distribute” means to give out or share property among parties using fair means;

“farm land” means land used for agricultural activity;

“holding out to the public” means to carry on a relationship as husband and wife and act in a way which makes the public believe in the existence of the relationship which the act portrays;

“household property” means property acquired for the purposes of the matrimonial home;

“immediate family” means husband, wife and children;

“marriage” has the meaning given to it in section 2 and includes cohabitantes deemed to be married;

“matrimonial home” includes

- (a) any house or premises occupied by the spouse and the children of the marriage during the marriage;

Property Rights of Spouses Bill

(b) any other self-acquired house or premises occupied by the spouses and the children during the marriage; or

(c) premises rented for cohabitation where the cohabitees or spouses live or reside;

“mediator” means an impartial person appointed or qualified to be appointed to assist the parties to satisfactorily resolve their dispute’

“Minister” means the Minister responsible for Justice;

“necessaries” includes items for health, life, education and reasonable shelter suitable to the condition of life of a spouse at the time of the actual requirement of the spouse;

“notice” means written notice by registered mail or an oral declaration supported by a witness;

“personal purposes” do not include necessities;

“prescribe” means prescribed by regulations made under this Act;

“Property” includes matrimonial property and joint property and has the meaning given to it in section 10;

“separate property” is not joint property;

“spouse” includes multiple spouses in a polygamous marriage;

“termination” includes dissolution of a marriage and the end of cohabitation;

“trust” includes an executorship, administratorship, guardianship of children or the office, committee or receiver of the estate of a person with mental disorder or a person incapable of managing that person’s own affairs, a charitable trust, family trust and a non-governmental organization; and

“trust property” includes the property in the possession or under the control wholly or partly of a trustee by virtue of a trust.

Date of *Gazette* notification: