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DIVORCE REFORM: RIGHTS PROTECTIONS IN THE NEW SWAZILAND

TAMAR EZER, AISHA GLASFORD, ELIZABETH HOLLANDER, LAKEISHA POOLE, GRANT RABENN, AND ALEXANDRIA TINDALL

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I. INTRODUCTION	886
II. RIGHT TO DIVORCE	889
A. RESTRICTIONS ON THE AVAILABILITY OF DIVORCE UNDER THE CURRENT SYSTEM VIOLATE A WOMAN’S RIGHT TO A MARRIAGE OF HER CHOICE AND FREEDOM OF ASSOCIATION . . .	889
1. A Woman Has a Right to the Marriage of Her Choice, as Guaranteed by Her Right to Consent and Right to Marry.	891
2. A Woman’s Right to Freedom of Association is Violated When She is Forced to Stay in a Loveless and Unwanted Marriage	892
B. REQUIRING WOMEN TO REMAIN IN ABUSIVE, ADULTEROUS, OR POLYGAMOUS MARRIAGES VIOLATES THEIR PHYSICAL INTEGRITY, INCLUDING THEIR RIGHTS TO LIFE, HEALTH, AND FREEDOM FROM TORTURE	893
1. Forcing Women to Remain in Violent and Abusive Marriages Undermines Their Physical Integrity	894
2. Trapping Women in Economically Abusive or Neglectful Marriages Violates Their Physical Integrity and That of Their Children	896
3. Tying Women to Adulterous or Polygamous Marriages in Which They May be Neglected or Exposed to HIV Violates Their Right to Physical Integrity	897
C. ENABLING DIVORCE WOULD RESPECT A WOMAN’S RIGHT TO	

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	HAVE HER CAUSE HEARD AND PROVIDE JUDICIAL RELIEF FOR RIGHTS VIOLATIONS	899
D.	A DIVORCE STATUTE WITH THE FOLLOWING STATUTORY GROUNDS IS NECESSARY TO PROTECT WOMEN'S FUNDAMENTAL RIGHTS	900
	1. The Option of No-Fault Divorce Protects Individual Rights, Allows for Honesty and Cooperation, and Can Prevent Violence and Abuse Before They Begin	901
	2. To Remedy Specific Rights Violations, Enumerated Statutory Grounds for Divorce Must Be Provided	902
III.	CUSTODY	903
	A. CUSTOMARY LAW VIOLATES WOMEN'S RIGHT TO EQUALITY IN PARENTING BY AUTOMATICALLY GRANTING CUSTODY TO THE FATHER AND HIS FAMILY	904
	B. LACKING LEGISLATIVE GUIDANCE, COURTS FAIL TO ADEQUATELY PROTECT THE BEST INTERESTS OF CHILDREN	905
	C. SWAZILAND'S FAILURE TO RECOGNIZE A CHILD'S RIGHT TO BE HEARD IN CUSTODY DETERMINATIONS UNDERMINES BOTH A CHILD'S RIGHT TO FREEDOM OF EXPRESSION AND ANY MEANINGFUL ASSESSMENT OF THE CHILD'S BEST INTERESTS.	908
	D. SWAZILAND'S FAILURE TO OFFER A JOINT CUSTODY REMEDY UPON DIVORCE COMPROMISES A CHILD'S RIGHT TO PARENTAL CARE AND PARENTS' RIGHTS TO PROVIDE THAT CARE, SHATTERING FAMILIES	909
	E. TO PROTECT THE RIGHTS OF WOMEN AND CHILDREN, SWAZILAND NEEDS TO ADOPT LEGISLATION THAT SPECIFIES BEST INTERESTS FACTORS, INCORPORATES THE CHILD'S VOICE, ENCOURAGES JOINT CUSTODY, AND PROVIDES FOR COURT-SUPERVISED ADMINISTRATIVE REMEDIES	912
	1. Swaziland Should Codify Best Interests Factors and Recognize a Child's Right to Be Heard in Custody Determinations	912
	2. Swaziland Should Encourage Joint Custody, Providing for a Default of Shared Custody	915
	3. Swaziland Should Incorporate Court Supervised Administrative Remedies to Improve Custody Determinations and Lessen Monetary Impediments.	916
	F. CIRCUMSTANCES IN WHICH RIGHTS ARE VIOLATED NECESSITATE DIVORCE TO PROTECT THE HEALTH AND DEVELOPMENT OF FAMILY MEMBERS	917
IV.	MAINTENANCE	918
	A. DENYING WOMEN AND CHILDREN MAINTENANCE, THE CURRENT SYSTEM VIOLATES THEIR RIGHT TO AN ADEQUATE	

	STANDARD OF LIVING AND PROTECTION OF THEIR WELL-BEING.	918
B.	SWAZI MAINTENANCE LAW FAILS TO PROTECT WOMEN AND CHILDREN BY NEGLECTING TO SPECIFY MAINTENANCE DUTIES .	920
C.	SWAZI MAINTENANCE LAW PROVIDES A NARROW OPPORTUNITY FOR REQUESTING SUPPORT, BEARING LITTLE RELATION TO REALITY	922
D.	INADEQUATE ENFORCEMENT PROVISIONS PREVENT SWAZI WOMEN AND CHILDREN FROM COLLECTING MAINTENANCE . . .	922
E.	TO CONFORM TO BINDING INTERNATIONAL LAW AND THE CONSTITUTION, SWAZILAND MUST IMPLEMENT A SERIES OF REFORMS TO ITS MAINTENANCE SYSTEM.	924
V.	PROPERTY.	925
A.	VIABILITY OF DIVORCE FOR WOMEN IS LINKED TO SECURING PROPERTY RIGHTS	925
	1. The Right to Property is the Key to Full Economic Rights and a Life with Dignity.	925
	2. International Law and the Swazi Constitution Uphold Women's Property Rights	926
B.	CUSTOMARY AND CIVIL LAW MARRIAGE REGIMES FAIL TO RECOGNIZE WOMEN'S AUTONOMY AND ECONOMIC CONTRIBUTIONS, VIOLATING THEIR PROPERTY RIGHTS	927
	1. Requiring a Refund of Lobola in Customary Marriages Commodifies Women Themselves and Chains them to the Marital Relationship	928
	2. A Husband's Marital Power in Civil and Customary Marriages Threatens the Wife's Economic Security and Independence	929
	3. Discounting Swazi Women's Domestic Activities Upon Dissolution of an Out-of-Community of Property Marriage Violates Women's Property Rights	930
C.	DIVORCE LEGISLATION MUST DESIGNATE LOBOLA AN UNCONDITIONAL GIFT, COMPENSATE WOMEN FOR THE HUSBAND'S MISMANAGEMENT OF PROPERTY, RECOGNIZE WOMEN'S VITAL DOMESTIC ROLE IN THE HOUSEHOLD, AND PROVIDE A HOME TO THE CUSTODIAL PARENT	933
D.	SWAZILAND'S DEVELOPMENT HINGES ON PROTECTION OF WOMEN'S PROPERTY RIGHTS AND THEIR FULL INTEGRATION IN THE ECONOMY	935
VI.	LEGISLATIVE OBLIGATIONS.	936
A.	SWAZI CITIZENS HAVE THE RIGHT TO A LEGISLATIVE REMEDY FOR VIOLATIONS UNDER THE CURRENT DISCRIMINATORY AND UNCLEAR DIVORCE REGIME.	936
B.	SWAZILAND'S OBLIGATION TO PASS DIVORCE LEGISLATION	

REQUIRES THE PROVISION OF A NO-FAULT OPTION FOR DIVORCE, SPECIFIC GROUNDS FOR DIVORCE, CUSTODY DETERMINATIONS IN THE BEST INTERESTS OF CHILDREN, ADEQUATE MAINTENANCE, AND JUST PROPERTY DIVISION	937
APPENDIX: THE MATRIMONIAL CAUSES ACT, 2007	938

PART I: INTRODUCTION

Swaziland is long overdue for divorce reform. With no governing statute, the current system is marked by a lack of clarity and is especially harmful to women and children. Divorce for civil marriages is limited to two outdated common-law grounds¹ and not formally recognized for customary marriages at all. Custody determinations are ad hoc at best, depriving children of any meaningful evaluation of their best interests; maintenance obligations are not specified and inadequately enforced;² and property division fails to account for a husband's abuse of marital power and a wife's contributions to property through working the land and domestic activities.

While marriage is a fundamental institution necessary for the well-being of society, there are circumstances that necessitate divorce. Failing and abusive marriages are damaging to both individuals and society. As H .R. Hahlo in *THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE*, remarked: “[W]hile there is a social interest in the preservation of marriage, there is also a social interest in not insisting on the continuance of a marriage which has hopelessly broken down.”³ Inability to divorce does not cure social ills, but rather falls on society's most vulnerable with particular severity. As one scholar observed, “[A] divorceless state is not a state without adultery, prostitution and fornication. It may be, rather, a place sharply divided between zones of official law and zones of unofficial behavior. A country with rare or expensive divorce is a country with two kinds of family law, one for the rich and one for the poor.”⁴ The victims of Swaziland's divorce system are its women and children. They are the ones most often trapped in abusive marriages and without the economic means to survive on their own.

Not only is the divorce system in Swaziland inadequate in substance, but it is also procedurally disempowering. As a family law lawyer described, divorce is

1. These two grounds are adultery and desertion, discussed in more detail in Part II below.

2. As discussed in Part IV below, maintenance is the only area for which there is a statute, the Maintenance Act of 1970. However, the statute is entirely procedural and fails to specify maintenance duties and a standard for determining support.

3. H. R. HAHLO, *THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE* 362 (4th ed. 1975).

4. WILLIAM L. O'NEILL, *DIVORCE IN THE PROGRESSIVE ERA* 6-7 (1967); see also LEGAL ASSISTANCE CENTRE, *PROPOSALS FOR DIVORCE LAW REFORM IN NAMIBIA* 253 (2000), available at <http://www.lac.org.na/grap/Pdf/divlawref.pdf> [hereinafter *NAMIBIA PROPOSALS*] (“[N]o divorce law can solve the problems resulting from broken and disrupted marriages, simply because the law of divorce never caused such problems in the first place.”).

“not an easy vehicle. It’s a wheelbarrow. People don’t access it, because it’s too cumbersome.”⁵ For one thing, Swazis from rural areas encounter a language barrier. Proceedings in civil court take place in English, necessitating translation for many Swazis. Translators are not well-trained and instructed and oftentimes distort meanings and use biased language.⁶ Additionally, legal procedures are technical and complicated, obliging an attorney, which many Swazis cannot afford.⁷ Recommendations to deal with these issues include the use of siSwati in the courtroom, simplified court forms in siSwati for parties to lodge complaints and request desired relief,⁸ and assistance by NGOs in the drafting of court documents.⁹

The time in Swaziland is ripe for action to protect the basic rights of Swazi citizens. In February 2006, Swaziland’s new Constitution went into force—the first constitution in 30 years.¹⁰ Swaziland has also recently bound itself to core international human rights treaties.¹¹ On March 26, 2004, Swaziland acceded to the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”),¹² the International Covenant on Civil and Political Rights (“ICCPR”),¹³ and the International Covenant on Economic, Social, and Cultural

5. Interview with Ms. Gigi-Reid-Nkosi, Family law lawyer, in Manzini, Swaz. (Mar. 9, 2006).

6. WOMEN AND LAW IN SOUTHERN AFRICA, MAINTENANCE IN SWAZILAND 33-34, 62 (1992) [hereinafter MAINTENANCE IN SWAZILAND].

7. “The biggest obstacle preventing women from seeking redress in courts is their inability to pay legal fees—two out of three Swazis live in chronic poverty, and women are worse off than men in this traditionally paternalistic society.” *Swaziland Campaign to Inform Women of Their Legal Rights Underway*, UN: INTEGRATED REGIONAL INFORMATION NETWORKS, Jan. 27, 2006, available at <http://www.afroaidsinfo.org/public/Home/news2006/06news11.htm>.

8. These recommendations are set out in the proposed Matrimonial Causes Act below. See also MAINTENANCE IN SWAZILAND, *supra* note 6, at 63, 67; NAMIBIA PROPOSALS, *supra* note 4, at 185.

9. In Swaziland, parties can only be represented by private attorneys, effectively denying representation to the poor. Another recommendation is to allow parties to make a motion by agreement when seeking divorce on the basis of irreconcilable differences or irretrievable breakdown to encourage amicable, efficient, and cost-effective resolution of disputes. However, private negotiations should take place under the backdrop of laws guaranteeing certain standards, and agreements must be with the full, free, and informed consent of parties. Moreover, judicial review should protect vulnerable parties from coercion and ensure the best interests of children. See Proposed Matrimonial Causes Act.

10. “All these [marriage and divorce] laws . . . are in a way obsolete because of the new Constitution. All of those laws have to now be amended to be in line with the Constitution.” Interview with Prince David DImanini, Minister of Justice and Constitutional Affairs, in Manzini, Swaz. (Mar. 9, 2006).

11. The Constitution requires the government to “promote respect for international law, treaty obligations.” SWAZ. CONST. § 61(1)(c).

12. Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, acceded to by Swaziland Mar 26, 2004, available at <http://www1.umn.edu/humanrts/instreet/cedaw.htm> [hereinafter CEDAW].

13. International Covenant on Civil and Political Rights, art. 1, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, acceded to by Swaziland 26 Mar 2004, available at <http://www1.umn.edu/humanrts/instreet/b3cpr.htm> [hereinafter ICCPR].

Rights (“ICESCR”).¹⁴ Other conventions ratified by Swaziland, necessitating reform, are the Convention on the Rights of the Child (“CRC”)¹⁵ and the African Charter on Human and Peoples’ Rights (“African Charter”).¹⁶ Swaziland also signed¹⁷ the African Charter on the Rights and Welfare of the Child¹⁸ and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“Women’s Protocol to the African Charter”).¹⁹ Finally, the foundational human rights document—the Universal Declaration of Human Rights (“UDHR”)²⁰—although non-binding, provides important guidance.

Swazi citizens are clamoring for reform of a divorce system “far behind the lifestyles of [their] people.”²¹ In Spring 2006, Swaziland Action Group Against Abuse (SWAGAA), Women and the Law in Southern Africa- Swaziland (WLSA), and Georgetown’s International Women’s Human Rights Clinic undertook a joint project investigating current marriage and divorce laws in Swaziland and recommending new legislation. Supplementing research efforts, the team conducted a fact-finding investigation in March 2006 and interviewed over a hundred Swazis of various backgrounds—government officials, judges, attorneys, teachers, accountants, etc.—to gain a better understanding of the workings of the current system and what reforms would be appropriate. This resulting report and proposed statute recommend a uniform divorce law governing both civil and customary marriages, which: provides for no-fault divorce in addition to divorce on specific grounds, specifies factors for custody determinations in the child’s best interests, sets out a formula for the calculation of maintenance obligations, and provides for property division recognizing the

14. International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3 1976, *acceded to by Swaziland* Mar.26 2004, *available at* <http://www1.umn.edu/humanrts/instree/b2esc.htm> [hereinafter ICESCR].

15. Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, art. 1, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990, *ratified by Swaziland* Sept. 2, 1995, *available at* <http://www1.umn.edu/humanrts/instree/k2crc.htm> [hereinafter CRC].

16. African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, *ratified by Swaziland* Sept. 15, 1995 *available at* <http://www1.umn.edu/humanrts/instree/z1afchar.htm> [hereinafter African Charter].

17. Under the Vienna Convention, a state is obligated to “refrain from acts which would defeat the object and purpose of a treaty” upon signing it. Vienna Convention on the Law of Treaties, art. 18, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980. Additionally, the African Charter requires that states “ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.” African Charter, *supra* note 16, at art. 18(3).

18. African Charter on the Rights and Welfare of the Child, arts. 21(2), O.A.U. Doc. CAB/LEG/24.9/49, *entered into force* Nov. 29, 1999, *signed by Swaziland* Jun. 29, 1992, *available at* <http://www1.umn.edu/humanrts/africa/afchild.htm>.

19. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, OAU Doc. CAB/LEG/66.6 (2003), *entered into force* Nov. 25, 2005, *signed by Swaziland* Jul. 29, 1992, *available at* <http://www1.umn.edu/humanrts/africa/protocol-women2003.html>.

20. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. GAOR, 3d Sess. 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), *available at* <http://www1.umn.edu/humanrts/instree/b1udhr.htm> [hereinafter UDHR].

21. Interview with Gigi-Reid-Nkosi, Family law lawyer, in Manzini, Swaz. (Mar. 9, 2006).

contributions of both spouses and the value of essential domestic activities. The next three sections of the report present a detailed analysis of custody, maintenance, and property considerations, followed by a brief summary of recommendations and the proposed Matrimonial Causes Act in the appendix. The hope is to thus bring the Swazi divorce system into compliance with the Constitution and international law and to protect the fundamental rights of Swazi women and children.

PART II: RIGHT TO DIVORCE

A. RESTRICTIONS ON THE AVAILABILITY OF DIVORCE UNDER THE CURRENT SYSTEM VIOLATE A WOMAN'S RIGHT TO A MARRIAGE OF HER CHOICE AND FREEDOM OF ASSOCIATION.

A woman's right to divorce stems from her right to a marriage of her choice and her right to freedom of association. Swaziland acknowledges these rights in its Constitution and through international conventions it has ratified. These rights are violated by the current system, which restricts the availability of divorce from civil marriages and does not recognize divorce from customary marriages.

Common-law grounds for divorce fail to protect women from abusive marriages. Under Roman-Dutch common-law governing civil marriage, the only grounds for divorce are fault-based: adultery and malicious desertion.²² Courts have interpreted malicious desertion to include constructive desertion, where the innocent spouse leaves the marriage as a result of egregious conduct by the other spouse.²³ However, the conduct must be "accompanied by a fixed and settled intention to end the marriage" in order to allow for divorce.²⁴ Thus, cruelty or neglect are insufficient grounds on their own, and women find it difficult to leave an abusive husband who nonetheless wishes to remain married.²⁵ Husbands can plea for a second chance only to go home and "start the violence – neglect cycle all over again."²⁶

Under customary law, formal divorce is unavailable. There is no recourse to courts, and the common understanding is that "[t]here is no divorce in Swaziland

22. ALICE K. ARMSTRONG & RONALD T. NHLAPO, *LAW AND THE OTHER SEX: THE LEGAL POSITION OF WOMEN IN SWAZILAND* 46 (1987) [hereinafter *LAW AND THE OTHER SEX*]; Ronald T. Nhlapo, *The Legal Situation of Women in Swaziland and Some Thoughts on Research*, in *THE LEGAL SITUATION OF WOMEN IN SOUTHERN AFRICA* 97, 116 (Julie Stewart & Alice Armstrong eds., 1990) [hereinafter *The Legal Situation of Women in Swaziland*].

23. *LAW AND THE OTHER SEX*, *supra* note 22, at 51 ("There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him.").

24. *Id.*

25. *Id.* (quoting Hahlo: "The conduct of a drunkard or habitual criminal may be such as to force any self-respecting woman to leave him, yet this may be the last thing he intends.").

26. *Id.* Proving adultery is likewise difficult. As one man explained, "[Y]ou must find those two people in bed. Sometimes that is impossible." Interview with Man, in Manzini, Swaz. (Mar. 7, 2006); *see also* Khosa v. Khosa, [1973] Swaz 148 (Aug. 24, 1973).

law and custom.”²⁷ Scholars indicate that there are informal ways to accomplish dissolution,²⁸ but caution that “Swazi culture sets great store by the ideal of permanence,” and the “rules are tilted towards discouraging divorce.”²⁹ Once a Swazi woman is married and smeared with red ochre, she must perform certain functions for her husband for the rest of her life, including customary mourning as his widow.³⁰ Moreover, a husband’s death does not end the wife’s obligations, as marriage is a contract between the families and death “simply ushers in a new phase in the relationship.”³¹

Unlike women, men are able to bypass this antiquated and convoluted system entirely by engaging in polygamy. Unhappy in marriage, men commonly take on a second wife and neglect the needs of the first family. As Professor Nhlapo explains:

Too often, the very act of marrying another wife signifies abandonment of the first. When ‘moving on to somebody else’ is used as a substitute for divorce in this way, the first wife and her household are bound to suffer the consequences of the resultant diversion of affections (and, more importantly, financial resources) to the new favourite.³²

The existing divorce system thus has a disparate impact on women. They are the ones tied to unfulfilling and harmful relationships. Women’s fundamental equality, espoused in both the Swazi Constitution³³ and international law,³⁴ demands divorce reform.

27. Interview with Xolile Mazibuko, SWAGAA Volunteer, in Manzini, Swaz. (Mar. 6, 2006); *see also* Interview with Lindiwe Ngcamphalala, Attorney, LKM Attorneys & Legal Consultants, in Ezulwini, Swaz. (Mar. 5, 2006) (“[It’s] sad. [There’s] no way to divorce out of Swazi custom.”).

28. *The Legal Situation of Women in Swaziland*, *supra* note 22, at 116-118.

29. RONALD T. NHLAPO, MARRIAGE AND DIVORCE IN SWAZI LAW AND CUSTOM 100 (1992) [hereinafter MARRIAGE AND DIVORCE]; *The Legal Situation of Women in Swaziland*, *supra* note 22, at 116 (“It has long been conceded. . . that divorce is extremely difficult to obtain among the Swazi.”).

30. *Id.* at 117.

31. MARRIAGE AND DIVORCE, *supra* note 29, at 75.

32. *The Legal Situation of Women in Swaziland*, *supra* note 22, at 11.

33. SWAZ. CONST § 14(3) (“A person of whatever gender . . . shall be entitled to the fundamental rights and freedoms of the individual . . .”), § 20(1) (“All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every respect and shall enjoy equal protection of the law.”), § 20(2) (“[A] person shall not be discriminated against on the grounds of gender.”), § 28(1) (“Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.”).

34. CEDAW, *supra* note 12, at art. 2(e), 15(1) (States must “take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise” and “shall accord to women equality with men before the law.”); ICCPR, *supra* note 13, at art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law . . . [T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex.”); African Charter, *supra* note 16, at arts. 3, 18(3) (“Every individual shall be equal before the law [and] [e]very individual shall be entitled to equal protection of the law.” “The State shall ensure the elimination of every discrimination against women.”); Women’s Protocol to the African Charter, art. 8 (“Women and men are equal before the law and shall have the right

Moreover, reform must apply to both civil and customary marriages, and custom cannot serve as an excuse to subjugate women. Custom is not above the law. As the Constitution sets out, “This Constitution is the supreme law of Swaziland,”³⁵ and “any custom . . . inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity” will not be recognized, applied, or enforced.³⁶ The Constitution further explicitly grants Parliament the power to regulate custom.³⁷ Likewise under international law, CEDAW requires states to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of . . . customary and all other practices that are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”³⁸ Swaziland must thus move to enact a divorce statute granting women in all marriages full equality.³⁹

1. A Woman Has a Right to the Marriage of Her Choice, as Guaranteed by Her Right to Consent and Right to Marry.

*“The contract of marriage is consensual; it is like any other contract. If one party is unsatisfied for any reason, they should be able to get out of the contract.”*⁴⁰

This sentiment is embodied by both the Swazi Constitution and UDHR, which identically provide: “Marriage shall be entered into only with the free and full consent of the intending spouses.”⁴¹ These provisions unequivocally require consent to marry, a basic principle echoed in CEDAW⁴² and the ICCPR.⁴³ Because marriage is an inherently consensual relationship, neither spouse should be trapped in the relationship unwillingly. Accordingly, if a woman is in a

to equal protection and benefit of the law.”); UDHR, *supra* note 20, at art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”).

35. SWAZ. CONST § 2(1).

36. SWAZ. CONST § 252(3); *see also* § 233(9) (“[A] chief enforces a custom, tradition, practice or usage which is just and *not discriminatory*.”) (emphasis added).

37. SWAZ. CONST § 252(4)(b).

38. CEDAW, *supra* note 12, at art. 5(a); *see also* African Women’s Protocol, art. 2(2) (“States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men . . . with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”); Human Rights Committee General Comment 28, para. 5 (admonishing states to “ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality.”).

39. A uniform law governs divorce in both civil and customary marriages in South Africa, Zimbabwe, and Tanzania. NAMIBIA PROPOSALS, *supra* note 4, at 111, 129; Law of Marriage Act, TANZ. LAWS [CAP 29 R.E. 2002].

40. Interview with Desmond Manda, Lawyer, Lawyers for Human Rights, in Manzini, Swaz. (Mar. 9, 2006).

41. SWAZ. CONST. § 27(2); UDHR, *supra* note 20, at art. 16(2).

42. “State parties shall ensure . . . the same right freely to choose a spouse and to enter into marriage only with their free and full consent.” CEDAW, *supra* note 12, at art. 16(b).

marriage she does not want and to which she no longer consents, she should be allowed a way out.

Further, the Constitution and international law explicitly establish the right to marry. Swaziland's Constitution specifies: "Men and women of marriageable age have a right to marry and found a family."⁴⁴ This closely parallels the ICCPR, which recognizes the "right of men and women of marriageable age to marry and to found a family."⁴⁵ As the Human Rights Committee explained, remarriage constitutes an "aspect of the right to marry."⁴⁶ Thus, when an initial relationship fails, a woman has the right to seek happiness, family, and fulfillment through remarriage. Furthermore, the right to marry, together with the requirement of consent support a woman's right to a marriage of her choice. Divorce reform is necessary to protect this right.

2. A Woman's Right to Freedom of Association is Violated When She is Forced to Stay in a Loveless and Unwanted Marriage.

Additionally, a woman must be able to exit an unhappy or otherwise undesirable marriage to avoid a violation of her freedom of association. The Constitution of Swaziland provides for "freedom of . . . association."⁴⁷ Freedom of association is also a right recognized by international instruments. The ICCPR states: "Everyone shall have the right to freedom of association with others . . . No restrictions may be placed on the exercise of this right."⁴⁸ The African Charter likewise protects this right, explicitly prohibiting compelled association.⁴⁹ Forcing individuals to remain in loveless and unwanted marriages directly violates this prohibition.

Swazi citizens expressed this view. They do not see marriage as a compelled relationship, but rather as one based on love. As one interviewee explained, a couple should divorce "if they are out of love."⁵⁰ An attorney likewise asserted, "If . . . I can't stand this man, I don't want to be married to him anymore, I don't love him anymore, I should have a way out without having to prove adultery or

43. "No marriage shall be entered into without the free and full consent of the intending spouses." ICCPR, *supra* note 13, at art. 23(3); *see also* Women's Protocol to the African Charter, art. 6(a) ("[N]o marriage shall take place without the free and full consent of both parties.").

44. SWAZ. CONST. § 27(1).

45. ICCPR, *supra* note 13, at art. 23(2); *see also* CEDAW, *supra* note 12, at art. 16(1)(a) ("States Parties . . . in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage."); UDHR, *supra* note 20, at art. 16(1) ("Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.").

46. Human Rights Committee General Comment 28, para. 24.

47. SWAZ. CONST. § 14(1)(b), 25(2) ("[A] person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of . . . association.").

48. ICCPR, *supra* note 13, at art. 22(1-2).

49. "Every individual shall have the right to free association . . . no one may be compelled." African Charter, *supra* note 16, at art. 10.

50. Interview with Male Student, Nazarene High School, in Manzini, Swaz. (Mar. 7, 2006).

desertion.”⁵¹ Not allowing a woman such a divorce option violates her freedom of association.

This violation is especially apparent in cases where a marriage partner becomes incurably insane or falls into a prolonged state of unconsciousness. The current system makes no provision for these situations, forcing the couple to remain together. Tied to an empty relationship, the healthy spouse sacrifices her own life and takes on significant emotional and financial burdens, which may be detrimental to the family. This extreme case only highlights the absurdity of the current system. To protect Swazis’ freedom of association, legislation must provide a way out of harmful and unwanted relationships.

B. REQUIRING WOMEN TO REMAIN IN ABUSIVE, ADULTEROUS, OR POLYGAMOUS MARRIAGES VIOLATES THEIR PHYSICAL INTEGRITY, INCLUDING THEIR RIGHTS TO LIFE, HEALTH, AND FREEDOM FROM TORTURE.

Divorce is a necessary remedy for Swazi women who, under the current system, must remain married to abusive or unfaithful husbands against their will. Individuals have a right to physical integrity, which includes their rights to life, health, and freedom from torture. The right to life is delineated in the Constitution,⁵² and the ICCPR provides, “Every human being has the inherent right to life.”⁵³ The right to life is closely tied to the more general right “to enjoy the best attainable state of physical and mental health,” as recognized in both the African Charter and ICESCR.⁵⁴ This right to health is basic and the prerequisite to the enjoyment of other human rights. As the Committee on Economic, Social, and Cultural Rights explained: “Health is a fundamental human right indispensable for the exercise of other human rights.”⁵⁵

The rights to life and to health further necessitate freedom from torture, widely recognized by both international law and the Swazi Constitution. The Women’s Protocol to the African Charter explicitly sets out this link: “Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman, or degrading . . . treatment shall be prohibited.”⁵⁶ The ICCPR similarly requires, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment.”⁵⁷ The Swazi Constitution

51. Interview with Mary Pais da Silva, Attorney, in Manzini, Swaz. (Mar. 6, 2006).

52. SWAZ. CONST. § 15(1). “A person shall not be deprived of life intentionally . . .”

53. ICCPR, *supra* note 13, at art. 6(1).

54. African Charter, *supra* note 16, at art. 16(1); ICESCR, *supra* note 14, at art. 12(1) (“States parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”); Women’s Protocol to the African Charter, art. 14(a) (“States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted.”).

55. CESCR General Comment 14, The right to the highest attainable standard of health, para. 23.

56. Women’s Protocol to the African Charter, art. 4(1).

57. ICCPR, *supra* note 13, at art. 7; African Charter, *supra* note 16, at art. 5 (“Every individual shall have the right to the respect of the dignity inherent in a human being All forms of exploitation and degradation of man particularly . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”).

mirrors this language: “A person shall not be subjected to torture or inhuman or degrading treatment.”⁵⁸ Further, under the CRC, children have a special right to be protected from abuse: “States Parties shall . . . protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.”⁵⁹ Swaziland’s Constitution explicitly calls for the enactment of laws to ensure “children receive special protection against exposure to physical and moral hazards within and outside the family.”⁶⁰

Thus, through both its Constitution and espousal of international law, Swaziland has shown its commitment to protecting women and children’s physical integrity by ensuring their rights to life, health, and freedom from torture. Physical integrity is violated when a woman is forced to remain in a marriage in which: (1) her husband subjects her or her children to domestic violence, (2) impoverishes her and her children through economic abuse, or (3) commits adultery or engages in polygamy.

1. Forcing Women to Remain in Violent and Abusive Marriages Undermines Their Physical Integrity.

*“Domestic violence is a problem, whereby women are being killed. Men are killing their wives.”*⁶¹

Domestic violence is a daily reality for many women and children in Swaziland, and one from which they currently have no escape. As journalist Nkosingiphile Mbhamali described, “Almost every day, there is a report of a husband killing or seriously injuring his wife.”⁶² Headlines such as “Another Man Stabs Wife”⁶³ and similar horror stories fill the Swazi newspapers daily. Swazi law must enable women to escape this violence before they become a headline.

The existing system traps women in violent marriages. As discussed above, divorce is not an option for customary marriages, and domestic violence does not fit easily into the two common-law grounds of adultery and desertion. Moreover, a woman must first get an order for restitution of conjugal rights.⁶⁴ Consequently, the divorce may be thwarted by her husband’s desire to resume marital relations no matter how severe the abuse. Not only do orders for the restitution of conjugal rights not save marriages, but they endanger the lives of domestic violence victims by ordering them back under the same roof and into the same bed as their

58. SWAZ. CONST. § 18(2).

59. CRC, *supra* note 15, at art. 19.

60. SWAZ. CONST. § 29(7)(d).

61. Interview with Female Member of Parliament, in Lobamba, Swaz. (Mar. 9, 2006).

62. Interview with Nkosingiphile Mbhamali, Journalist, in Manzini, Swaz. (Mar. 8, 2006).

63. Sihle Mzleni, *Another Man Stabs Wife*, TIMES OF SWAZ., Feb. 1, 2006, available at <http://www.times.co.sz/002.html#article1>.

64. High Court Rules, 1954, §44 (Swaz.).

tormentor.⁶⁵ The remedy under current law is thus further abuse. It is time for Swaziland to provide its women with a real remedy, protective of their integrity and dignity.

The severity of this deficiency became immediately apparent during interviews. Swazis shared accounts of horrific domestic violence with no relief available. One victim described how her husband had ripped her hair out, raped her, broke her collar bone and arm, punched and bruised her so badly she could not leave the house, and tried to gouge out her eye in front of her friends.⁶⁶ A young man described how as a teenager he had watched his father abuse his stepmother: "My father punched my stepmother in the face three times. She fell into a wall and cut her face He kicked her in the head after she fell I took her to the hospital She now has a metal plate in her head She was in the hospital for 3 months She is still married to him."⁶⁷

A woman's right to physical integrity is violated by sexual abuse, as well as physical abuse. Swaziland is obligated under CEDAW "to protect women against violence of any kind occurring within the family."⁶⁸ Sexual abuse can include marital rape, forcing the victim to undress or perform sexual acts, and other sexual actions without the victim's consent.⁶⁹ This sexual abuse violates a wife's physical integrity by brutalizing her physically, damaging her emotionally, and potentially exposing her to HIV. The CEDAW Committee has recognized marital rape as placing women and girls at particular risk for HIV infection.⁷⁰ Similarly, the World Health Organization described: "Forced or coercive sexual intercourse with an HIV infected partner is one of the routes of transmission for HIV . . . to women Risk of transmission is also increased with the degree of trauma, vaginal lacerations, and abrasions that occur when force is used."⁷¹ However, current Swazi law sanctions marital rape and sexual abuse, inducing the common conception that a wife's consent to marital relations is a given. As one man

65. As Namibia's Legal Assistance Centre explained, "[W]hen a party has gone so far as to approach a court to request a divorce, there is little hope of saving the marriage." NAMIBIA PROPOSALS, *supra* note 4, at 169. Not only is dragging out divorce proceedings potentially dangerous for domestic violence victims, but it "may simply add more trauma for minor children and prevent all parties concerned from getting on with their lives." *Id.* at 170.

66. Interview with Xolile, Domestic Violence Victim, in Manzini, Swaz. (Mar. 8, 2006).

67. Interview with Cyril Magongo, Young Man, in Rural Area, Swaz. (Mar. 10, 2006).

68. CEDAW General Recommendation 12, preamble; *see also* CEDAW General Recommendation 19, para. 23 ("Family violence is one of the most insidious forms of violence against women [W]omen . . . are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes.").

69. Swaziland Action Group Against Abuse, Forms of Abuse, <http://www.swagaa.org.sz/FormsAbuse.htm> (last visited May 15, 2006).

70. CEDAW General Recommendation 24, para. 18.

71. *Violence Against Women and HIV/AIDS: Critical Intersections: Intimate Partner Violence and HIV/AIDS*, INFORMATION BULLETIN SERIES No. 1, at 2, available at <http://www.who.int/gender/violence/en/vawinformationbrief.pdf>.

asserted, "She consented the day I married her."⁷² To remedy these violations of women's physical integrity, Swaziland must allow women to divorce on the basis of both physical and sexual abuse by their husbands.

2. Trapping Women in Economically Abusive or Neglectful Marriages Violates Their Physical Integrity and That of Their Children.

Additionally, current inability to divorce violates the physical integrity of women and children forced to remain victims of economic neglect or abuse. Husbands may neglect their families, leaving them with inadequate housing, food, and medical care. As the CEDAW Committee explained, "The abrogation of their family responsibilities by men can be a form of violence, and coercion."⁷³ Although this may qualify as constructive desertion, this standard does not provide courts with clear guidance and is difficult to satisfy. Such neglect is especially common in polygamous marriages, where the husband is often unwilling or unable to support all of his wives and children. As one wife explained:

It is very difficult to be in a polygamous marriage because the husband cannot provide for everyone. To make an example of myself, I have a house with no electricity. I have been trying to get electricity for a year. My husband has to take care of all the other wives. I never get to see him because he is with other wives.⁷⁴

Economic abuse also includes taking a wife's money or forcing her to hand over her wages, preventing her from having a job, employing her without paying her a salary, gambling away joint funds, and other financial manipulations.⁷⁵ Such abuse is all too common in Swaziland today. SWAGAA estimates that from April of 2004 to February of 2005, it counseled almost 50% more women for economic abuse than physical abuse.⁷⁶ Women and children's physical integrity must be protected by allowing women a release from a marriage of forced poverty and economic abuse.

72. Interview with Josefa Bembe, Superintendent, Manzini Regional Royal Swazi Police, in Manzini, Swaz. (Mar. 6, 2006).

73. CEDAW General Recommendation 19, para. 23.

74. Interview with Woman, in Ngwenyameni, Swaz. (Mar. 8, 2006).

75. Swaziland Action Group Against Abuse, Forms of Abuse, <http://www.swagaa.org.sz/FormsAbuse.htm>.

76. Swaziland Action Group Against Abuse, Counseling, <http://www.swagaa.org.sz/Counsel.htm>.

3. Tying Women to Adulterous or Polygamous Marriages in Which They May be Neglected or Exposed to HIV Violates Their Right to Physical Integrity.

“The kingdom of Swaziland is increasingly a kingdom of death.”⁷⁷

This is how a journalist described Swaziland’s HIV infection rate, which, at 42.6% and climbing, is the highest in the world.⁷⁸ To protect her physical integrity, a woman should be entitled to divorce from a marriage in which her husband is adulterous or takes another wife, thus putting her at risk for HIV infection. Infidelity and polygamy threaten women’s physical integrity when married men have sexual intercourse without condoms both in and out of the marital home. Thus, faithfulness by married women is not enough protection from contracting HIV, and in fact, married women are oftentimes at greatest risk of infection.⁷⁹ Studies in Uganda and Kenya have shown higher HIV infection rates among married women than unmarried women and even prostitutes.⁸⁰ Under the Women’s Protocol to the African Charter, a woman has the “right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS.”⁸¹ Providing women with this protection entails enabling them to leave adulterous and polygamous marriages which endanger their health.

Adultery and polygamy should be considered in the context of Swaziland’s staggering HIV infection rate. In 2003, 200,000 adults in Swaziland were living with HIV/AIDS, 110,000 of those adults were women and 16,000 were children, while 65,000 children became orphans due to their parents dying of AIDS.⁸² Currently, the HIV infection rate among pregnant women between the ages of 25-29 is an astounding 56%.⁸³ In light of these statistics, Swaziland must take a closer look at laws that prevent women from taking protective action.

77. Oakland Ross, *Life in a Kingdom of Death; If an abused young orphan can survive all he has endured, and still be willing to start over again from scratch, you must believe that Africa can do the same.* TORONTO STAR, June 26, 2005.

78. *AIDS Scourge in Africa Shows Urgent Need for New Women’s Agency: UN Envoy*, U.N. NEWS SERVICE, Mar. 17, 2006, available at <http://www.un.org/apps/news/story.asp?NewsID=17847&Cr=hiv&Cr1=aids>.

79. The Global Coalition on Women and Aids, *The Female Aids Epidemic: 2005*, available at <http://womenandaids.unaids.org/womenandaidsnovfin.doc> (“Among young women surveyed in Harare (Zimbabwe), Durban and Soweto (South Africa), 66% reported having one lifetime partner, 79% had abstained from sex at least until the age of 17 (roughly the average age of first sexual encounter in most countries in the world). Yet, 40% of the young women were HIV-positive. (Many had been infected despite staying faithful to one partner.”)).

80. Stella Talisuna, *Marriage – A Major Source of HIV Infection*, THE MONITOR (Kampala), Jan. 6, 2006; Bernard Muthaka, *Marriage Biggest Source of HIV for Women*, THE NATION (Nairobi), Nov. 17, 2005.

81. Women’s Protocol to the African Charter, art. 14(d).

82. Joint United Nations Programme on HIV/AIDS, *Report on the Global HIV/AIDS Epidemic*, July 2004, quoted by Avert.org, *AIDS and HIV statistics for Sub-Saharan Africa*, available at <http://www.avert.org/subaadults.htm>.

83. *AIDS Scourge in Africa Shows Urgent Need for New Women’s Agency: UN Envoy*, U.N. NEWS SERVICE, Mar. 17, 2006, available at <http://www.un.org/apps/news/story.asp?NewsID=17847&Cr=hiv&Cr1=aids>.

The impact of these laws is especially devastating in combination with women's biological susceptibility to contracting HIV/ AIDS. According to the World Health Organization, "Women are physically more susceptible to HIV infection than men."⁸⁴ In fact, "African women are considerably more likely - at least 1.2 times - to be infected with HIV than men due to greater efficiency of male-to-female HIV transmission through sex."⁸⁵ Laws subordinating women heighten the effect of this physiological reality. The CEDAW Committee thus emphasized the need to "give special attention to the rights and needs of women and children and to the factors relating to the reproductive role of women and their subordinate position in some societies which make them especially vulnerable to HIV infection."⁸⁶ Only by empowering women can Swaziland prevent further violations of women's physical integrity and deterioration of their health.

Enabling women to exit adulterous and polygamous marriages that threaten their health is in line with the beliefs of Swazi citizens. Swazis recognize the culpability of exposing an unwitting spouse to HIV. As one man succinctly put it: "You are assassinating that lady, because you go out and get this HIV, and kill her."⁸⁷ Another man likened knowing transmission of HIV to shooting with an AK-47. He explained:

If I know that I am HIV positive and go to my wife knowing quite well and I engage myself and not protecting her and myself, it is as good as killing her, isn't it? . . . If I take an AK-47 and put it on your breast and pull the trigger, what happens? . . . So to me HIV is even worse than an AK-47, especially if I do it knowingly.⁸⁸

Women should thus be allowed a way out of these relationships.

Polygamy not only increases the risk of exposure to HIV, but it harms families and violates women's fundamental equality and dignity. Interviewees pointed to both increased exposure to HIV and to an inadequate standard of living as harms of polygamy and almost unanimously regarded polygamy as detrimental to women and families.⁸⁹ International law is clear on this point. The CEDAW

84. World Health Organization, *Women and AIDS: Have You Heard Us Today?*, Dec. 1, 2004, available at <http://www.who.int/features/2004/aids/en/>.

85. Avert.org, *Worldwide HIV & AIDS Epidemic Statistics*, available at <http://www.avert.org/worldstatinfo.htm>.

86. CEDAW General Recommendation 15, para. b.

87. Interview with Lucky Maseko, Taxi Driver, in Ezulwini, Swaz. (Mar. 6, 2006).

88. Interview with Louskin Fanyana Mabundza, Headteacher, Manzini Nazarene High School, in Manzini, Swaz. (Mar. 7, 2006).

89. E.g., Interview with Phindile Weatherson, Bank Personnel, in Ezulwini, Swaz. (Mar. 7, 2006) (Polygamy "serves no purpose except serving a man's libido Currently there is no room for it because of the economy and HIV With the new economy, a man can't support multiple wives People in polygamous relationships tend to be very poor. The most vulnerable children come from polygamous relationships.").

Committee explicitly recognized that “[p]olygamous marriage contravenes a woman’s right to equality with men, and can have . . . serious emotional and financial consequences for her and her dependants.”⁹⁰ According to the Human Rights Committee, “[E]quality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women.”⁹¹ Accordingly, for Swaziland to meet its obligations under the constitution and international law, it must respect women’s equality, dignity, and physical integrity by no longer trapping them in these relationships.

C. ENABLING DIVORCE WOULD RESPECT A WOMAN’S RIGHT TO HAVE HER CAUSE HEARD AND PROVIDE JUDICIAL RELIEF FOR RIGHTS VIOLATIONS.

Women are entitled to court access and legal relief for violations of their rights to a marriage of their choice, freedom of association, and physical integrity. The ICCPR mandates that “any person whose rights or freedoms . . . are violated shall have an effective remedy.”⁹² Furthermore, courts have a particular role to play in vindicating rights. As set out in the African Charter, “Every individual shall have the right to have his cause heard. This comprises . . . the right to appeal to competent national organs against acts of violating his fundamental rights.”⁹³ Swaziland’s Constitution likewise provides: “The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by . . . the Judiciary . . . and shall be enforceable by the courts.”⁹⁴ Court access is crucial in the context of divorce, as South Africa’s Constitutional Court has recognized. In *Cary v. Cary*, Court held that a husband can be required to pay the expenses incurred by his wife in a divorce proceeding against him, if he has the means and she does not.⁹⁵ As the Court explained, “the paramount consideration [is] that she should be enabled adequately to place her case before the Court.”⁹⁶ Swaziland must thus enact a divorce statute, enabling women to present their grievances before a court and receive judicial protection for their fundamental rights.

90. CEDAW General Recommendation 21, para. 14.

91. Human Rights Committee General Comment 28, para. 24.

92. ICCPR, *supra* note 13, at art. 2(3)(a).

93. African Charter, art. 7(1). The ICCPR further encourage states “to develop the possibilities of judicial remedy.” ICCPR, *supra* note 13, art. 2(3)(b); *see also* Human Rights Committee General Comment 31, para. 15 (“The Committee attaches importance to States Parties’ establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of rights recognized by the Covenant can be effectively assured by the judiciary in many different ways . . .”).

94. SWAZ. CONST. § 14(2).

95. *Cary v. Cary*, 1998 (8) BCLR 877 (CC), SACLR LEXIS 83 (S. Afr.).

96. *Id.* at 15.

D. A DIVORCE STATUTE WITH THE FOLLOWING STATUTORY GROUNDS IS
NECESSARY TO PROTECT WOMEN'S FUNDAMENTAL RIGHTS.

Violations of women's fundamental rights under the current system are numerous, but can be remedied through the passage of a protective divorce statute. A Senior Parliamentary Counsel at the Office of the Attorney General emphasized the need for a clear divorce statute: "We need to have clear grounds for divorce. I don't think it's a women's issue . . . it cuts both ways . . . [but] it hits harder on women, because normally they are the underdogs in the marriage."⁹⁷ To effectively meet the needs of Swazi citizens, a divorce statute should both provide for no-fault divorce and enumerate specific instances upon which spouses can obtain relief. Moreover, by enacting such a statute, Swaziland would be bringing its law in line with the new Constitution, as well as meeting its obligations under international treaties. Swaziland can thus provide for the health and welfare of its people, taking a position of leadership in the region.

A statute setting out the following grounds for divorce is recommended:⁹⁸

- 1) Irreconcilable Differences between the Spouses or Irretrievable Breakdown of the Marriage;
- 2) Incurable Insanity or Continued Unconsciousness;
- 3) Abuse of the Spouse or Children;
- 4) Unbearable Living Conditions;
- 5) Adultery; and
- 6) Polygamy.

This list represents a combined fault/no-fault system similar to that of Denmark.⁹⁹ It adapts and expands on existing common-law grounds, while providing parties with a less contentious no-fault option. This reflects the views of Swazi citizens, who want a divorce regime responsive to specific violations, such as adultery and abuse, while also allowing parties to end the marriage "when the love is gone."¹⁰⁰ This system has the advantage of both general no-fault grounds for divorce, eliminating the requirement of guilt by one of the spouses when the relationship is no longer viable, while explicitly legislating certain

97. Interview with Thabisile Langa, Senior Parliamentary Counsel, Office of Attorney General, in Ezulwini, Swaz. (Mar. 5, 2006).

98. Under the Proposed Matrimonial Causes Act, dissolution of marriage shall occur automatically upon the death of a spouse, in addition to dissolution by divorce. This mirrors South Africa's Dissolution of Marriage on Presumption of Death Act 23 of 1979 § 1 (S. Afr.) and Tanzania's Law of Marriage Act, § 12, TANZ. LAWS [CAP 29 R.E. 2002].

99. Act on the Contractation and Dissolution of Marriage, Act No. 256 of 4 June 1969 (Den.), available at <http://www2.law.uu.nl/priv/cefl/Reports/pdf/DenmarkApp02.pdf>.

100. Interview with Female Senator, in Ezulwini, Swaz. (Mar. 7, 2006).

automatic grounds, not contingent on further judicial discretion, to protect against infringements of fundamental rights.

1. The Option of No-Fault Divorce Protects Individual Rights, Allows for Honesty and Cooperation, and Can Prevent Violence and Abuse Before They Begin.

“There is no point in trying to preserve a marriage in law if it has become a dead husk in reality.”¹⁰¹

Not only is it pointless to preserve a dead marriage, but doing so can also have harmful consequences for the parties involved. Thus, the first two proposed grounds provide for no-fault divorce. They cover situations of irreconcilable differences between the spouses or irretrievable breakdown of the marriage, and incurable insanity or continued unconsciousness by one spouse. These parallel no-fault grounds found in South Africa,¹⁰² the United States (every state except New York),¹⁰³ Denmark,¹⁰⁴ and many other countries around the world.¹⁰⁵ They are also favored by Swazi citizens. High Court Judge Stanley Mamaphalele, for instance, declared that it was high time for Swaziland to enact an updated divorce statute recognizing “irretrievable breakdown” of marriage.¹⁰⁶ As discussed above, adopting these two grounds would further protect Swazi citizens’ right to a consensual marriage and to freedom of association.¹⁰⁷

No-fault divorce would also allow for proceedings that are more honest and cooperative. As Namibia’s Legal Assistance Centre explained, “Marriages are

101. NAMIBIA PROPOSALS, *supra* note 4, at 167. Namibia’s Legal Assistance Centre further pointed out, “Even if only one of the parties wants the divorce, the law cannot revive the relationship simply by making divorce difficult to obtain. To keep parties tied to each other when their marriage is broken might actually encourage immorality.” *Id.*

102. Divorce Act 60 of 1979 (S. Afr.).

103. Legal Affairs Debate Club, *Finding Fault in No-Fault Divorce?*, March 20, 2006, available at http://www.legalaffairs.org/webexclusive/debateclub_no-fault-divorce0306.msp.

104. Act on the Contraction and Dissolution of Marriage, Act No. 256 of 4 June 1969 (Den.), available at <http://www2.law.uu.nl/priv/cefi/Reports/pdf/DenmarkApp02.pdf>.

105. Namibia’s Legal Assistance Centre likewise recommended adoption of these two grounds: (1) irretrievable breakdown and (2) mental illness or continued unconsciousness. NAMIBIA PROPOSALS, *supra* note 4, at 169. In its research it found, “Virtually all the members of the legal profession who were consulted were in favour of law reform” in the “direction” of no-fault divorce. *Id.* at 168.

106. Interview with Stanley Mamaphalele, High Court Judge, in Ezulwini, Swaz. (Mar. 9, 2006).

107. Besides allowing for no-fault divorce, the Proposed Matrimonial Causes Act also recommends providing parties with an option to legally separate for an interim period before seeking divorce. This would provide parties with an opportunity for reflection and perhaps reconciliation. Legal separation would terminate the personal effects of the marriage, such as cohabitation, while continuing the legal effects of the marriage, such as property ownership and financial support. A spouse can petition for legal separation on the basis of any of the divorce grounds or if simply finding it intolerable to continue cohabiting with the other spouse. Divorce should be granted at the application of both spouses if they have been legally separated for at least six months or at the application of one spouse if one year or more has elapsed. Divorce subsequent to separation should be automatic and no further showing of fault required.

complex relationships and the distinction between ‘guilt’ and ‘innocence’ is unrealistically simplistic. In reality, both spouses may be at fault, or they may simply be incompatible without fault on either side.”¹⁰⁸ No longer needing to allocate blame and to designate a culprit and victim would allow the process to be less antagonistic and to better serve the needs of the parties and any children involved.¹⁰⁹ It would also eliminate collusion between spouses, who manufacture a fault-based ground in order to get a divorce, thus circumventing the law.¹¹⁰

Additionally, providing for no-fault divorce could prevent later physical integrity violations. Interviewees emphasized that unhappy marriages often result in violence and abuse, adulterous affairs, or the husband taking on an additional wife. As one man advocated, “if you don’t love that person anymore,” it would be better to go because otherwise “they end up killing each other.”¹¹¹ The Director of Intervention for Children explained, “The frustration of having to stay in a marriage results in violence.”¹¹² Such violence can be prevented by enabling women a way out of unhappy marriages before they turn abusive.

2. To Remedy Specific Rights Violations, Enumerated Statutory Grounds for Divorce Must Be Provided.

*“Go before the coffin comes”—a Swazi expression recognizing the need for divorce to protect the parties’ well-being.*¹¹³

108. NAMIBIA PROPOSALS, *supra* note 4, at 167; *see also id.* at 112 (“[F]ault-based divorce law unrealistically assumes that only one spouse is to blame for the marriage breakdown, when the reality is that in most cases both are to blame.”), at 168 (“[E]ven where one or more of the traditional fault-based grounds is present, both parties may still have contributed to what went wrong. A court is not well-placed to apportion blame in an intimate relationship.”).

109. *Id.* at 112 (“[R]equiring one spouse to prove the guilt of the other often increases the bitterness between them, and requires the disclosure of intimate details of the marriage that can be humiliating to the spouses and harmful to their children Furthermore, the guilt principle conflicts with the idea of reconciliation.”); *see also id.* at 168 (“A move from fault-based grounds is likely to reduce the bitterness of divorce proceedings, which will be a particularly positive development whether there are children.”).

110. NAMIBIA PROPOSALS, *supra* note 4, at 112 (explaining that the fault requirement “results . . . in the spouses’ colluding to fabricate evidence on which a divorce action can be based.”); *see also id.* at 167 (characterizing the fault-based system as “a legal fiction.”), at 168 (criticizing fault-based divorce for encouraging collusion); *e.g.*, Muller 1973 (4) SA 117 (R), *cited in* H. R. HAHLO, *THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE* 364 (4th ed. 1975).

111. Interview with Man, in Manzini, Swaz. (Mar. 7, 2006); *see also* Interview with Married Woman, in Ezulwini, Swaz. (Mar. 7, 2006) (A woman likewise spoke of the need for divorce to prevent people who “don’t want to be married anymore . . . from killing each other.”); Interview with Lucky Maseko, Married Man / Taxi Driver, in Manzini, Swaz. (Mar. 6, 2006) (indicating that divorce is necessary when the situation is bad so that spouses do not “end up killing each other”); Interview with Married Woman, in Ngwenyameni, Swaz. (Mar. 8, 2006) (“Divorce in the traditional system is needed because people end up killing each other or commit[ing] suicide.”). There is even a Swazi expression recognizing the need for divorce to protect the parties’ well-being: “Go before the coffin comes.” Interview with Prosperity Success, Pastor, Christ Embassy, in Manzini, Swaz. (Mar. 7, 2006). Interview with Khosi Mabuza, Director of Intervention for Children, Organization To Raise a Child, in Manzini, Swaz. (Mar. 9, 2006).

112. *Id.*

113. Interview with Prosperity Success, Pastor, Christ Embassy, in Manzini, Swaz. (Mar. 7, 2006).

The remaining proposed grounds are fault-based, similar to current common-law grounds for divorce. Enabling spouses to divorce in cases of abuse, unbearable living conditions, adultery, and polygamy would protect the physical integrity of spouses and the well-being of families. Enumerating these statutory grounds and specifying evidence required would also provide clarity and predictability in the divorce system. The proposed grounds are, moreover, in line with the views of Swazi citizens. Nearly all Swazis interviewed suggested physical abuse or domestic violence as a primary ground.¹¹⁴ Many also expressed an interest in allowing a woman to divorce her husband if he takes another wife without her consent.¹¹⁵

Passage of a divorce statute that provides for no-fault divorce and clearly delineates the above grounds will remedy violations of women's rights under the current system. Swaziland would thus meet constitutional standards, as well as its obligations under the international instruments to which it is a party. Further, for divorce to be a meaningful option for women, it must protect custody rights and not impoverish women and families through inadequate maintenance and property division. Parts III, IV, and V of this report focus on these closely connected issues, describing current shortcomings and potential legislative solutions.

PART III: CUSTODY

Custody determinations in Swaziland suffer from a lack of systemization. Thus, upon divorce, the needs of children are often overlooked. This uncertainty also directly harms children, enabling their use as bargaining chips by parents during divorce proceedings. Swaziland must enact a divorce statute, which effectively provides for the care of children and for their continuing relationship with their parents.

Currently, no statute governs custody determinations in Swaziland. Under customary law, children are assumed to belong to the father and his family, and under civil law, courts have come to adopt a best interests standard. However, with no legislative guidance, judges generally fall back on stereotypes—awarding physical custody to the mother and legal custody to the father. The child's voice is missing from the process, and joint custody is not an option for families. It is time for legislation to rectify these failings and meaningfully protect children's best interests.

114. *E.g.*, Interview with Michael Bhekithemba Dlamini, Attorney, in Manzini, Swaz. (Mar. 6, 2006); Interview with Lucky Maseko, Married Man / Taxi Driver, in Manzini, Swaz. (Mar. 6, 2006); Interview with Anonymous Citizen, in Manzini, Swaz. (Mar. 7, 2006).

115. *E.g.*, Interview with Teacher, Nazarene High School, in Manzini, Swaz. (Mar. 7, 2006). Moreover, bigamy is recognized as a ground for divorce in other countries. *E.g.*, Act on the Contracting and Dissolution of Marriage, Act No. 256 of 4 June 1969 (Den.), available at <http://www2.law.uu.nl/priv/cefl/Reports/pdf/DenmarkApp02.pdf>.

A. CUSTOMARY LAW VIOLATES WOMEN'S RIGHT TO EQUALITY IN PARENTING BY AUTOMATICALLY GRANTING CUSTODY TO THE FATHER AND HIS FAMILY.

*"Under Swazi Law and Custom, the children belong to the husband's family."*¹¹⁶

By automatically granting custody to the husband and the husband's family, customary law violates women's equal right to provide parental care. Upon marriage, a man pays lobola to the wife's family, thus acquiring her productive and reproductive capacities.¹¹⁷ As a result, under customary law, all legal rights over children vest in the father,¹¹⁸ and "[c]hildren are born for men."¹¹⁹ The parents may separate, but the father's custody remains unquestioned.¹²⁰

This is a violation of women's equal right to provide parental care. CEDAW requires states to "ensure, on a basis of equality of men and women . . . [t]he same rights and responsibilities as parents . . . in matters relating to their children."¹²¹ This is the case "irrespective of marital status" and whether parents are separated.¹²² According to the Human Rights Committee, "States must ensure equality in regard to the dissolution of marriage."¹²³ "[D]ecisions with regard to

116. Interview with Khosi Mabuza, *supra* note 112.

117. ZAKHE HLANZE & LOLO MKHABELA, *BEYOND INEQUALITIES: WOMEN IN SWAZILAND* 34-35 (1998) [hereinafter *BEYOND INEQUALITIES*]; *see also* MARRIAGE AND DIVORCE, *supra* note 29, at 48 ("[C]attle transferred to the woman's family compensate them for the loss of their daughter and her reproductive capacities.").

118. *LAW AND THE OTHER SEX*, *supra* note 22, at 59. In fact, lobola's role in ensuring the children of the marriage belong to the father and his family is "[s]o central" that it has been referred to as "child-price." MARRIAGE AND DIVORCE, *supra* note 29, at 48.

119. *BEYOND INEQUALITIES*, *supra* note 117, at 35. The perception of fathers as having complete legal control over families is not unique to Swaziland, but rather was the prevailing view in the eighteenth century. Erik D. Sorensen & Jacquelin Goldman, *Custody Determinations and Child Development: A Review of Current Literature*, 13 J. DIVORCE & REMARRIAGE 53 (Jun. 4 1990). "Children were considered to be the father's property in much the same way as material goods." *Id.* Only in the nineteenth century were children awarded individual rights, and with the impact of the Industrial Revolution, "a mother's role in the family, separate from that of serving her husband, began to be seen as important." *Id.*; *see also* Nancy Polikoff, *Legal Issues Confronting Feminists: The Divorce Revolution & Mothers on Trial*, 26 OFF OUR BACKS 16 (May 31, 1986) ("Historically, children were the property of their fathers. Until well into last century, mothers had no rights to custody of their children at all."). It is time for Swaziland to likewise move into the modern era and recognize the rights of all family members.

120. A mother does not even retain custody over children born out of wedlock. Rather, her father—their maternal grandfather—holds all legal rights over them. *LAW AND THE OTHER SEX*, *supra* note 22, at 59. Moreover, the children's father can "buy" them from the grandfather at any time by paying a standard fine, and the grandfather has no right to refuse the transfer. *Id.*; *BEYOND INEQUALITIES*, *supra* note 117, at 25.

121. CEDAW, *supra* note 12, at art. 16(1).

122. *Id.* at art. 16(1)(d). The CEDAW Committee highlighted the importance of equal rights and responsibilities even outside marriage: "The shared rights and responsibilities enunciated in the Convention should be enforced at law and as appropriate through legal concepts of guardianship, wardship, trusteeship and adoption. States parties should ensure that by their laws both parents, regardless of their marital status and whether they live with their children or not, share equal rights and responsibilities for their children." CEDAW General Recommendation 21, para. 20.

123. Human Rights Committee General Comment 28, para. 29.

... the custody of children" "should be the same for men and women."¹²⁴ The customary allocation of custody thus tramples over the rights of mothers.

B. LACKING LEGISLATIVE GUIDANCE, COURTS FAIL TO ADEQUATELY PROTECT THE BEST INTERESTS OF CHILDREN.

*"Arrangements [made on behalf of the child], must accord with 'the overriding principle which runs like a golden thread through the fabric of our whole law relating to children, namely, that the interests of the children are paramount.'"*¹²⁵

Under civil law, Swazi courts on their own have moved to adopt a best interests standard when making custody determinations.¹²⁶ This reflects a shift from a fault-based system, penalizing the guilty party in divorce proceedings through a denial of custody, to more of a focus on the child's well-being.¹²⁷ Although a commendable development, children's interests do not receive adequate protection in practice. Lacking legislative guidance, courts often fail to engage in a systematic analysis of children's best interests and instead fall back on stereotypes.

Judicial adoption of the best interests standard in custody proceedings is in line with both international law and worldwide trends. International instruments not only provide for the best interests standard in legal determinations involving children, but further specifically direct decision-makers to employ this standard in the context of child custody proceedings. Thus, the CRC, for instance, mandates, "In all actions concerning children . . . the best interests of the child shall be a primary consideration."¹²⁸ Moreover, international documents, like the Women's Protocol to the African Charter, require: "In case[s] of separation, divorce or annulment of marriage the interests of the children shall be given

124. *Id.* This is a basic principle, espoused in custody law around the world. For instance, the California Family Code specifically states, "The mother . . . and the father . . . are equally entitled to the custody of the minor child, and "the court . . . shall not prefer a parent as custodian because of that parent's sex." CAL. FAM. CODE §§ 3010(a), 3040(a)(1) (2006).

125. LAW AND THE OTHER SEX, *supra* note 22, at 56 (1987).

126. Interview with Prosecutor, in Manzini, Swaz. (Mar. 7, 2006); Interview with Maxine Lengwemya, Lecturer of Law, University of Swaziland, in Kwaluseni, Swaz. (Mar. 7, 2006).

127. LAW AND THE OTHER SEX, *supra* note 22, at 57; *see also* NAMIBIA PROPOSALS, *supra* note 4, at 134 (describing this evolution with regards to Zimbabwe, which has a similar Roman-Dutch legal system as Swaziland); Edward Kruk, *Child Custody Determination: An Analysis of the Litigation Model, Legal Practices, and Men's Experiences in the Process*, 1 J. MEN'S STUD. 163 (Nov. 30, 1962) ("[T]here has been a shift from child custody laws overtly based on gender and notions of marital fault, to ones that are theoretically gender-neutral and which de-emphasize fault.").

128. CRC, *supra* note 15, at art. 3; *see also* CEDAW, *supra* note 12, at art. 16(1)(d) ("[I]n all cases the interests of the children shall be paramount."), art. 5(b) (" . . . it being understood that the interest of the children is the primordial consideration in all cases"); African Charter on the Rights and Welfare of the Child, art. 4(1) ("In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.").

paramount importance.”¹²⁹ Thus, as Swazi courts have recognized, the child’s best interests must govern custody considerations.

Countries around the world similarly acknowledge the best interests of the child as the foremost consideration and provide for its explicit use in custody determinations. Under South Africa’s Constitution, for instance, “A child’s best interests are of paramount importance in every matter concerning the child.”¹³⁰ Likewise, Nigeria’s Child’s Rights Act provides, “In every action concerning a child, . . . the best interest of the child shall be the primary consideration.”¹³¹ It further specifies, “Where in any proceedings before a court the custody or upbringing of a child . . . is in question, the Court shall, in deciding that question, regard the welfare of the child as the first and paramount consideration.”¹³² The Australian Family Law Act similarly provides, “In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.”¹³³ Under Zimbabwe law, the best interests principle governs in both customary and civil cases: “[I]n any case relating to the custody of children the interests of the children concerned shall be the paramount consideration irrespective of which law or principle is applied.”¹³⁴ Thus, Swazi courts’ usage of the best interests standard is consistent with progressive practices around the world. Swaziland now needs to take the next step and give this standard explicit legislative sanction.

Furthermore, countries not only provide for a general best interests standard, but also codify the various factors this analysis entails. Under England’s Children’s Act, the court considers “the child’s wishes and feelings, if ascertainable; his or her physical, emotional and educational needs, the likely effect on the

129. Women’s Protocol to the African Charter, art. 7(c); Human Rights Committee General Comment 17, para. 6 (“If the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children . . .”).

130. S. AFR. CONST § 28(2) (1996), available at <http://www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1>.

131. Child’s Rights Act No. 26 (2003) 116:90 O.G., A451-679 § 1 (Nigeria).

132. Child’s Rights Act No. 26 (2003) 116:90 O.G., A451-679 § 71 (Nigeria).

133. Family Law Act, 1975, § 65E (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/; see also *id.* § 68E for use of the best interests standard “as the paramount consideration” generally.

134. NAMIBIA PROPOSALS, *supra* note 4, at 134 (quoting the Zimbabwe Customary Law and Local Courts Act); see also Law of Marriage Act, § 125(2), TANZ. LAWS [CAP 29 R.E. 2002] (“In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant.”); Children Act, Cap. 59, Schedule 1, § (1) (2000) (Uganda) (“Whenever the State, a court, a local authority or any person determines any question with respect to . . . the upbringing of a child . . . , the child’s welfare shall be the paramount consideration.”); NAMIBIA PROPOSALS, *supra* note 4, at 104 (explaining that under England’s Children’s Act of 1989, “the court’s foremost consideration must be the welfare of the child” and “[i]n general” in the United States, “laws require that custody arrangements (whether agreed by the parents or ordered by the court) be based on what is in the best interests of the child.”); Child Status Bill (2003) § 2(1) (Namib.) (asserting as an objective of the Bill “to promote and protect the best interests of the child”), § 5 (“[Q]uestions pertaining to custody, guardianship or access will be decided solely on the best interests of the child . . .”), § 10 (requiring that for any custody order, “the court shall treat the best interests of the child as the paramount consideration).

child of any change in his or her present circumstances; the child's age, sex, background and any other characteristics the court considers relevant; any harm the child has suffered or is at risk for suffering; [and] the capability of each parent of meeting the child's needs."¹³⁵ The Australian Family Law Act likewise contains a provision dedicated entirely to "[h]ow a court determines what is in a child's best interests."¹³⁶ Factors a court must consider include, but are not limited to, "any wishes expressed by the child," "the nature of the relationship of the child with each of the child's parents and with other persons," "the likely effect of any changes in the child's circumstances," "the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs," "the child's maturity, sex and background," "the need to protect the child from physical or psychological harm," "the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents," and "any family violence involving the child or a member of the child's family."¹³⁷ Zimbabwe courts "consider all of the circumstances of the case, including the child's sex, age, health, and educational and religious needs, and each parent's social and financial position, character, temperament, and past behavior towards the child."¹³⁸

In Swaziland, however, courts lack guidance as to what factors they should consider, and best interests determinations are ad hoc at best. Lacking concrete standards to evaluate, judges are not bound to engage in a rigorous analysis.¹³⁹ Thus, they generally default to stereotypes, granting physical custody to the mother and legal guardianship to the father.¹⁴⁰ This allocation of custody based

135. NAMIBIA PROPOSALS, *supra* note 4, at 104.

136. Family Law Act, 1975, § 68F (Austl.).

137. *Id.*; see also Child Status Bill (2003) §§ 3-4 (Namib.) (listing factors a court "must take . . . into consideration.").

138. NAMIBIA PROPOSALS, *supra* note 4, at 105. In the United States, custody laws vary from state to state. However, courts generally consider the following factors: "the child's emotional ties with each parent; whether one parent has taken on greater parenting responsibilities in the past; each parent's potential for future performance of parenting functions; the emotional needs and development of the child; the child's other relationships; the wishes of the child, if ascertainable; the parents' wishes; the amount of time each parent will be able to spend with the child after the divorce; and which parent, if given custody, will be more likely to foster a loving relationship between the child and other parent." *Id.* at 104-5. For information on the factors Florida considers in making best interests determinations, please see Richard A. Gardner, *Guidelines for Assessing Parental Preference in Child-Custody Disputes*, 30 J. DIVORCE & REMARRIAGE 1 (June 30, 1999).

139. *E.g.*, Khoza v. Khoza (2), 148 (Swaz. High Ct. 1973) (granting the mother custody of the five minor children). In this case, the court mentions that the mother had a house with "adequate room" for the five children, but engages in no real best interests analysis. *Id.* at 150. The court does not even consider the father as a potential custodian, but rather concludes that "it is problematical whether in the circumstances [his] elder sister will be in a position to act as mother." *Id.*

140. *E.g.*, Malambe v. Khoza, 379 (Swaz. High Ct. 1975) ("[T]he effect of a custody order is merely to place the minor children in the care of their mother until they attain majority or become self-supporting. The father remains their guardian and when the custody order ceases to operate he will continue to have the same rights in regard to the children as he originally had."), *affirmed by* Khoza v. Malambe, 385 (Swaz. C.A. 1976) ("[A]n order for custody, unaccompanied by an order as to the guardianship of the

on a parent's gender is both discriminatory¹⁴¹ and fails to protect children's best interests.¹⁴² Moreover, the limited number of factors considered makes custody an open question, entirely dependent on the idiosyncrasies of individual judges. The resulting uncertainty creates conflict between parents who are unable to plan accordingly and turns children into bargaining chips during divorce proceedings.¹⁴³ Swaziland needs to remedy this gap and enact legislation ensuring key factors relevant to children's best interests are meaningfully assessed.

C. SWAZILAND'S FAILURE TO RECOGNIZE A CHILD'S RIGHT TO BE HEARD IN
CUSTODY DETERMINATIONS UNDERMINES BOTH A CHILD'S RIGHT TO FREEDOM OF
EXPRESSION AND ANY MEANINGFUL ASSESSMENT OF THE CHILD'S BEST
INTERESTS.

*"Children will no longer remain silent about their rights, but will speak
and even shout out about their needs and demands."*¹⁴⁴

Swaziland's failure to recognize a child's right to be heard and to incorporate that right into its best interests analysis violates that standard, as well as a child's right to expression. Both Swaziland's Constitution and international law establish a child's right to freedom of expression. Swaziland's Constitution categorizes "freedom of . . . expression" as one of the "[f]undamental human rights and freedoms of the individual."¹⁴⁵ Moreover, under the Constitution, "A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly."¹⁴⁶ The CRC explicitly recognizes that a "child capable of forming his or her own views" has "the right to express those views freely in all matters affecting the child, the views of the child given due weight in

children, leaves the guardianship where it was during the marriage, namely in the father."); *see also* LAW AND THE OTHER SEX, *supra* note 22, at 58 (describing this division whereby the mother has physical custody over children and control over their daily life, while the father has the legal power to administer their property and consent to medical procedures or contract a marriage on their behalf); *Calitz v. Calitz*, 1939 AD 56 (SA) ("[T]he management of the minor's property and control of the minor's education belong to the father solely: as to control of the minor's person though the minor shares it with the father, in case of difference of opinion the father's authority prevails.").

141. Under CEDAW, not only do parents have equal custody rights, but they have "[t]he same rights and responsibilities with regard to guardianship." CEDAW, *supra* note 12, at art. 16(1)(f).

142. Sorensen & Goldman, *supra* note 119, at 53.

143. "The lack of certainty can at the very least encourage opposed divorces, which prolong the process and have the potential to increase bitterness between parties." NAMIBIA PROPOSALS, *supra* note 4, at 176. Moreover, "unpredictability . . . opens the door to bargaining and negotiation that may not have the best interests of the child at heart." *Id.*

144. The Children's Charter of South Africa of 1992, available at <http://www.anc.org.za/misc/childcht.html>.

145. SWAZ. CONST. § 14 (1)(b); *see also id.* § 24(1) ("A person has a right to freedom of expression and opinion.").

146. SWAZ. CONST. § 331(1).

accordance with the age and maturity of the child.”¹⁴⁷ It, therefore, requires that the child “be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child.”¹⁴⁸ Swaziland must remedy this vital oversight in custody proceedings. As Swaziland’s Director of Intervention for Children urged, “Children should be a part of the process . . . and be able to give input on custody.”¹⁴⁹

Comparative law likewise supports taking the child’s voice into account. South Africa’s Children’s Charter, for instance, asserts, “All children have the right to express their own opinions and the right to be heard in all matters that affect his or her rights and protection and welfare.”¹⁵⁰ To this effect, “[A]ll children have the right to be heard in courtrooms and hearings affecting their future rights and protection and welfare.”¹⁵¹ Under Tanzania’s Law of Marriage Act, “the court shall have regard . . . to the wishes of the infant, where he or she is of an age to express an independent opinion.”¹⁵² To meaningfully protect children’s best interests and their freedom of expression, Swaziland must similarly allow for children’s voice in custody proceedings.

D. SWAZILAND’S FAILURE TO OFFER A JOINT CUSTODY REMEDY UPON DIVORCE COMPROMISES A CHILD’S RIGHT TO PARENTAL CARE AND PARENTS’ RIGHTS TO PROVIDE THAT CARE, SHATTERING FAMILIES.

By not allowing for joint custody upon divorce, the current regime in Swaziland violates children’s rights to parental care and parental rights to provide that care, forcing families apart. Both the Swazi Constitution and international law recognize the child’s right to parental care. The Constitution provides, “The child has the right to be properly cared for and brought up by parents.”¹⁵³ Under

147. CRC, *supra* note 15, at art. 12(1). “[T]he views of the child” must further be “given due weight in accordance with the age and maturity of the child.” *Id.*; see also African Charter on the Rights and Welfare of the Child, art. 7 (“Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters . . .”).

148. CRC, *supra* note 15, at art. 12(2); see also African Charter on the Rights and Welfare of the Child, art. 4(2) (“In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings.”).

149. Interview with Khosi Mabuza, Director of Intervention for Children, Organization to Raise a Child, in Mbabane, Swaz. (Mar. 7, 2006).

150. The Children’s Charter of 1992, art. 3(1) (S. Afr.).

151. *Id.* Moreover, “A long line of South African divorce cases have taken the view that if a court is satisfied that a child has the necessary emotional and intellectual maturity to state a preference which is a genuine and accurate reflection of the child’s feelings towards the respective parents, then the court should give weight to this preference.” NAMIBIA PROPOSALS, *supra* note 4, at 178.

152. Law of Marriage Act, § 125(2)(b), TANZ. LAWS [CAP 29 R.E. 2002]; see also Family Law Act, 1975, § 68G(2) (Austl.) (“The court may inform itself of wishes expressed by a child.”).

153. SWAZ. CONST. § 29 (3). Moreover, the Constitution calls for the enactment of laws to ensure “a child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents . . .” *Id.* § 29(7)(a); see also Child’s Rights Act No. 26 (2003) 116:90 O.G., A451-679 § 14(1) (Nigeria) (“Every child has a right to parental care.”); Family Law Act, 1975, § 60B(2)(a) (Austl.) (“[C]hildren have the right to know and be cared for by both parents,

the CRC, "State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities . . . determine . . . that such separation is necessary for the best interests of the child."¹⁵⁴ Even when a child "is separated from one or both parents," the CRC recognizes the child's "right" "to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."¹⁵⁵ In the context of the dissolution of marriage, the Human Rights Committee explained, "steps should be taken . . . to guarantee personal relations with both parents."¹⁵⁶

Likewise, both parents have the right and responsibility to provide parental care. The new Swazi Constitution specifically calls upon Parliament to "enact laws necessary to ensure that parents undertake their natural rights and obligations of care, maintenance and proper upbringing of their children."¹⁵⁷ The CRC espouses "the principle that both parents have common responsibilities for the upbringing and development of the child."¹⁵⁸ Moreover, as previously discussed, CEDAW requires states to "ensure, on a basis of equality of men and women . . . [t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children."¹⁵⁹ The CEDAW Committee specifically chided countries "where [when] the mothers are divorced or living apart, many fathers fail to share the responsibility of care, protection and maintenance of their children."¹⁶⁰ To fulfill its constitutional and international obligations, Swaziland should thus allow parents to make joint custody arrangements for their children.

regardless of whether their parents are married, separated, have never married or have never lived together."); Children Act, Cap. 59, § 4(1) (2000) (Uganda) ("A child is entitled to live with his or her parents."); S. AFR. CONST. 1996 s. 28 (1) (recognizing the child's "right to family care or parental care").

154. CRC, *supra* note 15, at art. 9(1); *see also* African Charter on the Rights and Welfare of the Child, art. 19(1) ("Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible have the right to reside with is or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.").

155. CRC, *supra* note 15, at art. 9(3); *see also id.* at art. 10(2) ("A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents."); African Charter on the Rights and Welfare of the Child, art. 19(2) ("Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.").

156. Human Rights Committee General Comment 17, para. 6.

157. SWAZ. CONST. § 29(7)(c); *see also* Children Act, Cap. 59, § 6(1) (2000) (Uganda) ("Every parent shall have parental responsibility for his or her child.").

158. CRC, *supra* note 15, at art. 18(1); *see also* CEDAW, *supra* note 12, at 5(b) ("To ensure that family education includes . . . the recognition of the common responsibility of men and women in the upbringing and development of their children.").

159. CEDAW, *supra* note 12, art. 16(1); *see also* Women's Protocol to the African Charter, art. 6(i) ("[A] woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children."), art. 7(c) ("[I]n case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children.").

160. CEDAW General Recommendation 21, para. 19.

Permitting these arrangements would both better protect children's best interests and the well-being of families. As widely recognized, a child's development benefits from care from both parents.¹⁶¹ Studies have further shown that children under joint custody "retained two psychological parents in their lives," while half of children in single parent custody, "never saw the other parent at all."¹⁶² Besides supporting "greater ongoing involvement by both parents,"¹⁶³ joint custody avoids overburdening either parent with childcare and minimizes detrimental conflict.¹⁶⁴ Swaziland must take steps to protect the family, a foundational principle under both international law and the Swazi Constitution. The UDHR and ICCPR declare, "The family is the natural and fundamental group unity of society and is entitled to protection by society and the State."¹⁶⁵ The Constitution closely echoes, "The family is the natural and fundamental unit of society and is entitled to protection by the State."¹⁶⁶ Swaziland must thus allow for a joint custody option upon divorce.

Recognizing the benefits of joint custody, the trend around the world has been to encourage it.¹⁶⁷ Joint custody is favored in the United States, and most states have laws specifically allowing for it.¹⁶⁸ In California, for instance, where there is parental agreement, "[t]here is a presumption . . . that joint custody is in the best interests of a minor child."¹⁶⁹ Similarly, the United Kingdom's Children Act

161. Sorensen & Goldman, *supra* note 119, at 53. ("[J]oint custody has become more common following the recognition of the importance of both parents to the child's adjustment.").

162. Deborah Anna Luepnitz, *A Comparison of Maternal, Paternal, and Joint Custody: Understanding the Varieties of Post-Divorce Family Life*, J. DIVORCE 1 (Mar. 31, 1986).

163. NAMIBIA PROPOSALS, *supra* note 4, at 180.

164. *Id.* ("[J]oint custody helps to combat the stereotype of mother as sole nurturer, avoids saddling either parent with overburdening arrangements and benefits children by preventing a sense of abandonment by one parent."); Gardner, *supra* note 138, at 1. ("Joint custody may help remedy many issues that accompany divorce like: burn out; childcare; money; and parental conflict.").

165. UDHR, *supra* note 20, art. 16(3); ICCPR, art. 23(1); *see also* ICESCR, *supra* note 14, art. 10(1) ("The widest possible protection and assistance shall be accorded to the family, which is the natural and fundamental group unity of society, particularly . . . while it is responsible for the care and education of dependent children."); African Charter, art. 18(1) ("The family shall be the natural unit and basis of society. It shall be protected by the State . . ."); African Charter on the Rights and Welfare of the Child, art. 18(1) ("The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.").

166. SWAZ. CONST. § 27 (3); *see also id.* at § 27(5) ("Society and the State have the duty to preserve and sustain the harmonious development, cohesion and respect for the family and family values.").

167. Sorensen & Goldman, *supra* note 119, at 53 (Jun. 4 1990).

168. NAMIBIA PROPOSALS, *supra* note 4, at 180, 105 (recounting: "In the 1980's, joint custody became the preferred custody arrangement in many US states" and that "by 1996 over forty states had laws authorizing joint or shared custody.").

169. CAL. FAM. CODE § 3080 (2006); *see also* CAL. FAM. CODE § 3020 (2006) "[T]he public policy of this state [is] to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy."); D.C. CODE § 16-914 (a)(2) (2006) ("Unless the court determines that it is not in the best interests of the child, the court may issue an order that provides for frequent and continuing contact between each parent and the minor child or children and for the sharing of responsibilities of child-rearing There shall be a rebuttable presumption that joint custody is in the best interests of the child or children.").

promotes joint custody, and Canadian courts are increasingly awarding joint custody.¹⁷⁰ Australia's Family Law Act specifically sets out, "[P]arents jointly share duties and responsibilities concerning the care, welfare and development of their children."¹⁷¹ In this vein, Namibia's Legal Assistance Centre recommended that the country provide for joint custody upon divorce.¹⁷²

E. TO PROTECT THE RIGHTS OF WOMEN AND CHILDREN, SWAZILAND NEEDS TO ADOPT LEGISLATION THAT SPECIFIES BEST INTERESTS FACTORS, INCORPORATES THE CHILD'S VOICE, ENCOURAGES JOINT CUSTODY, AND PROVIDES FOR COURT-SUPERVISED ADMINISTRATIVE REMEDIES.

As set out above, Swaziland has no real system for making custody determinations, and judges decide custody cases on an ad hoc basis. Children are thus deprived of any meaningful evaluation of their best interests, and as a Swazi attorney lamented, "Our system is failing us."¹⁷³ In order to truly protect children's best interests, Swaziland should: 1) explicitly set out the best interests standard in legislation; 2) codify concrete best interests factors; 3) incorporate the child's right to be heard into those factors; 4) encourage joint custody; and 5) supply administrative remedies to work in tandem with formal judicial processes. These reforms are necessary for the protection of rights recognized by Swaziland's new Constitution and international human rights conventions.

1. Swaziland Should Codify Best Interests Factors and Recognize a Child's Right to Be Heard in Custody Determinations.

*"No divorce decree should be issued until the court is satisfied that all arrangements in respect of minor children are in their best interests."*¹⁷⁴

In order to ensure accountability, consistency and notice, Swaziland needs to legislatively recognize the best interests standard and provide concrete factors for courts to consider. Remediating these gaps within Swazi law is crucial because "[t]he welfare of the children in custody cases has become, at least partially, dependent upon the decision-making of the courts."¹⁷⁵ Codification would make custody determinations more meaningful and lessen the uncertainty and conflict that plague the current system.

A best interests analysis should include the following factors:

170. NAMIBIA PROPOSALS, *supra* note 4, at 180.

171. Family Law Act, 1975, § 60B(2)(c) (Austl.); *see also id.* § 69B(1)(a) (asserting the objective of "ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child.").

172. NAMIBIA PROPOSALS, *supra* note 4, at 181.

173. Interview with Lindiwe Ngcamphalala, Attorney, LKM Attorneys & Legal Consultants, in Ezulwini, Swaz. (Mar. 5, 2006).

174. NAMIBIA PROPOSALS, *supra* note 4, at 174.

175. Sorensen & Goldman, *supra* note 119, at 53.

- 1) The wishes of the child where practicable;
- 2) The wishes of the child's parent(s);
- 3) Which parent has been the primary caretaker and each parent's potential for future performance of parenting functions;
- 4) The potential disruption of the child's social and school life;
- 5) The demands of parental employment;
- 6) The age and number of the children;
- 7) The mental and physical health of all individuals involved;
- 8) Evidence of domestic violence, child molestation, child abuse, child neglect, or child kidnapping;
- 9) The capacity and willingness of the parents, individually and jointly, to share custody and guardianship;
- 10) Each parent's willingness to participate in mediation and family planning;
- 11) Each parent's parenting plan; and
- 12) The evaluations of a social welfare officer.

This formulation recognizes the vital importance of the child's voice (factor 1). Such consideration treats the child as a subject with valid thoughts and feelings, rather than a mere passive object to be distributed by the court.¹⁷⁶ As discussed above, it thereby protects children's freedom of expression and right to be heard in matters affecting their welfare. An assessment of the child's wishes can often best take place outside the courtroom and through a nuanced evaluation by a social welfare officer (factor 12).¹⁷⁷ This would focus on the child's reasoning and help ensure that the parents do not use the child as a pawn in fighting against each other.¹⁷⁸

The court must further give weight to the child's need for stability.¹⁷⁹ The court

176. In recommending consideration of the child's preference in custody decisions, Namibia's Legal Assistance Centre explained, "The children of a marriage should not be treated like objects to be fought over when a marriage comes to an end. A new divorce law should make it clear that any child with sufficient maturity will be given an opportunity to state his or her views, and that those views will be given appropriate consideration in determining the child's 'best interests.'" *NAMIBIA PROPOSALS, supra* note 4, at 178-9.

177. Interview with Khosi Mabuza, Director of Intervention for Children, Organization to Raise a Child, in Mbabane, Swaz. (Mar. 7, 2006).

178. Interview with Khosi Mabuza, Director of Intervention for Children, Organization to Raise a Child, in Mbabane, Swaz. (Mar. 7, 2006) (explaining that the child's opinion should be solicited through a series of questions "so that the Court can evaluate what they say and make an informed decision.").

179. In Canada, an important factor in custody cases is the "desire to preserve the status quo when the children are living in a stable home environment." *NAMIBIA PROPOSALS, supra* note 4, at 108. The

should thus take into account which parent has been the primary caretaker (factor 3),¹⁸⁰ potential disruption of the child's social and school life (factor 4), and the desirability of keeping siblings together.¹⁸¹

However, the child's need for stability must be balanced against the need for an environment that would best enable the child to grow and develop. Best interests factors should strive to address not only children's current wants but also their prospective needs. As recognized by Namibia's Legal Assistance Centre and a Canadian commentator, "[T]he best interests of the child standard is an all-embracing concept that encompasses the physical, emotional, intellectual and moral well-being of the child. The court must look not only at the day to day needs of the child but also to the longer term growth and development of the child."¹⁸² It is thus important to assess each parent's potential for future performance of parenting functions (factor 3).¹⁸³ Other factors that go into this determination are the parents' parenting plan (factor 11), their wishes (factor 2), the demands of their employment (factor 5), and the age and number of the children (factor 6).

Ensuring the child's protection must be a guiding principle in custody decisions. Thus, the court must consider the mental and physical health of all the individuals involved (factor 7). Evaluations by social welfare officers (factor 12) may be important in this regard. Moreover, legislation should require courts to take into account evidence of domestic violence,¹⁸⁴ child molestation, child abuse, child neglect, or child kidnapping (factor 8).¹⁸⁵ Additionally, courts must recognize that domestic violence harms children, even when it is not directed at

California Family Code refers to "a wholesome and stable environment." CAL. FAM. CODE § 3040(a)(2) (2006).

180. In the United States, many states place great importance on this factor, in "the belief that awarding custody to the primary caretaker will promote stability and continuity in the child's life and thus promote the child's well-being." NAMIBIA PROPOSALS, *supra* note 4, at 105. This approach also relies on "demonstrable evidence of the past rather than guesses about the future." *Id.* at 176. Allowing the court to weigh the parents' previous actions would also prevent "men who have no real interest in daily responsibility for child care [from] seek[ing] custody as a bargaining chip to avoid having to make high maintenance payments, or to convince the mother to settle for a less advantageous property settlement." *Id.*

181. Under the Proposed Matrimonial Causes Act, the court should not separate siblings unless there is good reason to do so.

182. NAMIBIA PROPOSALS, *supra* note 4, at 108 (quoting PAYNE, INTRODUCTION TO CANADIAN FAMILY LAW 127).

183. *See also* Proposed Matrimonial Causes Act ("Special consideration should be given to the fact of which parent has been the primary caretaker and each parent's potential for future performance of parenting functions. Which parent has been the primary caretaker, however, should not be treated as a conclusive consideration in such determinations.").

184. Namibia's Legal Assistance Centre recommended that a new divorce law "highlight three key factors" in custody determinations: (1) which parent has been the child's primary caretaker; (2) the child's preference; and (3) the need to protect the child against domestic violence." NAMIBIA PROPOSALS, *supra* note 4, at 175.

185. Under the Proposed Matrimonial Causes Act, "A parent with a history of domestic violence, child abuse, child molestation, child neglect or child kidnapping must prove beyond a reasonable doubt that access would not seriously endanger the mental physical, moral or emotional health of the child."

them.¹⁸⁶ Explicit consideration of this factor is especially important given the pervasiveness of domestic violence in Swaziland.¹⁸⁷

Finally, custody determinations ought to encourage cooperation by parents. Courts should, therefore, give due regard to the capacity and willingness of parents to share custody (factor 9) and each parent's willingness to participate in mediation and family planning (factor 10). To promote this cooperation, courts can require parents to submit a detailed parenting plan (factor 11), delineating their proposed schedule for the child and allocation of rights and responsibilities.¹⁸⁸

2. Swaziland Should Encourage Joint Custody, Providing for a Default of Shared Custody.

*"Having both parents is to have a better life."*¹⁸⁹

Swaziland should encourage parents to assume joint custody over their children, making shared custody the default arrangement upon divorce unless it is contrary to the children's best interests. While joint custody is the ideal and calls for fifty percent split of physical responsibility for the child, shared custody allows for more flexible arrangements.¹⁹⁰ Swaziland would thus provide for frequent and continuing contact between each parent and the minor children. This would enable the sharing of child-rearing responsibilities and promote a nurturing relationship between the children and parents regardless of marital status. As discussed above, this would best protect families and children, as well as the child's right to parental care and the parents' right to provide that care.

Shared custody arrangements can take a variety of forms to best suit each family's situation. As Namibia's Legal Assistance Centre explained, joint custody "may give the two parents custody for alternating periods, or the children may live with one parent while the other parent continues to play a role in decisions about the day to day lives of the children."¹⁹¹ The important thing is that both parents contribute regularly to the child's care.

186. NAMIBIA PROPOSALS, *supra* note 4, at 179 ("They may become excessively anxious, or live in constant fear of repeated violent episodes. They may feel responsible for the violence, or guilty because they do not know how to prevent it. The presence of violence can affect children's health, self-esteem and behaviour.").

187. As one interviewee remarked, "Violence is rife in our country." Interview with Lindiwe Ngcamphalala, Attorney, LKM Attorneys & Legal Consultants, in Ezulwini, Swaz. (Mar. 5, 2006); *see also* Interview with Nkosingiphile Mbhamali, Journalist, in Manzini, Swaz. (Mar. 8, 2006) ("Almost every day, there is a report of a husband killing or seriously injuring his wife.").

188. Proposed Matrimonial Causes Act, (detailing provisions a parenting plan may include).

189. Interview with Musa Sukati, Legal Secretary, LKM Attorneys & Legal Consultants, in Manzini, Swaz. (Mar. 6, 2006).

190. *E.g.*, NAMIBIA PROPOSALS, *supra* note 4, at 108.

191. *Id.* at 29. For instance, the parent may pick the children up from school and contribute to activities necessary for their daily care and development.

3. Swaziland Should Incorporate Court Supervised Administrative Remedies to Improve Custody Determinations and Lessen Monetary Impediments.

The judicial system is inadequate on its own to address the complexity of custody decisions. For custody determinations to truly serve the needs of children and families, they must incorporate the insights of social workers and allow for mediation. Courts would benefit from consulting social workers who are attuned to the needs of children and specialize in ensuring their welfare. Legal determinations would thus gain from multidisciplinary expertise.¹⁹² Legislation should, therefore, empower courts to request reports from a Social Welfare Officer¹⁹³ when there is any doubt as to what custody and access arrangements would be in the best interests of the child.¹⁹⁴

Divorce legislation should further provide for mediation to work in conjunction with judicial proceedings. As Namibia's Legal Assistance Centre recounted, "Divorce mediation has emerged as a viable complement to adversarial divorce proceedings."¹⁹⁵ This is the case as "an adversarial court process" may not be "an appropriate forum for resolving disputes in the highly-charged and emotional atmosphere of a divorce."¹⁹⁶ Mediation, by contrast, would encourage spouses to reach agreement on practical issues relating to divorce and promote cooperative custody arrangements.¹⁹⁷ The mediator's role is to establish and maintain "a

192. Astra Outley, *Special Issue: Adoption and Foster Care: Overcoming Barriers to Permanency: Recommendations for Juvenile and Family Courts*, 44 FAM. CT. REV. 244, 251-52 (April 2006); Tamar Ezer, *Practitioner's Note: Delivery of Legal Services to Children in the Boston Area*, 8 UC DAVIS J. JUV. L. & POL'Y 95, 115 (Winter 2004).

193. Many Swazi citizens expressed concern about the current lack of accountability of the Social Welfare Office. *E.g.*, Interview with Civil Servant, in Mankanyane, Swaz. (Mar. 10, 2006); Interview with Mary Pais de Silva, Attorney, in Manzini, Swaz. (Mar. 6, 2006); Interview with Maxine Lengwemya, Lecturer of Law, University of Swaziland, in Kwaluseni, Swaz. (Mar. 7, 2006). The Proposed Matrimonial Causes Act attempts to address this issue by requiring the Social Welfare Officer to produce a report and recommendations within a month (or to at least issue a progress report identifying obstacles to the deadline). The Act further empowers the court, either parent, the child's guardian, or the child to request the report. If Social Welfare Officers are remiss in their duties, the Commissioner of Health and Human Services must hold them accountable for failure to perform their functions. If the Commissioner of Health and Human Services also fails in this regard, Swazi citizens can turn to the newly formed Human Rights Commission to investigate "complaints of injustice . . . by a public officer" and "complaints concerning . . . the functioning of any . . . organ of the Government" and "take appropriate action for the remedying" of any breach. SWAZ. CONST. § 164(1).

194. Such reports would be particularly helpful where there is an intention to separate siblings or place a child with someone other than the primary caretaker or parent. In certain cases, as the Proposed Matrimonial Causes Act provides, a guardian ad litem should be appointed to represent the minor child's interests—especially where the interests of the child may be in conflict with those of the parent.

195. NAMIBIA PROPOSALS, *supra* note 4, at 142; *see also* Donald G. Alexander, *Some Thoughts on Child Custody Actions in the Courts*, EVERYMAN, Dec. 2002, at 46 (relating how mediation is used throughout South Africa, New Zealand, the United States and Ethiopia. Some countries go as far as to require mandatory mediation when the issues of custody or maintenance are contested in a divorce proceeding.).

196. NAMIBIA PROPOSALS, *supra* note 4, at 142.

197. *Id.* at 141. Many interviewees in a Namibia study noted that mediation would be "particularly positive where children are involved" as (1) it would engender a move away from stereotypes and

co-operative, problem-solving orientation between the spouses,”¹⁹⁸ hopefully allowing joint custody arrangements to be a reality for certain families.¹⁹⁹ After mediation, the court would get to approve agreements reached and ensure they are in the child’s best interests.

Not only would providing for mediation help reduce familial conflict, but it would also make proceedings more timely and cost effective. Efficiency is especially important when children are involved because it helps to minimize the trauma of divorce and preserve stability in children’s lives. The current divorce system is archaic and cost-prohibitive for many Swazis.²⁰⁰ Allowing for mediation by any trained third party would reduce the need for lawyers and the burden on the court.²⁰¹ Parents can opt to engage in mediation and then bring agreements reached for court approval without the aid of counsel. In this way, mediation has the potential to reduce both the emotional and financial costs of divorce and best meet the needs of children and parents.

F. CIRCUMSTANCES IN WHICH RIGHTS ARE VIOLATED NECESSITATE DIVORCE TO PROTECT THE HEALTH AND DEVELOPMENT OF FAMILY MEMBERS.

Divorce does not threaten families and the well-being of children,²⁰² but rather may be necessary to protect them. This is especially true in situations of domestic violence, economic abuse, and conflict. “[T]he primary predictors of a decline in the quantity and quality of a child’s interactive behavior and social development [are] poor parenting, interparent conflict, reliance on support from friends and community services, the stability in the child’s environment, and the emotional maturity of the child following divorce.”²⁰³ Moreover, “interparent conflict, the quality of parenting, and the stability of the child’s environment . . . affect a

assumptions and towards the real facts of a situation and (2) it would address emotional aspects of a divorce along with practical ones, bringing a human face to the process. *Id.* at 159; *see also* Alexander, *supra* note 195, at 46 (describing mediation by a children’s agency).

198. NAMIBIA PROPOSALS, *supra* note 4, at 142 (quoting Kenneth Kressel, *Divorce Mediation: A Critical Overview* 384-85, in *FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW* (Martha Minow ed., 1993)).

199. Besides ordering mediation, the court can further encourage resolution of custody issues by mandating family planning sessions and parenting classes.

200. Interview with Media Representative, Save the Children, in Mbabane, Swaz. (Mar. 6, 2006); Interview with Nurse, Health Clinic, in Mbabane, Swaz. (Mar. 8, 2006); Interview with Lorraine Mlophe, Magistrate, Magistrate Court, in Ezulwini, Swaz. (Mar. 7, 2006).

201. Namibia’s Legal Assistance Centre identified the following as groups that Groups that “could be trained to provide mediation services”: “priests and pastors, social workers, lawyers, paralegals, traditional leaders, members of counseling organizations or NGOs and school principals and teachers.” NAMIBIA PROPOSALS, *supra* note 4, at 159.

202. “Multiple studies show that ‘there is no clear and simple relationship between strict divorce law and marriage stability in a given society, nor between lenient divorce law and marriage instability.’” NAMIBIA PROPOSALS, *supra* note 4, at 167 (quoting MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 16 (1989)).

203. Gardner, *supra* note 138, at 1.

child's development *regardless of the custody arrangement*."²⁰⁴ Divorce thus does not harm children, but instead helps to safeguard basic rights and create a healthier environment for both parents and children. However, divorce can only be a meaningful option and genuinely ensure the welfare of vulnerable family members if it includes economic protections. Divorce legislation must thus provide for adequate maintenance and the just distribution of property, discussed in the following sections.

PART IV: MAINTENANCE

Current Swazi maintenance law—a body of law covering both spousal and child support—is unclear, discriminatory, and in violation of both the Swazi Constitution and binding international law. Unlike other areas of divorce law, however, there is a statute governing maintenance, the Maintenance Act of 1970. Nonetheless, maintenance is one of the legal problems most often encountered by women, topping the list of their concerns.²⁰⁵ Gaps in the Maintenance Act and its inadequate implementation provisions are responsible for this broken system. The Act fails to specify maintenance duties and a standard for determining support. It further limits the timing for bringing maintenance claims, does not allow for adjustments or retroactive payments, and contains only weak enforcement measures. Moreover, underlying these problems is societal gender inequality, in which “women bear the major burden of maintaining themselves and their children.”²⁰⁶

Swaziland's new Constitution provides Parliament with an explicit mandate to address these problems. Recognizing the shortcomings of the existing system, the Constitution specifically instructs, “Parliament shall enact laws necessary to ensure . . . care, maintenance and proper upbringing . . . of children.”²⁰⁷ The Constitution thus calls for legislation to produce a functional maintenance system.

A. DENYING WOMEN AND CHILDREN MAINTENANCE, THE CURRENT SYSTEM VIOLATES THEIR RIGHT TO AN ADEQUATE STANDARD OF LIVING AND PROTECTION OF THEIR WELL-BEING.

Swaziland's ineffective maintenance system is failing its women and children. Unable to collect maintenance payments, women and children are denied an adequate standard of living and protection of their welfare, in contravention of both the Swazi Constitution and binding international law. This is especially true

204. *Id.* (emphasis added).

205. MAINTENANCE IN SWAZILAND, *supra* note 6, at 7; LAW AND THE OTHER SEX, *supra* note 22, at 65.

206. MAINTENANCE IN SWAZILAND, *supra* note 6, at 2.

207. SWAZ. CONST. § 29(7)(c); *see also id.* § 29(7)(a) (“Parliament shall enact laws necessary to ensure . . . a child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents.”).

upon divorce, a time of particular vulnerability for mothers and children.²⁰⁸

Swaziland's dysfunctional maintenance system violates its citizens' right to an adequate standard of living by preventing women and children from obtaining the financial support necessary for food, shelter, and basic necessities. The Constitution requires the state to "secure the maximum welfare, freedom and happiness of every person in Swaziland" and "to provide an adequate means of livelihood."²⁰⁹ The ICESCR sets out the "right of everyone to an adequate standard of living for himself and his family."²¹⁰ This right consists of a series of specific rights to "adequate food, clothing and housing, and to the continuous improvement of living conditions."²¹¹ The CRC explicitly makes the connection between the right to an adequate standard of living and a state-supported maintenance system. The same article recognizes "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development"²¹² and obligates states to "take all appropriate measures to secure the recovery of maintenance of the child."²¹³

Both the Swazi Constitution and international law recognize the need for special protections for women and children to provide for their well-being. In language almost identical to that of the UDHR, the foundational human rights document, the Swazi Constitution proclaims, "Motherhood and childhood are entitled to special care and assistance by society and the state."²¹⁴ Under the ICESCR, "[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons,"²¹⁵ and "[t]he widest possible protection and assistance should be accorded to the family."²¹⁶ The CRC calls upon states to "take all appropriate legislative and administrative measures" "to ensure the child such protection and care as is necessary for his or her well-being."²¹⁷ International law further acknowledges particular vulnerability

208. Judi Bartfeld, *Child Support and the Postdivorce Economic Well-Being of Mothers, Fathers, and Children*, 37 *DEMOGRAPHY* 2, 203-213 (2000) ("Mothers . . . fare dramatically worse than fathers after marital dissolution."); see also Virginia Rhodes Nuta, *Emotional Aspects of Child Support, Family Relations*, 35 *THE SINGLE PARENT FAMILY* 1, 180 (1986).

209. SWAZ. CONST. § 59(1).

210. ICESCR, *supra* note 14, art. 11(1).

211. *Id.*; see also UDHR, art. 25(1) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . ."); Women's Protocol to the African Charter, art. 15 ("States Parties shall ensure that women have the right to nutritious and adequate food."), art. 16 ("Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment.").

212. CRC, *supra* note 15, art. 27(1).

213. *Id.*, art. 27(4).

214. SWAZ. CONST. § 27(4). Compare with UDHR, *supra* note 20, art. 25(2) ("Motherhood and childhood are entitled to special care and assistance."). See also SWAZ. CONST. §§ 14(1)(f), 27(4), 28(1) and (2), 29 (setting out special protections for women and children).

215. ICESCR, *supra* note 14, art. 10(3).

216. *Id.*, art. 10(1).

217. CRC, *supra* note 15, art. 3(2); see also Human Rights Committee General Comment 17, para. 3 ("Every possible economic and social measure should be taken to reduce infant mortality and to eradicate malnutrition among children.").

upon divorce necessitating protection: "In the case of dissolution, provision shall be made for the necessary protection of any children."²¹⁸ The African Charter on the Rights and Welfare of the Child specifically deals with the need for maintenance: "No child shall be deprived of maintenance by reference to the parents' marital status."²¹⁹ In leaving women and children without maintenance, Swaziland's current system directly violates these provisions.

Women disproportionately suffer from the failings of Swaziland's maintenance system as they bear the burden of maintaining children, while men control the majority of resources.²²⁰ The Maintenance Act is thus discriminatory in its impact on women. CEDAW requires states to "take all appropriate measures to eliminate discrimination against women in . . . areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular . . . the right to family benefits."²²¹ In failing to protect women during and after divorce, Swaziland's maintenance system is in violation of this binding international norm.

Such violations have had a catastrophic effect on Swaziland's women and children. Swazis interviewed in a landmark report on the maintenance system, undertaken by the Woman and Law in Southern Africa (WLSA) Research Project, "addressed at length" the "adverse effects" of insufficient support "with regards to children and married women."²²² They pointed to malnutrition and disease—leading to death in some cases, cycles of violence and poverty, and disintegration of the family unit.²²³ The report urges reform, noting that "women's and children's economic condition, their social conditions, their health, . . . their opportunities in life . . . , even their ability to survive is at stake."²²⁴ Swaziland should protect its families by fixing the maintenance system and ensuring their adequate support.

B. SWAZI MAINTENANCE LAW FAILS TO PROTECT WOMEN AND CHILDREN BY NEGLECTING TO SPECIFY MAINTENANCE DUTIES.

The Maintenance Act suffers from egregious gaps. It is entirely procedural, leaving the substance of maintenance duties to the common-law and discretion of individual judges. As the WLSA report noted, "[T]he Maintenance Act does not explain who has a duty to maintain another and to what extent."²²⁵ It further fails to specify a method or standard for calculating support payments. As a result, women and children are left without a minimum guarantee of support.

218. ICCPR, art. 23(4).

219. African Charter on the Rights and Welfare of the Child, art. 18(3).

220. For a description of resource allocation and access in Swaziland, please see Property section *infra*.

221. CEDAW, *supra* note 12, art. 13.

222. MAINTENANCE IN SWAZILAND, *supra* note 6, at 60.

223. *Id.* at 60.

224. *Id.* at 2.

225. *Id.* at 7.

The law's ambiguity prejudices those most in need of financial support. The lack of clear duty prevents Swazis from coming to a common understanding of what constitutes support. The WLSA report displays a proliferation of views amongst interviewees: "[T]o some people 'support' means provision with food whilst to others it means provision with food, clothing, education, medication, accommodation and other necessities of life."²²⁶ The report further indicates that court-enforced support "is perceived as relevant to children" but not to wives.²²⁷ Thus, women may not even be aware of the support to which they are entitled, and consequently, they are hesitant to approach the court with maintenance claims.²²⁸ As a Swazi prosecutor emphasized, "[We] need [a] law or act to cover the vague parts, to put them [applicants] on firm footing, rather than subject [them] to interpretation."²²⁹

Moreover, common-law notions should be updated to ensure the protection of family members. Common-law is based on the Roman-Dutch fault-based divorce system with the flaws discussed above. This system allows for a husband's duty to support his wife to end when the wife is the guilty party in a divorce.²³⁰ Maintenance should not be tied to fault, but rather to the needs and welfare of family members. On this point, the prosecutor urged, "Amend the law to include spousal maintenance. Since [we're] moving away from common-law, [it] should be explicit in statutory law."²³¹

Even when there is no conflict on the existence of a duty of support, the Maintenance Act provides no guidance as to how to determine the amount. This means in the end, children and women get—as described by a Lecturer of Law at the University of Swaziland—a "laughable" amount in support.²³² For the past quarter-century, nations have been moving towards an objective, uniform, and minimum maintenance standard.²³³ It is time for Swaziland to ensure its citizens

226. *Id.* at 41.

227. *Id.* at 31.

228. *Id.* at 31. In the WLSA report, "[I]n not a single Magistrate's Court cases did the woman concerned ask for maintenance for herself." *Id.*

229. Interview with Prosecutor, in Manzini, Swaz. (Mar. 7, 2006). The current lack of clarity in the Maintenance Act has allowed the perpetuation of an ancient custom by which fathers are allowed to "buy" out of wedlock children from the maternal grandfather, and the grandfather has no right to refuse. The father then obtains custody rights over the child and no longer owes maintenance payments. This is a common defense by fathers who wish to avoid maintenance payments, and many mothers opt not to request maintenance for fear of losing their children. BEYOND INEQUALITIES, *supra* note 119, at 25; MAINTENANCE IN SWAZILAND, *supra* note 6, at 49.

230. *Id.* at 20 (citing Stern v. Schettel 1938 CPD 78, at 80).

231. Interview with Prosecutor, in Manzini, Swaz. (Mar. 7, 2006).

232. Interview with Maxine Lengwemya, Lecturer, University of Swaziland, in Kwaluseni, Swaz. (Mar. 7, 2006).

233. In England and the United States, uniform support guidelines have been established as "a response to concerns that many child support awards were too low and that there was too much variation between awards in similar cases." NAMIBIA PROPOSALS, *supra* note 4, at 103. Maintenance is further more reliable when "it is calculated with reference to formulas or guidelines." *Id.* at 182; see also JOHN DE WITT GREGORY, UNDERSTANDING FAMILY LAW 439 (2005). For an example of an objective calculus, see California Family Code, § 4055.

this protection too.²³⁴

C. SWAZI MAINTENANCE LAW PROVIDES A NARROW OPPORTUNITY FOR REQUESTING SUPPORT, BEARING LITTLE RELATION TO REALITY.

Another great inadequacy in Swazi maintenance law is the limited opportunity to request support. The Maintenance Act is again completely silent on the timing and conditions of maintenance requests, leaving common-law to govern. Under common-law, claims for maintenance upon divorce must be brought at the time of divorce and not afterwards.²³⁵ Moreover, a divorce can be granted without providing for the custody and maintenance of children. This works an injustice on some women, who at the time of their divorce are under a great deal of emotional stress and are entirely focused on having their marriage dissolved.²³⁶ As the WLSA report described, "It is only after the divorce that they realize they need support and then it is too late for them to claim. Such a requirement places an unnecessary impediment in the exercise of a woman's rights."²³⁷ Maintenance law should aim to provide parties with needed, properly entitled support, rather than to create procedural barriers to the realization of rights basic to their health and survival.

By not allowing for retroactive awards and later modifications, current maintenance law is blind to the reality faced by parents and children. A wife's right to support is restricted to present requirements. Thus, maintenance obligations do not apply when a wife incurs debts to maintain herself or her children.²³⁸ Moreover, there is no opportunity for adjustment when the circumstances of the parents or children change. It is time to enact a law responsive to the parties' real needs.

D. INADEQUATE ENFORCEMENT PROVISIONS PREVENT SWAZI WOMEN AND CHILDREN FROM COLLECTING MAINTENANCE.

Besides its substantive gaps, there are serious enforcement deficiencies in the Maintenance Act that prevent Swazi women and children from collecting maintenance. Women encounter stumbling blocks both in obtaining maintenance orders and in having them enforced. The Act does not allow women to bring a

234. WLSA's report concludes with a recommendation that "[t]he law should prescribe a precise formula for calculating the amount of maintenance payable." MAINTENANCE IN SWAZILAND, *supra* note 6, at 67.

235. *Id.* at 20 (citing HAHLO, *supra* note 3).

236. *Id.* at 25. In her report on the well-being of mothers during and after divorce, Professor Judi Bartfeld found that women endure emotional and financial trauma to which men are not subject. Bartfeld, *supra* note 208, at 203-213. Moreover, Professor Rhodes Nuta, in her examination of the emotional aspects of support enforcement, found during divorce, women "may be confronted for the first time in their lives with the reality that they are on their own, either in supporting the children entirely or in getting the judicial system to enforce support." Nuta, *supra* note 208, at 180.

237. MAINTENANCE IN SWAZILAND, *supra* note 6, at 25.

238. *Id.* at 20.

maintenance claim on their own or with the help of an attorney, but rather relies on maintenance officers for enforcement. Although the Act calls upon the Minister of Interior to “designate public officers to appear in Courts in proceedings . . . to perform the functions and duties assigned to maintenance officers,”²³⁹ this has yet to occur. Over thirty years later, Swaziland remains without a corps of dedicated maintenance officers. Until this designation, the Act provides for “the Attorney-General to conduct prosecutions in any Subordinate Court.”²⁴⁰ Thus, prosecutors can act as maintenance officers, and they continue to do so, although only intended as a temporary measure.²⁴¹ To fill the gap, social welfare officers also help out with cases.²⁴² However, neither of these groups is adequately qualified for the job, leaving women and children without a real remedy.

Public prosecutors, overworked and focused on criminal law, are ill-fitted to handle maintenance claims. Dealing with a backlog of criminal cases, prosecutors do not have time for maintenance cases and regard them as less critical, additional work for which they do not fully prepare.²⁴³ The WLSA report found that prosecutors went to court without knowledge of the applicant’s case²⁴⁴ and a clear understanding of the law.²⁴⁵ Prosecutors also have no expertise in family problems and oftentimes lack sensitivity to women’s concerns.²⁴⁶ A Lecturer of Law at the University of Swaziland characterized public prosecutors as “overstretched” and “not very helpful to women.”²⁴⁷

Social welfare officers do not fare much better. In fact, according to the WLSA report, Swazis perceive social welfare officers “as a major obstacle in the successful processing of maintenance claims.”²⁴⁸ Although claims are often instituted at the Social Welfare Office,²⁴⁹ and women feel compelled by procedural barriers to seek the office’s assistance, the “process is tedious” and

239. The Maintenance Act, 1970, § 4(1).

240. The Maintenance Act, 1970, § 4(2).

241. MAINTENANCE IN SWAZILAND, *supra* note 6, at 24.

242. LAW AND THE OTHER SEX, *supra* note 22, at 71.

243. MAINTENANCE IN SWAZILAND, *supra* note 6, at 24; Interview with Prosecutor, in Manzini, Swaz. (Mar. 7, 2006).

244. MAINTENANCE IN SWAZILAND, *supra* note 6, at 34, 36-37 (“[O]fficers were in some instances observed and heard asking applicants about the facts of their case claiming they had not had time to look at the case prior to that moment.”).

245. *Id.* at 34. Prosecutors thus allowed respondents to sidetrack the case with irrelevant issues. In one instance, when the respondent argued that he would not pay maintenance because the applicant had allegedly not taken the child to his parents, the prosecutor asked the court to postpone the hearing so that this visit could occur. *Id.*

246. *Id.* at 34.

247. Interview with Maxine Lengwemya, Lecturer of Law, University of Swaziland, in Kwaluseni, Swaz. (Mar. 7, 2006).

248. MAINTENANCE IN SWAZILAND, *supra* note 6, at 63.

249. *Id.* at 37.

frustrating.²⁵⁰ This is probably the case because, like prosecutors, social welfare officers are overworked and undertrained.²⁵¹ Not only do social welfare officers lack gender awareness,²⁵² but they also do not have the requisite legal expertise. The WLSA report observed that social welfare officers never attended court hearings to provide evidence.²⁵³ Compliance with the Swazi Constitution and international conventions requires reform so that Swazi women will finally have a remedy for their maintenance claims.

Even when a maintenance order is successfully obtained, it cannot always be successfully enforced. The Maintenance Act provides for garnishing wages if the respondent fails to comply with a maintenance order,²⁵⁴ but this is not useful for respondents who are self-employed. Moreover, this provision could be tightened by making garnishee orders automatic upon the issue of a maintenance order so that there is an easier, quicker, and free method of enforcement.²⁵⁵ The Act additionally allows for property to be attached,²⁵⁶ but this is a difficult process, and it is easy to evade such an order. This provision could also be broadened to help reach those working in the informal sectors. Additionally, the Act allows for imprisonment.²⁵⁷ However, this is not a very satisfying remedy as there is no way to obtain maintenance payments from a person who is not working.²⁵⁸ Interviewees were unanimous in their recommendation that the ideal situation would be to imprison defaulters who would then be provided with work according to their skills and ability, and the resulting salary would be apportioned among their dependants.²⁵⁹ Finally, the Act currently allows for the excuse of a delinquent party with a fine “not exceeding two hundred emalangeni,” an insubstantial amount of money.²⁶⁰ Fines must be at least equivalent to the maintenance amount owed.

E. TO CONFORM TO BINDING INTERNATIONAL LAW AND THE CONSTITUTION,
SWAZILAND MUST IMPLEMENT A SERIES OF REFORMS TO ITS MAINTENANCE
SYSTEM.

Accordingly, maintenance law in Swaziland is in dire need of reform to protect women’s and children’s well-being and ensure compliance with constitutional and international obligations. Maintenance obligations should be clearly speci-

250. Interview with Maxine Lengwemya, Lecturer of Law, University of Swaziland, in Kwaluseni, Swaz. (Mar. 7, 2006).

251. MAINTENANCE IN SWAZILAND, *supra* note 6, at 63.

252. *Id.* at 68.

253. *Id.* at 36.

254. *Id.* at 25.

255. *Id.* at 67; *see also* NAMIBIA PROPOSALS, *supra* note 4, at 104 (describing US law), 125.

256. MAINTENANCE IN SWAZILAND, *supra* note 6, at 25.

257. Maintenance Act § 11(1).

258. MAINTENANCE IN SWAZILAND, *supra* note 6, at 47.

259. *Id.* at 48.

260. Maintenance Act § 11(1).

fied, and a precise formula should determine support. There needs to be greater flexibility in the timing of maintenance claims, and there should be room for adjustment. The current enforcement system needs to be revamped, providing women and children with a civil remedy for maintenance claims and enabling them to bring actions for support payments on their own or with the aid of an attorney.²⁶¹ Social welfare officers should simultaneously receive sufficient training in the bringing of maintenance claims.²⁶² Finally, slight amendments to provisions allowing for garnishing wages, attaching property, imprisonment, and fines would help increase their efficacy.

PART V: PROPERTY

A. VIABILITY OF DIVORCE FOR WOMEN IS LINKED TO SECURING PROPERTY RIGHTS.

1. The Right to Property is the Key to Full Economic Rights and a Life with Dignity.

For divorce to be viable for women, they must have secure economic rights protecting them and their children from destitution. The right to property is the key to realization of other economic rights essential for survival, such as the rights to food, clothing, housing, and education,²⁶³ and ability to live in dignity.²⁶⁴ As the CEDAW Committee explained, this right to own and manage property “is central to a woman’s right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate nutrition for herself and for her family.”²⁶⁵

The current divorce system in Swaziland fails to adequately protect women’s right to property, trapping them in relationships that violate their physical integrity and impede the full realization of their human rights. Tying property division to a fault system of divorce leaves women fearful of losing their

261. One of the recommendations in the WLSA report is to enable the self-processing of maintenance claims so that women do not have to go through public prosecutors or the Social Welfare Office. MAINTENANCE IN SWAZILAND, *supra* note 6, at 68.

262. *Id.* at 61 (urging that social welfare officers “receive adequate and appropriate training to enable them to carry out their jobs efficiently as far as processing maintenance cases is concerned”).

263. See the ICESCR, *supra* note 14 (especially articles 11 and 13) for a listing of economic rights.

264. SWAZ. CONST. § 18(1) (“The dignity of every person is inviolable.”). The first article of the UDHR, the foundational human rights document, sets out, “All human beings are born free and equal in dignity and rights,” a sentiment echoed by the preambles to other human rights conventions. ICCPR, ICESCR, CEDAW, CRC Preambles. It also figures prominently in both the African Charter and Women’s Protocol to the African Charter. African Charter, art. 5 (“Every individual shall have the right to respect of the dignity inherent in a human being and to recognition of his legal status.”); Women’s Protocol to the African Charter, art. 3(1) (“Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.”).

265. CEDAW General Recommendation 19, para. 26.

economic support and investments if they attempt to leave the marriage.²⁶⁶ Moreover, the need to refund lobola, a husband's marital power over the couple's property, and dismissal of the wife's indirect contributions to property lead to a skewed and discriminatory regime, which has dire consequences for women's ability to leave abusive and unhappy marriages. As the CEDAW Committee set out, "[A]ny law or custom that grants men a right to a greater share of property at the end of a marriage . . . is discriminatory and will have a serious impact on a woman's ability to divorce her husband, to support herself or her family and live in dignity as an independent person."²⁶⁷

2. International Law and the Swazi Constitution Uphold Women's Property Rights.

International law and the new Swazi Constitution provide explicit protection for women's property rights. International law obligates states to effectively provide the right to property. Under the African Charter, "The right to property shall be guaranteed."²⁶⁸ CEDAW provides that spouses shall have the "same rights . . . in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property."²⁶⁹ The Women's Protocol to the African Charter specifically mandates equality in division of property upon divorce: "in case of . . . divorce . . . women and men shall have the right to an equitable sharing of the joint property deriving from the marriage."²⁷⁰

This international norm is also reflected in Swaziland's Constitution. The Constitution recognizes the "property rights of the individual"²⁷¹ and that each "person has a right to own property either alone or in association with others."²⁷² Moreover, the Constitution specifically call upon Parliament "as soon as practicable after the commencement of this Constitution" to "enact legislation regulating the property rights of spouses."²⁷³ The Constitution thus acknowledges the need for legislative protection for married women's right to own and administer property, joining countries like Ethiopia, Senegal, and Tanzania.²⁷⁴

266. One interviewee admitted, "I would have divorced a long time ago, but cannot leave because I have put in more effort in the house than [my] husband. We stay in different rooms "[My] lawyer told me that if I am the first to initiate divorce, then the husband can take more as I can be the one to be blamed." Interview with Anonymous, translated by Busisiwe Ntsele, in Manzini, Swaz. (Mar. 9, 2006).

267. CEDAW General Recommendation 19, para. 28.

268. African Charter, art. 14; *see also* UDHR, *supra* note 20, art. 17(1) ("Everyone has the right to own property.").

269. CEDAW, *supra* note 12, at art. 16(1)(h).

270. Women's Protocol to the African Charter, art. 7(d).

271. SWAZ. CONST. §14(1)(c).

272. *Id.*, §19(1).

273. *Id.* §34(2). The Constitution further explicitly recognizes women's right to land: "[A] citizen of Swaziland, without regard to gender, shall have equal access to land for normal domestic purposes." *Id.* § 211(2).

274. Ethiopia, art. 35(7) ("Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land."); Senegal, art. 19 («La femme a le droit d'avoir son patrimoine propre comme le mari.

**B. CUSTOMARY AND CIVIL LAW MARRIAGE REGIMES FAIL TO RECOGNIZE
WOMEN'S AUTONOMY AND ECONOMIC CONTRIBUTIONS, VIOLATING THEIR
PROPERTY RIGHTS.**

Both customary and civil law marriage regimes in Swaziland fail to provide adequate protections to women's property rights, recognizing their autonomy and economic contributions. There are three types of marriages in Swaziland: customary marriages, in-community of property civil marriages, and out-of-community of property civil marriages. In-community of property marriage refers to joint ownership of the couple's property by the husband and wife, and out-of-community refers to separate ownership of property.²⁷⁵ If a couple is Swazi, even if they are contracting as civil marriages, their property will be governed by Swazi law and custom unless they specify otherwise. As the Marriage Act sets out, if both parties are Africans, "the marital power of the husband and the proprietary rights of the spouses shall be governed by Swazi law and custom."²⁷⁶ A husband's marital power over his wife and the couple's property comes with both customary and in-community of property marriages (described below). Out-of-community of property can exclude marital power, allowing the wife to manage her own property, but this must be done explicitly through an ante-nuptial contract²⁷⁷ and is extremely rare.²⁷⁸ According to the Deeds Registry Office, only 124 couples signed ante-nuptial contracts from 2001-2005, averaging no more than 25 contracts per year.²⁷⁹

Swazi couples are both unaware of the need for these ante-nuptial contracts and discouraged from using them.²⁸⁰ As an initial matter, Swazi couples entering a civil marriage generally do not realize that their property will be governed by

Elle a le droit de gestion personnelle ses biens.» "The wife has the same right to property as her husband. She has the right to conduct her own affairs."); Law of Marriage Act, § 56, TANZ. LAWS [CAP 29 R.E. 2002] ("A married woman shall have the same right as has a man to acquire, hold and dispose of property, whether movable or immovable, and the same right to contract.").

275. LAW AND THE OTHER SEX, *supra* note 22, at 34-39.

276. Marriage Act § 24; *see also* § 25(1) ("If both parties to a marriage are Africans, the consequences flowing from the marriage shall be governed by the law and custom applicable to them unless prior to the solemnization of the marriage the parties agree that the consequences flowing from the marriage shall be governed by the common-law.").

277. "A woman married out of community of property . . . shall be assisted by her husband in executing any deed or other document . . . unless the marital power has been excluded." Deeds Registry Act § 16 (2).

278. BEYOND INEQUALITIES, *supra* note 119, at 34.

279. Specifically, 13 ante-nuptial contracts were signed in 2000, 31 in 2001, 16 in 2002, 17 in 2003, 23 in 2004 and 24 in 2005. Compiled manually. Source: Deeds Registry Office, Thabisile Langa, Senior Parliamentary Counsel, Attorney General's Office.

280. Moreover, the ability to opt out does not save a discriminatory provision in the law. As the United States Supreme Court held in striking down a statute enabling the husband to unilaterally dispose of joint property unless the wife takes certain steps to protect her interests, "the absence of an insurmountable barrier will not redeem an otherwise unconstitutionally discriminatory law." *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) (internal quotations omitted).

customary law.²⁸¹ Moreover, “Few are aware of the different types of marriages”²⁸² and have a good understanding of the legal terminology and implications.²⁸³ Additionally, out-of-community of property marriages are discouraged by religious authorities for reflecting disunity and selfishness. As one Swazi researcher explained, “people marry in churches, pastors do not tell [couples about signing ante-nuptial contracts], because they feel “out” is somewhat un-Godly—God put them together, so they should . . . jointly [own property].”²⁸⁴

The property rights of Swazi women upon divorce, however, are insecure for all three types of marriage. Women in customary marriages must contend with the refund of lobola, which prevents them from enjoying the products of their labor and denigrates women themselves as property. Women in both civil and customary marriages must struggle with marital power and the husband’s potential to mismanage and misappropriate property to further his own interests. Women in out-of-community of property marriages without marital power find that the value of their domestic activities and indirect contributions to property is overlooked.

1. Requiring a Refund of Lobola in Customary Marriages Commodifies Women Themselves and Chains them to the Marital Relationship.

With the payment of lobola in customary law marriages, women are essentially treated as property themselves and chained to the marital relationship. *Lobola*, or the transfer of cattle or money from the groom’s family to the bride’s, generally concludes marriage negotiations between the two families.²⁸⁵ A common perception is that by paying lobola a man acquires the wife’s productive and reproductive capacities.²⁸⁶ Thus, “if the wife leaves she must leave everything in the house, she must not take anything because whatever she got there, they bought together, whatever happened, everything belongs in the family name” and “there is nothing left for [the wife] to take.”²⁸⁷ Moreover, if the wife seeks to then

281. MARRIAGE AND DIVORCE, *supra* note 29, at 41 (“[C]ouples with a marital problem . . . respond that . . . they thought they were married in community of property.”); *The Legal Situation of Women in Swaziland*, *supra* note 22, at 115 (People “usually discover with shock, much later, that customary law has been imported into their civil marriage in the two most crucial aspects of their lives: marital power and property rights.”).

282. Interview with Veli Ngwenya, WLSA Research Assistant, in Mbabane, Swaz. (Mar. 7, 2006).

283. MARRIAGE AND DIVORCE, *supra* note 29, at 41.

284. Interview with Veli Ngwenya, WLSA Research Assistant, in Mbabane, Swaz. (Mar. 7, 2006).

285. LAW AND THE OTHER SEX, *supra* note 22, at 16.

286. BEYOND INEQUALITIES, *supra* note 118, at 34-35; MARRIAGE AND DIVORCE, *supra* note 29, at 48; LAW AND THE OTHER SEX, *supra* note 22, at 16.

287. Interview with Pastor, translated by Busisiwe Ntsele, in Lulyengo, Swaz. (Mar. 7, 2006); *see also* LAW AND THE OTHER SEX, *supra* note 22, at 41 (explaining that if a “marriage is breaking up,” the wife may be “may be sent to her parents in the clothes she stands in.”).

leave the marriage, her family must return the lobola.²⁸⁸ This is not always possible, and there is a lot of pressure on wives by their families to stay in difficult marriages. As one woman explained, “They tell you if you come back home, . . . there are names they will call you, and you are full of shame.”²⁸⁹ Perhaps a perversion of lobola’s core purpose of linking the two families,²⁹⁰ this is a direct violation of women’s autonomy and dignity.²⁹¹

2. A Husband’s Marital Power in Civil and Customary Marriages Threatens the Wife’s Economic Security and Independence.

The husband’s marital power in both civil and customary marriages cripples women’s ability to attain economic independence. Marital power in civil marriages is an inherent part of in-community of property marriages. As the Deeds Registry Act states, “Immovable property, bonds or other real rights shall not be transferred or ceded to, or registered in the name of a woman married in community of property,”²⁹² and “her husband . . . may . . . alone deal with such property or bond.”²⁹³ The husband is thus the administrator of the joint estate, including all property a woman may have acquired prior to marriage, and the woman is stripped of all decision-making power.²⁹⁴ Besides control over the wife’s property, the husband also represents the wife in court in civil matters and enters into contracts on her behalf.²⁹⁵ As a result, most married women in Swaziland, have no access to loans or credit because they are contractually incapacitated and cannot use property as collateral.²⁹⁶ Marital power in customary marriages is even broader. The husband holds unfettered power over not only the wife’s property, but also her person. He can determine what the wife wears, with whom she associates, and whether she may seek employment or

288. BEYOND INEQUALITIES, *supra* note 119, at 35; MARRIAGE AND DIVORCE, *supra* note 29, at 49; LAW AND THE OTHER SEX, *supra* note 22, at 16.

289. Interview with Xolile Mazibuko, SWAGAA Volunteer, in Manzini, Swaz. (Mar. 6, 2006); see also Interview with Nonhlanhla Shongwe, advocate, Swaziland Action Group Against Abuse, in Manzini, Swaz. (Mar. 8, 2006) (The wife “belongs to the husband’s family,” which “makes it difficult for her to come back home.”).

290. Interview with Xolile Mazibuko, SWAGAA Volunteer, in Manzini, Swaz. (Mar. 6 2006) (“Sometimes they abuse it.”); Interview with Lungile Magagula, Head of Department, Justice Peace and Reconciliation, Council of Swaziland Churches, in Manzini, Swaz.(Mar. 9, 2006) (“The value of it was good, but it has been commoditized now.”).

291. The Human Rights Committee spoke out against the commodification of women in the context of inheritance: “Women may not be treated as objects to be given together with the property of the deceased husband to his family.” Human Rights Committee General Comment 28, para. 18. The same holds true in the context of marriage and divorce. Women cannot be exchanged back and forth by families for property.

292. Deeds Registry Act, 1968, §16(3).

293. Deeds Registry Act, 1968, §16(4).

294. BEYOND INEQUALITIES, *supra* note 119, at 24, 34; LAW AND THE OTHER SEX, *supra* note 22, at 35.

295. *Id.* at 31, 35; BEYOND INEQUALITIES, *supra* note 118, at 34; *The Legal Situation of Women in Swaziland*, *supra* note 22, at 114–15.

296. This is a direct violation of CEDAW, *supra* note 12, at art. 3(b), which obliges states to “ensure, on a basis of equality of men and women, the same rights, in particular, the right to bank loans, mortgages, and other forms of financial credit.”

undergo medical treatment.²⁹⁷

However, a husband's marital power in customary marriages is also more flexible. According to some, a wife may administer minor property.²⁹⁸ When relations with the husband are good, a wife may control "[c]ooking utensils, personal clothing and even the modest profits from a roadside handicrafts or vegetable stall."²⁹⁹ This is in direct contrast with in-community of property marriages, where the Deeds Registry Act legally prohibits women from managing property. But, the non-interference of an "indulgent husband" in a customary marriage abruptly ceases upon break up, and "the woman may well be sent to her parents in the clothes she stands in."³⁰⁰

In this way, property rights for the majority of Swaziland's women are insecure. As scholars have characterized this, the husband "virtually has a free hand to do as he pleases with his wife's property,"³⁰¹ and the wife's position is even worse than that of a minor under guardianship, whom the law protects from the guardian's greed and incompetence.³⁰² During marriage, a husband can dispose of and encumber the wife's property without her consent or even knowledge. There is thus grave potential for abuse, especially as relations between the couple sour. In some cases, for instance, husbands confiscate the profits of their wives' business in order to settle gambling debts.³⁰³ In others, women find their homes "sold, donated or mortgaged without their knowledge or consent, leading to their destitution."³⁰⁴

3. Discounting Swazi Women's Domestic Activities Upon Dissolution of an Out-of-Community of Property Marriage Violates Women's Property Rights.

Imperative to securing women's right to property upon divorce is protecting their indirect contributions that have developed and increased the value of property during the marriage. The general perception, however, is that married Swazi women do not work and are not contributors to the estate.³⁰⁵ As in many

297. LAW AND THE OTHER SEX, *supra* note 22, at 31-33.

298. *Id.* at 41.

299. *Id.* at 41.

300. *Id.* at 41 (internal quotations omitted).

301. *Id.* at 30.

302. *Id.* at 36. "[G]uardianship is conceived in the interests of the minor while the marital power is in the interests of the husband . . . [T]he guardian deals with the ward's assets only within clearly-defined limits and under the vigilant supervision of the High Court." *Id.* at 30.

303. "I have had women clients lose their businesses because their husbands have used them to settle gambling debts. The husbands legally 'own' the business, on paper, even though they contribute nothing financially, and do no work whatsoever," said Fikile Mthembu, a lawyer." *Swaziland: Women Dominate Small Business Sector*, IRIN NEWS.ORG., Aug. 21, 2003, available at http://www.irinnews.org/report.asp?ReportID=36128&SelectRegion=Southern_Africa.

304. WLSA, THE DRAFT CONSTITUTION: WHAT'S IN STORE FOR SWAZI WOMEN? (2003).

305. *E.g.*, Interview with Louskin Fanyana Mabundza, Headteacher, Manzini Nazarene High School, in Manzini, Swaz. (Mar. 7 2006) ("Once [Swazis] get married, [the] wife stays at home, [and the] husband works."); Interview with Teacher, Manzini Nazarene High School, in Manzini, Swaz. (Mar. 7, 2006) ("Most men in Swaziland do not allow their wives to work."); Interview with Zanele Lukhene,

countries, the domestic activities of Swazi women constitute unremunerated work and are deemed wives' marital obligations.³⁰⁶ The CEDAW Committee explained, "In all societies women who have traditionally performed their roles in the private or domestic sphere have long had those activities treated as inferior."³⁰⁷ This ignores the economic contributions of wives' activities on the land and in the home, which maintain and increase the value of property.³⁰⁸ As the CEDAW Committee emphasized, "[S]uch activities are invaluable for the survival of society, and there can be no justification for applying different or discriminatory laws or customs to them."³⁰⁹

In Swaziland, women's labor on the land constitutes the backbone of the country's economy. Agriculture is the largest and most important sector of the Swazi economy, with 70% of farmers engaged in subsistence farming.³¹⁰ In 2002, subsistence farming added 12% to the value of Swaziland's GDP.³¹¹ Crop production is mainly carried out by women because it is culturally female work and because there is a shortage of young men, who are away working in the mines.³¹² As such, the role of Swazi women in the national economy is substantial, and their activities are crucial to the subsistence of the nation, as well as the household. CEDAW explicitly stresses "the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy."³¹³

In addition to cultivation of land, women are active participants in the informal sector of the economy through the production of goods from the land and market vending. According to the UNDP, women dominated the informal sector in

Town Accountant, in Mankayane, Swaz. (Mar. 10, 2006) (explaining that it is "totally not acceptable" to men to have a woman who works).

306. Wives who do not work outside the home are thus advised against out-of-community of property marriages: "The down side of this type of contract [out-of-community] is that a stay-at-home mom has no opportunity to accumulate assets. This option is therefore not recommended for a woman who doesn't have her own income and career." Women24.com, *Before you sign*, available at http://www.women24.com/Women24/Life/CareersMoney/Article/0,7173,1-2-5_7523,00.html.

307. CEDAW General Recommendation 21, para. 11.

308. In his classic work, John Locke emphasizes the importance of labor in giving property its value: "For 'tis labour indeed that puts the difference of value on every thing . . . [T]he improvement of labour makes the far greater part of the value." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 296, in THE HISTORY OF POLITICAL THOUGHT (Peter Laslett ed., 1992). In 1934, Margaret Reid helped define the "household economics" movement, asserting, "If an activity is of such character that it might be delegated to a paid worker, then that activity shall be deemed productive." MARGARET REID, ECONOMICS OF HOUSEHOLD PRODUCTION 11 (1934). She then proceeded to identify activities, such as cooking, cleaning, and child rearing as productive work. *Id.*

309. CEDAW General Recommendation 21, para. 12.

310. WORLD FOOD PROGRAMME, FAO GLOBAL INFORMATION AND EARLY WARNING SYSTEM ON FOOD AND AGRICULTURE, Special Report FAO/WFP Crop and Food Supply Assessment Mission to Swaziland 14 (June 23, 2005), available at http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/008/J5512e/J5512e00.htm.

311. Database of Gender Statistics, World Bank, available at <http://devdata.worldbank.org/data-query>.

312. BEYOND INEQUALITIES, *supra* note 119, at 21.

313. CEDAW, *supra* note 12, at art.14(1).

Swaziland with 59% participation in 2001.³¹⁴ Women thus play an integral role in both the Swazi economy and their family's survival.

Women further contribute to the family income by bearing the burden of household work, such as cooking, cleaning, and child rearing. Husbands in Swaziland do not share the burden of domestic work, deeming it mere household chores. As one Swazi teacher put it: "It is our custom that men come home from work and read [the] newspaper."³¹⁵ However, as the CEDAW Committee explained, it is the "contributions of a non-financial nature by the wife [that] enable the husband to earn an income and increase the assets."³¹⁶

The simultaneous reliance on and disregard for women's economic contributions is not unique to Swaziland. According to a Uganda report, "Women must work, substantially more than do men, in both the 'market' and the 'household' economies. On average, their workdays may be 50% longer, and their work is closely integrated with household production systems."³¹⁷ Similarly, a UNIFEM report found, "Poor women . . . often make an important indirect contribution to household income by substituting long hours of laborious drudgery gathering fuel and water, toiling in low yield subsistence cultivation, or collecting field and forest foods in order to save direct cash outlays."³¹⁸ A UN report highlighted the essential value of women's labor: "Poor households may depend on the economic activities of their women and children for up to 50 per cent income [and] many others generate income in cash or in kind . . . by household production."³¹⁹ Women's activities are thus fundamental to both the household and national economy and must receive sufficient recognition upon divorce.

Moreover, such recognition is mandated by the international law and the Constitution. The CEDAW Committee explicitly declared, "Financial and non-financial contributions should be according the same weight" in the division

314. UNITED NATIONS, EXECUTIVE BOARD OF THE UNITED NATIONS DEVELOPMENT PROGRAMME AND OF THE UNITED NATIONS POPULATION FUND, Second Regular Session, SECOND COUNTRY COOPERATION FRAMEWORK FOR SWAZILAND, 2001-2005 (Sep. 2001), *available at* <http://www.undp.org.sz/ccf.pdf>.

315. Interview with Zakith Simelane, Teacher, Manzini, Swaz. (March 7, 2006).

316. CEDAW Committee, General Comment 21, para. 32. UNIFEM report likewise highlighted: "Through their domestic roles, [women] contribute significantly to the capacity of the male members of their households to function effectively in the labour force." UNIFEM EAST AND SOUTHEAST ASIA REGIONAL OFFICE, DR. LORRAINE CORNE, RURAL DEVELOPMENT AND POVERTY ALLEVIATION IN ASEAN, A GENDER PERSPECTIVE, *available at* <http://www.unifemeseasia.org/resources/techpapers/poverty.htm>.

317. FOREIGN INVESTMENT ADVISORY SERVICE AND THE WORLD BANK, GENDER AND GROWTH ASSESSMENT FOR UGANDA: A GENDER PERSPECTIVE ON LEGAL AND ADMINISTRATIVE BARRIERS TO INVESTMENT 15 (2005), *available at* www.udc.udsm.ac.tz/MEED/Bus%20Env%20Conf%20Cairo%202005/Session%201.2/Session%201.2%20Ellis.doc.

318. UNIFEM EAST AND SOUTHEAST ASIA REGIONAL OFFICE, DR. LORRAINE CORNE, RURAL DEVELOPMENT AND POVERTY ALLEVIATION IN ASEAN, A GENDER PERSPECTIVE, *available at* <http://www.unifemeseasia.org/resources/techpapers/poverty.htm>.

319. David Kertzer, *Household and Gender in a Life-course Perspective*, in WOMEN, HOUSEHOLDS, CHANGE 5 (Eleonora Masini & Susan Stratigos, eds., United Nations University Press 1991), *available at* <http://www.unu.edu/unupress/unupbooks/uu10we/uu10we00.htm#Contents>.

of marital property.³²⁰ The Women's Protocol to the Africa Charter calls for states to adopt legislation and "take the necessary measure to recognise the economic value of the work of women in the home."³²¹ To do otherwise and provide women with no compensation for their domestic activities upon divorce is tantamount to allowing a form of slavery, prohibited by both the Swazi Constitution³²² and international law.³²³ As one Swazi phrased it, "Even if she [the wife] doesn't work [outside the home] . . . she is working in the home; she is taking care of the home."³²⁴

Courts around the world are recognizing the need to compensate women for their domestic services upon divorce. In the South African case *Gates v. Gates*, the court held that a wife's domestic services should be remunerated in the division of property, explaining: "[A]lthough a wife may not, in a positive sense actually bring in or earn any tangible assets or money during marriage, her service in managing the joint household performing household duties, and caring for children, have a very real and substantial value."³²⁵ Likewise, in the United States in *O'Neill v. O'Neill*, the court ruled: "A property division ought to accord value to those non-monetary contributions of one spouse The investment of human capital in homemaking has worth and should be evaluated in a property division incident to dissolution of a marriage . . . including . . . primary caretaking responsibilities."³²⁶ It is time for Swaziland to likewise ensure protection of women's property rights upon divorce.

**C. DIVORCE LEGISLATION MUST DESIGNATE LOBOLA AN UNCONDITIONAL GIFT,
COMPENSATE WOMEN FOR THE HUSBAND'S MISMANAGEMENT OF PROPERTY,
RECOGNIZE WOMEN'S VITAL DOMESTIC ROLE IN THE HOUSEHOLD, AND PROVIDE A
HOME TO THE CUSTODIAL PARENT.**

In order for divorce to be a meaningful option for women in Swaziland, a divorce statute must ensure their property rights. The statute must thus include four central elements: (1) explicit designation of lobola as an unconditional gift, (2) equal property division for customary and in-community of property marriages, with compensation for a husband's mismanagement of property or

320. CEDAW Committee General Recommendation 21, para. 32.

321. Women's Protocol to the African Charter, art. 13(h).

322. SWAZ. CONST. § 14(1) ("The fundamental human rights and freedoms of the individual enshrined . . . are hereby declared and guaranteed, namely . . . protection from . . . slavery."), § 17(1) ("A person shall not be held in slavery or servitude."), § 17(2) ("A person shall not be required to perform forced labour.").

323. African Charter, art. 14 ("All forms of exploitation and degradation of man particularly slavery . . . shall be prohibited."); ICESCR, art. 6(1) ("The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.").

324. Interview with Lousikan Fanyana Mabundza, Headteacher, Manzinin Nazarene High School, in Manzini, Swaz. (Mar. 7 2006).

325. *Gates v. Gates*, 1940 N.P.D. 361, 366 (1940).

326. *O'Neill v. O'Neill*, 536 A.2d 978, 984 (1988).

abuse, (3) explicit recognition of wives' indirect contributions to property through their domestic activities in out-of-community of property marriages, and (4) retention of the home for custodial parents of minor children.

Clarifying that lobola is an unconditional gift would stop the use of this custom to commodify women and trap them in unhappy or abusive marriages. This would meanwhile retain the positive element of lobola as a token of appreciation cementing the link between families.³²⁷ Divorce ends the marital bond, but it need not end the relationship between families. Children especially can benefit from the continuation of family relationships. Ending the refund of lobola would thus strengthen its core purpose. Moreover, the bride's family also gives the groom's family gifts, and these are unconditional.³²⁸

A default of equal division of property should govern for customary and in-community of property marriages, but additional factors should be considered to address certain obstacles women face. Thus, the court may award one spouse an additional amount to offset misappropriation by the other in managing joint property, addressing misuse under marital power.³²⁹ Additionally, women who have been married for a long period of time may have sacrificed an education or professional skills, disadvantaging them upon divorce and necessitating consideration.³³⁰ Likewise, women who experience domestic violence are denied opportunities and face greater challenges to financial security due to the emotional, psychological, and physical constraints placed on them by the abuse.³³¹ In these cases, compensation in the form of property can provide the wife and her children the safety net necessary for an adequate standard of living and a new start in life.

In out-of-community of property marriages, it is imperative that the value of the wife's domestic activities to acquisition, maintenance, and enhancement of property be recognized. In Swaziland, women's labor in the informal sector and their cultivation of land forms the backbone of the economy. Moreover, women's home-making and care-taking responsibilities enable the husband to go out and participate in the market economy.

Finally, the custodial parent must be allowed to retain the marital home until all minor children reach the age of majority.³³² Ensuring that the custodial parent

327. LAW AND THE OTHER SEX, *supra* note 22, at 16; MARRIAGE AND DIVORCE, *supra* note 29, at 100-101 (referring to marriage "as an alliance between two kinship groups" and the central role of lobola in this relationship).

328. *The Legal Situation of Women in Swaziland*, *supra* note 22, at 113.

329. *E.g.*, California Family Code § 2602.

330. NAMIBIA PROPOSALS, *supra* note 4, at 173; *see also* Illinois Marriage and Dissolution of Marriage Act [750 ILCS 5/204] § 503 (c)(d)(1)-(12).

331. A 2002 study found that "the employment rate of abused women, regardless of current marital status, is lower than that for non-abused women." Audra J. Bowles & Shannon N. Seitz, "Domestic Violence, Employment and Divorce," at 3 (2002), *available* at http://www.econ.yale.edu/seminars/labor/lap04/Bowlus_033104.pdf.

332. *See* NAMIBIA PROPOSALS, *supra* note 4, at 103 n.47 (noting that a problem with equal division of property is that it "sometimes forced the sale of the family home, dislocating women and children from

remain in possession of the marital home would protect the children's best interests and help ensure an adequate standard of living. The Committee on Economic, Social, and Cultural Rights stresses the importance of adequate housing as a precondition for the enjoyment of other rights: "The human right to adequate housing, . . . derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights."³³³ The children would thus have the necessary security and stability to grow into productive Swazi citizens.

D. SWAZILAND'S DEVELOPMENT HINGES ON PROTECTION OF WOMEN'S PROPERTY RIGHTS AND THEIR FULL INTEGRATION IN THE ECONOMY.

Recognizing women's property rights and eradicating gender inequality are additionally crucial for Swaziland's development. As the Beijing Declaration and Platform for Action, adopted by the Fourth World Conference on Women, declares, "Women contribute to the economy and to combating poverty through both remunerated and unremunerated work at home, in the community and in the workplace. The empowerment of women is a critical factor in the eradication of poverty."³³⁴ Swaziland's own draft national land policy acknowledges the importance of women's empowerment to development: "Existing gender biases in both social and legal contexts are firstly inequitable, and secondly inhibiting to national development."³³⁵ And, Swaziland's Constitution calls for "all necessary steps so as to ensure the full integration of women into the mainstream of economic development."³³⁶ Currently, Swaziland has an unemployment rate of 40% with 66% of the population living under poverty.³³⁷ Swaziland must take action to emancipate its women and unshackle its economy. As Amartya Sen explains:

[T]he limited role of women's active agency seriously affect the lives of all people—men as well as women, children as well as adults And yet there is plenty of evidence that whenever social arrangements depart from the standard practice of male ownership, women can seize business and economic initiative with much success. It is also clear that

their normal environment."), 173-174, 210; Illinois Marriage and Dissolution of Marriage Act [750 ILCS 5/204] § 503; California Family Code § 2581 (a)-(b).

333. CESCR General Comment 4, para. 1.

334. Beijing Declaration and Platform for Action, adopted by the Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing, September 15, 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995), para. 51.

335. "The draft national land policy," Environmental Consulting Services, <http://www.ecs.co.sz>.

336. SWAZ. CONST. § 59(5); *see also id.* § 59(1) (requiring "all necessary action to ensure that the national economy is managed in such a manner as to maximize the rate of economic development") and § 60(3) ("The State shall give the highest priority to the enactment of legislation for the economic empowerment of citizens.").

337. CIA WORLD FACT BOOK, available at <http://www.cia.gov/cia/publications/factbook/geos/wz.html#Econ>, last updated Jan. 10, 2006.

the result of women's participation is not merely to generate income for women, but also to provide the social benefits that come from women's enhanced status and independence.³³⁸

A World Bank report likewise concludes, "There is considerable empirical evidence of the importance of improving the status of women for improved general welfare."³³⁹ Swaziland thus needs a divorce statute protective of its women's equality and dignity, enabling them to reach their full economic potential.³⁴⁰

PART VI: LEGISLATIVE OBLIGATIONS

A. SWAZI CITIZENS HAVE THE RIGHT TO A LEGISLATIVE REMEDY FOR VIOLATIONS UNDER THE CURRENT DISCRIMINATORY AND UNCLEAR DIVORCE REGIME.

"Brilliant!"³⁴¹ "Yes, please!"³⁴² These were the responses of Swazi women when asked whether they thought a divorce statute that applied to all marriages in Swaziland was a good idea. As one woman put it, "That's a brilliant idea . . . This is what women want and need, a divorce statute they can look to."³⁴³ Moreover, it is these women's right under international law and the new Constitution to have a divorce statute remedying the current unclear, discriminatory, and inadequate system. As CEDAW provides, "States Parties shall take . . . all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."³⁴⁴ Likewise under the CRC, "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being . . . and, to this end, shall take all appropriate legislative and administrative measures."³⁴⁵ Swazi-

338. AMARTYA SEN, DEVELOPMENT AS FREEDOM 191, 201-2 (1999).

339. WORLD BANK, AGRICULTURE AND ACHIEVING THE MILLENNIUM DEVELOPMENT GOALS, AGRICULTURE AND RURAL DEVELOPMENT DEPARTMENT, 25 (2006), available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2006/03/13/000160016_20060313152030/Rendered/PDF/327290white0co15070Ag1MDGs1Complete.pdf.

340. A divorce statute protective of Swaziland's women would both recognize their property rights and enable them to leave abusive and unhappy marriages. Securing women's physical and psychological well-being would also increase their productivity as people with good health can be 20% more productive. *Healthier Workers are More Productive*, PERSONNELTODAY.COM, Sept. 2, 2004, available at <http://www.personneltoday.com/Articles/Article.aspx?liArticleID=28597&PrinterFriendly=true>.

341. Interview with Jabu Phakathi, Married Woman, in Ezulwini, Swaz. (Mar. 7, 2006).

342. Interview with Valentine Paungwayo, Divorced Woman, in Ezulwini, Swaz. (Mar. 7, 2006).

343. Interview with Valentine Paungwayo, Divorced Woman, in Ezulwini, Swaz. (Mar. 7, 2006).

344. CEDAW, *supra* note 12, at art. 3; *see also id.*, art. 2(f) (State must "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.").

345. CRC, *supra* note 15, art. 3(2); *see also id.*, art. 4 ("States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention); ICCPR, art. 2(2) ("[E]ach State Party to the present Covenant undertakes to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."); African Charter, art. 1 ("[P]arties to the present Charter shall

land's Constitution similarly calls for legislation protective of women and children.³⁴⁶ Parliament should fulfill its obligation towards Swaziland's women and children and pass a divorce statute ensuring their basic rights.

B. SWAZILAND'S OBLIGATION TO PASS DIVORCE LEGISLATION REQUIRES THE PROVISION OF A NO-FAULT OPTION FOR DIVORCE, SPECIFIC GROUNDS FOR DIVORCE, CUSTODY DETERMINATIONS IN THE BEST INTERESTS OF CHILDREN, ADEQUATE MAINTENANCE, AND JUST PROPERTY DIVISION.

Parliament must move to pass a divorce statute that provides a way out of unhappy or abusive marriages and ensures custody arrangements in the best interests of children, adequate maintenance, and just property division. As set out in the attached proposed Matrimonial Causes Act, a divorce statute should allow for no-fault divorce for unwanted marriages, while enumerating specific grounds for rights violations in circumstances of physical or economic abuse, adultery, or polygamy. In order to meaningfully protect children's best interests in custody determinations, the statute should explicitly set out this standard, codify factors for court consideration, allow for the child's right to be heard, provide for a default of shared custody, and furnish court-supervised administrative remedies to work in tandem with formal judicial processes. The proposed Act also specifies maintenance obligations, determined by a precise formula, and strengthens enforcement provisions. Finally, the proposed statute provides for equal property division at divorce for both customary and in-community of property marriages, with consideration of special circumstances like mismanagement of property or abuse. For out-of-community marriages, wives' indirect contributions to the acquisition, maintenance, and enhancement of property through their domestic activities must be recognized in property division. Moreover, lobola should be explicitly designated an unconditional gift and the custodial spouse allowed to retain the marital home. Enacting these provisions would help Swaziland "protect and promote the fundamental rights and freedoms of ALL in our Kingdom," as its Constitution aspires.³⁴⁷

recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them."); African Charter on the Rights of the Child, art. 1(1) ("Member States . . . shall undertake . . . to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter."); Women's Protocol to the African Charter, art. 2(1) ("States Parties shall combat all forms of discrimination against women through appropriate legislative . . . measures.").

346. SWAZ. CONST. § 34(2) ("Parliament shall, as soon as practicable after the commencement of this Constitution, enact legislation regulating the property rights of spouses that were married by civil or customary rites."), § 29(7) ("Parliament shall enact laws necessary to ensure . . . a child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents; . . . parents undertake their natural right and obligation of care, maintenance and proper upbringing their of children; and . . . children receive special protection against exposure to physical and moral hazards within and outside the family.").

347. SWAZ. CONST., Preamble.

APPENDIX: THE MATRIMONIAL CAUSES ACT, 2007

I. MEMORANDUM OF REASONS

While marriage is a fundamental institution necessary for the well-being of society, there are circumstances that necessitate legal separation or divorce. Failing and abusive marriages are harmful to both individuals and society. This Act allows men and women to petition for legal separation or divorce when their marriages are no longer working. By setting forth the requirements for and consequences of divorce, this Act clarifies ambiguities in the current common law system and seeks to safeguard the welfare of all the individuals involved. It aims to protect the family by providing for uniform and efficient proceedings, custody determinations in the best interests of children, adequate maintenance, and a just division of property.

The Matrimonial Causes Act does the following:

- Brings Swazi divorce law into compliance with the Constitution and with African and international conventions.
- Applies to both marriages under Swazi law and custom and under civil law.
- Provides for a no fault legal separation and divorce.
- Provides for an unconditional dissolution of marriage where a spouse has committed specified acts in violation of the contract of marriage.
- Provides proceedings to protect spouses and children in abusive relationships.
- Specifies factors for consideration in custody determinations to ensure the child's best interests.
- Recognizes the child's right to be heard in custody proceedings.
- Allows for the sharing of child-rearing responsibilities by divorced parents.
- Requires maintenance for children by both parents regardless of their marital status to ensure an adequate standard of living for all Swazi citizens.
- Specifies factors for the calculation of maintenance obligations.
- Provides for the just division of property, recognizing the contributions of both spouses and the value of essential domestic activities.
- Ensures a home for minor children.
- Provides for efficient and cost-effective proceedings to best protect individuals.

P. M. DLAMINI
ATTORNEY GENERAL

ARRANGEMENT OF SECTIONS

Section Title
Preamble

PRELIMINARY PROVISIONS

1. Short title
2. Application
3. Propagation
4. Interpretation

PART I
PROCEDURE

5. Jurisdiction
6. Language
7. Standing
8. Court Representation
9. In Camera Proceedings
10. Dissolution of Marriage
11. Pleading Requirements
12. Standard of Proof
13. Paternity Disputes
14. Motion by Agreement
15. Interim Relief

PART II
GROUNDS FOR DIVORCE/SEPARATION

16. Grounds for Divorce
17. Legal Separation
18. Divorce Pursuant to Legal Separation
19. Evidence
20. Prohibition of Orders for Restitution of Conjugal Rights

**PART III
CUSTODY**

21. General Principles
22. Custody Determination
23. Shared Custody Arrangements
24. Best Interests
25. The Parenting Plan
26. Court Powers
27. Notice
28. Modification

**PART IV
MAINTENANCE**

29. Child Support Guiding Principles
30. Child Support Payments
31. Spousal Support Payments
32. Modifications
33. Recovery for Support
34. Enforcement
35. Reciprocity with Other Countries

**PART V
PROPERTY**

36. Valuation of Assets and Liabilities
37. Community Property
38. Individual Property
39. Securing Children a Home
40. Property Division for In-Community of Property Marriages
41. Property Division for Out-of Community of Property Marriages
42. Property Division for Customary Law Marriages
43. Debts Incurred
44. Civil Damages

PROPERTY VI
JUDGMENTS AND COSTS

- 45. Final Judgments
- 46. Appeals
- 47. Costs

SCHEDULE I
REPEALS AND AMENDMENTS
THE FAMILY LAW ACT PREAMBLE

Whereas Swaziland committed itself to equality and eliminating discrimination in the Constitution which establishes “[a]ll persons are equal before and under the law in all spheres of . . . economic, social and cultural life and in every other respect and shall enjoy equal protection of the law” and specifies “a person shall not be discriminated against on the grounds of gender” in Sections 20(1) and (2).

Whereas Swaziland committed itself to ensuring full rights for women in the Constitution which requires that “[t]he fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and the Judiciary” and that “[a] person of whatever gender . . . shall be entitled to the rights and freedoms of the individual” in Sections 14(2) and 14(3).

Whereas Swaziland committed itself to repealing discriminatory laws in the Constitution which establishes that “[t]his Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void” in Section 2(1).

Whereas Swaziland committed itself by ratifying the Convention on the Elimination of All Forms of Discrimination Against Women to taking “all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men” in Article 3.

Whereas Swaziland committed itself by ratifying the Convention on the Rights of the Child to “ensur[ing] the child such protection and care as is necessary for his or her well-being . . . and, to this end, . . . tak[ing] all appropriate legislative and administrative measures” in Article 3(2).

Whereas the codification and simplification of separation and divorce procedure enables access and equal protection to all members of Swazi society.

Whereas divorce reform is necessary to protect women’s rights to a marriage of their choice, freedom of association, and physical integrity. Women must be allowed to escape abusive marriages harmful to their life and health.

Whereas legislative guidance is necessary to meaningfully protect children’s best interests.

Whereas custody proceedings must ensure the child's right to be heard, and custody determinations must respect the mother's right to equality and the child's right to parental care.

Whereas specified maintenance obligations and strong enforcement procedures are crucial to assure women and children an adequate standard of living regardless of marital status.

Whereas women have the right to share in property accumulated, maintained, or enhanced by their labor.

Whereas minor children require the security of a home.

The Matrimonial Causes Act shall govern as follows:

Divorce reform is necessary to ensure the following rights:

1. **The Right to Equality and Equal Protection** is provided for in SWAZ.CONST. §§ 14(3), 20(1), 20(2), 28(1); ICCPR, art. 26; CEDAW, art. 2(e), 15(1); African Charter, arts. 3, 18(3); African Women's Protocol, art. 8; UDHR, art. 7.
2. **The Right to a Consensual Marriage** is provided for in SWAZ.CONST. §§ 27(1), (2); ICCPR, art. 23(2),(3); CEDAW, art. 16(1)(a),(b); Women's Protocol to the African Charter, art. 6(a); UDHR, art. 16(1),(2).
3. **The Right to Freedom of Association** is provided for in SWAZ.CONST. §§ 14(1)(b), 25(2); ICCPR, art. 22(1-2); African Charter, art. 10.
4. **The Right to Physical Integrity, including protection of life and health** is provided for in SWAZ.CONST. §§ 15(1), 18(2), 29(7)(d); ICCPR, art. 6(1), 7; ICESCR, art. 12(1); CRC, art. 19; African Charter, art. 5, 16(1); Women's Protocol to the African Charter, art. 4(1), 14(a).
5. **The Right to Judicial Relief** for violations is provided for in SWAZ.CONST. § 14(2); ICCPR, art. 2(3)(a), (b); African Charter, art. 7(1).
6. **The Right to Protection of the Child's Best Interests** is provided for in CEDAW, art. 5(b), 16(1)(d); CRC, art. 3; Women's Protocol to the African Charter, art. 7(c); African Charter on the Rights and Welfare of the Child, art. 4(1).
7. **The Right to Parental Care** is provided for in SWAZ.CONST. §§ 29(3), 29(7)(a); CRC, art. 9(1), 9(3), 10(2); African Charter on the Rights and Welfare of the Child, art. 19(1), (2).

8. **The Equal Right and Responsibility to Provide Parental Care** is provided for in SWAZ. CONST. § 29(7)(c); CEDAW, art. 5(b), 16(1); CRC, art. 18(1); Women's Protocol to the African Charter, art. 6(i), 7(c).
9. **The Right to an Adequate Standard of Living** is provided for in SWAZ.CONST. §§ 29(7)(a), 29(7)(c), 59(1), 211(2); ICESCR, art. 11(1); CRC, art. 27(1), (4); African Charter on the Rights and Welfare of the Child, art. 18(3); Women's Protocol to the African Charter, art. 15, 16; UDHR, art. 25(1).
10. **The Right to Property** is provided for in SWAZ. CONST. §§ 14(1)(c), 19(1), 34(2); CEDAW, art. 16(1)(h); African Charter, art. 14; Women's Protocol to the African Charter, art. 7(d), 13(h), UCHR, 17(1).
11. **The Right to Dignity** is provided for in SWAZ.CONST. § 18(1); preambles of ICCPR, ICESCR, CEDAW, CRC; African Charter, art. 5; Women's Protocol to the African Charter, art. 3(1); UDHR, art. 1.

PRELIMINARY PROVISIONS

Short title

1. This Act may be cited as the Matrimonial Causes Act of 2007.

Application

2. (1) The provisions of this Act govern all marriages within the jurisdiction of Swaziland, including both marriages in accordance with civil rites and in accordance with Swazi law and custom.

(2) The rituals and ceremonies associated with marriages in accordance with Swazi law and custom are recognized, respected, and preserved to the extent they are conducted in a manner consistent with this Act.

- This signals the intent to make this Act apply to marriages under both civil law and Swazi law and Custom.
- Both civil and customary marriages must comply with the new Constitution, which provides, "This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void." SWAZ.CONST. § 2(1); *see also id.* § 252(3) (indicating no recognition or enforcement for any custom "that is "inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity.").

- Similarly, a uniform law governs divorce in both civil and customary marriages in South Africa, Zimbabwe, and Tanzania. NAMIBIA PROPOSALS at 111, 129; Law of Marriage Act, TANZ. LAWS [CAP 29 R.E. 2002].

Propagation

3. The Ministry of Justice and Constitutional Affairs, in cooperation with the Gender Coordination Unit of the Ministry of Home Affairs, shall propagate this Act to the people of Swaziland by delivering it to its fifty-five constituencies.

- In drafting the Constitution, the government of Swaziland visited the 55 constituencies to solicit the opinions of the Swazi people. The government also plans to deliver the enacted Constitution to the people by using similar methods. Interview with Prince David, the Honourable Minister for Justice and Constitutional Affairs, in Manzini, Swaz. (Mar. 9, 2006).
- Similar efforts should be carried out for the Matrimonial Causes Act because marriage and divorce are issues which impact every Swazi, and each individual is entitled to know his or her rights and responsibilities.

Interpretations

4. For the purposes of this section, the following terms shall be defined as:

“Abuse” shall be defined as deliberate acts of violence committed by a family member against the spouse or children, including marital rape and other coerced sexual acts;

“Adultery” shall be defined as voluntary sexual intercourse between one spouse and a person who is not their spouse. This shall not include involuntary sexual intercourse, or rape, of a wife by a man who is not her husband;

- This definition of adultery follows that proposed by H.R. HAHLO, THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE 362 (4th ed. 1975).

“Child” shall be defined as a person below the age of eighteen years.

- This provision is modeled after Children Act, Cap. 59, § 2 (2000) (Uganda).
- International consensus defines a child as a person under the age of 18. CRC, art. 1; African Charter on the Rights and Welfare of the Child, art. 2.

“Community Property” shall be defined as all property acquired by

either spouse subsequent to the marriage, except as provided in this Act;

“Continued Unconsciousness” shall be defined as a persistent vegetative state, as diagnosed by at least two licensed medical doctors with specialization in neurology, and from which there is no reasonable expectation of recovery;

“Custody” shall be defined as responsibility for the child’s physical living arrangements and day-to-day activities and upbringing;

“Divorce” shall be defined as the termination of a marriage for each spouse, subject to the provisions of this Act. The effect of a final judgment of divorce is to restore the parties to the state of unmarried persons;

“Guardian ad Litem” shall be defined as a person appointed to represent the interests of another in specific legal proceedings;

- This definition of “Guardian ad litem” is modeled after that used for “Curator ad litem” in Legal Assistance Center, *Proposals for Divorce Reform in Namibia*, 2000, at 31 [hereinafter **NAMIBIA PROPOSALS**].

“Guardianship” shall be defined as legal responsibility for a child. This term includes the right to make decisions regarding that child’s health, education, property, and financial affairs;

- This definition of “Guardianship” is modeled after District of Columbia Code § 16-914 (2006).

“Incurable Insanity” shall be defined as current and continued significant mental illness, as diagnosed by at least two licensed psychologists, for which the patient has been hospitalized, and from which mental illness there is no reasonable expectation of recovery;

“Irreconcilable Differences” shall be defined as the existence of substantial reasons for a spouse not to continue in the marriage;

- This definition of irreconcilable differences is modeled after California Family Code, Cal Fam Code § 2311 (2006)

“Irretrievable Breakdown” shall be defined as the state a marriage has reached when there is no reasonable prospect of the restoration of normal marital relations between the spouses;

“Joint Guardianship” shall be defined as an arrangement where both parents have an equal right to make legal decisions on behalf of the child, although the child may reside primarily with one parent;

- This definition of “joint guardianship” is modeled after NAMIBIA PROPOSALS at 105.

“Joint Custody” shall be defined as an arrangement that may give each of the two parents custody of the child for alternating periods of equal duration or where physical custody is otherwise equally split between both parents;

- This definition of “joint custody” is modeled after NAMIBIA PROPOSALS at 29.

“Legal Separation” shall be defined as the termination of the personal effects of a marriage, while the legal effects of the marriage subsist. Legal Separation may be short-term, long-term, or permanent, at the discretion of the spouses;

“Lobola” shall be defined as cattle or payment transferred to the bride’s family by the groom upon marriage

“Marital Power” shall be defined a husband’s power to manage his wife’s property and property in the joint estate;

“Marital Rape” shall be defined as one spouse forcing the other spouse to have sexual intercourse against his or her will;

“Polygamy” shall be defined as the contraction of a new marriage by a spouse, in addition to an already subsisting marriage. This shall include practices that are otherwise condoned by customary law;

“Reasonable Access” shall be defined as access by the non-custodial parent to the child at reasonable times and in reasonable places;

“Shared Custody” shall be defined as an arrangement in which the divorced mother and father share physical responsibility for the child, although this physical responsibility may not necessarily be split equally;

- This definition of “shared custody” is modeled after NAMIBIA PROPOSALS at 108.

“Separate Property” shall be defined as any property that is acquired and administered by the respective spouses before and subsequent to the marriage, except as provided in this Act;

“Sole Guardianship” shall be defined as an arrangement where one parent takes full legal responsibility for the child;

“Sole Custody” refers to a custody arrangement where the child resides with one parent, that parent takes full physical responsibility for the child, and that parent determines most, if not all, of the decisions regarding that child’s

day-to-day upbringing;

- This definition of “sole custody” is modeled after NAMIBIA PROPOSALS at 105.

“Spouse” shall be defined as a partner in a marriage;

“Unbearable Living Conditions” shall be defined as conditions stemming from economic neglect or abuse by a spouse, leading to an intolerable living situation;

“Visitation” shall be defined as the non-custodial parent’s right to visit with a child either in supervised or unsupervised environments;

“Voidable Marriage” means a marriage that may be nullified because at the time of the marriage: (1) either party was suffering from recurrent attacks of insanity; (2) either party was under the age of consent; or (3) valid consent was not obtained by either party. A voidable marriage is for all purposes a valid marriage until it is annulled by a decree of the court.

- This definition borrows from Tanzania’s Law of Marriage Act. Law of Marriage Act §39 (a)(iii)(iv), TANZ. LAWS [CAP 29 R.E. 2002]. It should correlate with the age of consent provisions and provide a civil means of enforcing age of consent provisions. These marriages are voidable rather than void because the party married under illegal circumstances may nonetheless want to remain in the marriage.

PART I PROCEDURE

Jurisdiction

5.

(1) Parties can initiate suit under this section of the Act in the Swazi Courts, Magistrate Courts, or High Court.

- This Act empowers both civil and customary courts to hear petitions, ensuring maximum accessibility and convenience to the parties. Parties can also initiate proceedings directly in the High Court, which currently handles custody and complex legal determinations. This along with the appeals provisions below should ensure this Act is correctly applied.

(2) A court shall have personal jurisdiction in an action if either party is:

- (a) domiciled in the court's area of jurisdiction on the date on which the action is instated; or
- (b) ordinarily resident in the court's area of jurisdiction on the said date and for a period not less than one year immediately prior.

- The domicile provision mirrors domicile provision in the South African and Scottish law. Section §2320 of the California Family Code provides that at least one of the parties must have been a resident of California for at least six months and a resident of the court in which the petition is filed for three months.
- This provision anticipates marriages to other nationalities in Swaziland. It also protects individuals where one spouse flees the country in hopes of avoiding litigation.

Language

6.

- (1) Proceedings under this Act shall take place in siSwati unless either party or the judge hearing the matter does not understand siSwati.
 - (a) If any of the relevant parties do not speak siSwati, but they all speak English, proceedings shall take place in English.
 - (b) If any of the relevant parties do not speak siSwati or English, a qualified translator should interpret in the proceedings.
 - (i) Qualified translators must have appropriate university accreditation.
 - (ii) Translation should reflect the words actually spoken as closely as possible.
- (2) In case of appeal, transcripts may be translated into English as necessary.

- The provision attempts to make the civil courts more accessible to Swazi citizens. Conducting court business in English is an outdated relic of earlier colonial times. Because magistrates and judges now speak siSwati, proceedings should take place in the language of the people.
- This would also deal with the current rampant problem of translators distorting meanings and using biased language. *WOMEN AND LAW IN SOUTHERN AFRICA, MAINTENANCE IN SWAZILAND* 33-34, 62 (1992). In cases where translation is still necessary, requiring appropriate qualifications and university accreditation will hopefully ensure it is carried out professionally.
- This provision also takes away one advantage of going to the Swazi courts instead of the civil courts.

Standing

7.

- (1) Either spouse has the right to file for a divorce or legal separation.

- This provision is a common provision in divorce statutes. *E.g.*, Swedish law; Law of Marriage Act, § 99, TANZ. LAWS [CAP 29 R.E. 2002].

- (2) Underage or not consenting parties to a marriage can seek nullification either on their own or through a guardian ad litem.

Court Representation

8.

- (1) Parties can bring actions on their own or through the representation of attorneys.
- (2) Nongovernmental Organizations (NGOs) can advise and assist parties in the drafting of court documents.
- (3) The court shall provide parties with simplified affidavit forms in siSwati to lodge complaints and request desired relief.

- This provision is a designed to increase court accessibility to all members of society. *See* MAINTENANCE IN SWAZILAND 63, 67.

In Camera Proceedings

9. Proceedings shall take place in camera upon either party's request. No person whose presence is not necessary shall be present at an inquiry, except with the permission of the court.

- This language is based on section 6(2) of the Maintenance Act.
- This provision aims to promote justice and the use of the law by addressing the concerns of parties reluctant to air their personal matters in open court. *See* MAINTENANCE IN SWAZILAND 24, 67.

Dissolution of Marriage

10. A marriage is legally dissolved either by the death of one of the spouses or by divorce:

(1) Upon the death of either spouse, as determined by a medical professional or ordered by a court, the marriage between the spouses shall for all purposes be deemed to have been dissolved by death, regardless of whether the marriage is under customary or civil law.

(2) Due to the nature of polygamous marriages, each wife is married to the husband only, thus the death of one wife does not affect the marital status of the other wife or wives.

- This mirrors South Africa's Dissolution of Marriage on Presumption of Death Act 23 of 1979 § 1 (S. Afr.) and Tanzania's Law of Marriage Act, § 12, TANZ. LAWS [CAP 29 R.E. 2002].
- Currently, under customary law, death does not dissolve a marriage. Certain obligations continue, and the family of the deceased may provide the remaining spouse with a substitute spouse. THANDBANTU NHLAPO, MARRIAGE AND DIVORCE IN SWAZI LAW AND CUSTOM 75-76 (Websters Ltd. 1992); Zakhe Hlanze & Lolo Mkhabela, BEYOND INEQUALITIES: WOMEN IN SWAZILAND 35 (1998).

Pleading Requirements

11.

- (1) In proceedings for divorce or legal separation, the petition shall set forth the following:
- (a) the date of the marriage
 - (b) if any children and how many
 - (i) children born before the marriage may be listed
 - (ii) a determination of paternity may be made in the action
 - (c) the age and birth of each minor child
 - (d) if there was a previous separation, the date of the separation
 - (e) a plain statement of the facts establishing the basis for relief requested.

- This provision mirrors California Family Code §2330.

- (2) A divorce will not be granted without also providing for the custody of children, maintenance, and the division of property.

Standard of Proof

12. Unless otherwise specified, the standard of proof in proceedings under this Act shall be on the balance of probability.

- This is modeled on Section 1(6) of the Scottish Divorce Act of 1975.

Paternity Disputes

13.

- (1) If the paternity of any child is in dispute in any proceeding under this Act, the burden of proof will shift to the alleged father where the mother testifies under oath that she had sexual intercourse with the alleged father during the relevant time period when the child was conceived.
- (2) Upon such testimony, it will be presumed that the alleged father fathered the child unless he puts forth DNA (Deoxyribonucleic Acid) evidence proving otherwise.

- Shifting the burden to the father in paternity disputes protects women and children. In many cases, the unmarried father can escape paying child support under current law by denying paternity. As a result, children grow up without enough food, health care, and education.

Motion by Agreement

14.

- (1) Parties can move for divorce based on irreconcilable differences or irretrievable breakdown or for legal separation through a joint affidavit when they are in agreement.
- (2) Parties may stipulate as to child custody, support, or property division subject to court approval as long as:
 - (a) there is no coercion or duress
 - (b) the parties are fully informed of their rights
 - (c) the agreement is in the best interests of any children and ensures their needs will be met.

- This provision will encourage the amicable, efficient, and cost-effective resolution of disputes.
- However, private negotiations will take place under the backdrop of laws guaranteeing certain standards, and agreements must be with the full, free, and informed consent of parties. Moreover, judicial review will protect vulnerable parties from coercion and ensure the best interests of children.

Interim Relief

15. (1) The summons shall contain a temporary restraining order:
- (a) restraining both parties from removing the minor child or children of the parties, if any, without the prior written consent of the other party or an order of the court;
 - (b) restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life, and requiring each party to notify the other party of any proposed extraordinary expenditures at least five business days before incurring those expenditures and to account to the court for all extraordinary expenditures made after service of the summons on that party; and
 - (c) notwithstanding the foregoing, nothing in the restraining order shall preclude a party from using community property, quasi-community property, or the party's own separate property to pay reasonable attorney's fees and costs in order to retain legal counsel in the proceeding.

- This is modeled after the California Family Code § 2040.

- (2) While proceedings are pending, the court may order:
- (a) temporary support payments;
 - (b) a contribution of costs to the pending action;
 - (c) interim custody of any child; and
 - (d) interim access to any child.

- This is modeled after High Court Rules, 1969, § 43 (Swaz.). PART II

**PART II
 GROUNDS FOR DIVORCE/SEPARATION**

Grounds for Divorce

16. Divorce or legal separation of the parties may be based on any of the following grounds, which shall be pleaded generally:

- (1) Irreconcilable Differences between the Spouses or Irretrievable Breakdown of the Marriage;
- (2) Incurable Insanity or Continued Unconsciousness;
- (3) Abuse of the Spouse or Children;
- (4) Unbearable Living Conditions;
- (5) Adultery; and
- (6) Polygamy

- **Combined Fault/No-Fault System:**

- This proposal recommends a combined fault/no-fault system for divorce in Swaziland. It adapts and expands on existing common-law grounds, while also providing parties with a less contentious no-fault option. Such a system would hopefully enable a smooth transition from current fault-based common law grounds.
- This system has the advantage of (1) general no-fault grounds for divorce, reducing contention and eliminating the requirement of guilt by one of the spouses when the relationship is no longer viable, while also (2) explicitly legislating certain automatic grounds, not contingent on further judicial discretion, to protect against infringements of fundamental rights.
- This reflects the views of Swazi citizens, who want a divorce regime responsive to specific violations, such as adultery and abuse, while also allowing parties to end the marriage “when the love is gone.” *E.g.*, Interview with Female Senator, in Ezulwini, Swaz. (Mar. 7, 2006).
- This type of combined fault/no-fault system is similar to the system implemented in Denmark’s Act on the Contraction and Dissolution of Marriage, Act No. 256 of 4 June 1969, *available at* <http://www2.law.uu.nl/priv/cefl/Reports/pdf/DenmarkApp02.pdf>.

- **No-Fault Provisions:**

- No-fault divorce eliminates the potentially embarrassing and oftentimes unrealistic requirement of guilt by one spouse and reduces contentiousness in divorce by providing for divorce on a finding that the relationship is no longer viable. It further may help prevent future violence and abuse.
- The provision for no-fault divorce is closely modeled after that in South Africa’s divorce statute. Divorce Act (S. Afr.) art. 4, No. 10 of 1979.
- Irretrievable breakdown of a marriage is a ground for divorce in South Africa, Denmark, California (USA), Canada, and most other countries. The format and evidence required from these three countries influenced the formulation of this proposed ground. Divorce Act (S. Afr.), No. 70 of 1979, Act on the Contraction and Dissolution of Marriage (Den.), Act No. 256 of 4 June 1969, *available at* <http://www2.law.uu.nl/priv/cefl/Reports/pdf/DenmarkApp02.pdf>; Cal. Fam. Code § 2310.
- Incurable insanity is offered as a supplemental no-fault ground for divorce, in conjunction with irretrievable breakdown or irreconcilable differences in South Africa and California (USA).

- **Fault-Based Grounds:**

- Abuse:

- When Swazis were interviewed regarding desired grounds for divorce, nearly all of the interviewees suggested physical abuse or domestic violence as a primary ground upon which divorce should be granted. *E.g.*, Interview with Michael Bhekithemba Dlamini, Attorney, in Manzini, Swaz. (Mar. 6, 2006); Interview with Lucky Maseko, Married Man / Taxi Driver, in Manzini, Swaz. (Mar. 6, 2006); Interview with Anonymous Citizen, in Manzini, Swaz. (Mar. 7, 2006).
- The Swazi Constitution explicitly provides, “A person shall not be subjected to torture or inhuman or degrading treatment or punishment.” SWAZ. CONST. § 18(2). This right to be free from torture and inhuman or degrading treatment is violated if there is not an option to escape a violent and abusive marriage.
- This right is also protected under international law. ICCPR, art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment . . .”); African Charter, art. 5 (“Every individual shall have the right to the respect of the dignity inherent in a human being All forms of exploitation and degradation of man particularly . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”); Women’s Protocol to the African Charter, art. 4(1) (“Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman, or degrading . . . treatment shall be prohibited.”); CRC, art. 19 (“States Parties shall . . . protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.”).

- **Unbearable Living Conditions:**

- Unbearable living conditions should be provided as a ground to remedy economic neglect or abuse of a spouse or children. Economic neglect may leave families with inadequate housing, food, and medical care. Economic abuse includes financial manipulations, such as taking a spouse’s money or wages, preventing him her from having a job, and gambling away joint funds.
- According to SWAGAA, nearly 50% more women sought relief and counseling for economic abuse than for physical abuse from April 2004 to February of 2005. SWAGAA Website, <http://www.swagaa.org.sz/Counsel.htm>.

>Adultery:

- This proposed ground parallels the common law ground of adultery, but reduces the evidence required.
- Adultery should also be considered in the context of the AIDS crisis in Swaziland. Swaziland currently has the world's highest AIDS infection rate, with 42.6% of the population infected. Further, 56% of pregnant women between the ages of 25-29 are infected. "AIDS scourge in Africa shows urgent need for new women's agency: UN envoy" UN Envoy's Report on Visit to Swaziland and Lesotho, (March 17, 2006), available at <http://www.un.org/apps/news/story.asp?NewsID=17847&Cr=hiv&Cr1=aids>.

>Polygamy:

- Many Swazis expressed an interest in allowing a woman the ability to divorce her husband if he takes another wife without her consent. *E.g.*, Interview with Teacher, Nazarene High School, in Manzini, Swaz., (Mar. 7, 2006).
- Bigamy is recognized as a ground for divorce in other countries, including Denmark. Act on the Contractation and Dissolution of Marriage (Denmark), Act No. 256 of 4 June 1969, available at <http://www2.law.uu.nl/priv/cefl/Reports/pdf/DenmarkApp02.pdf>.
- Polygamy should also be considered in the context of the AIDS crisis in Swaziland, as discussed above for adultery.
- Moreover, polygamy is a severe violation of women's equality and dignity. Human Rights Committee General Comment 28, para. 24; CEDAW General Recommendation 21, para. 14.

Legal Separation

17. Legal Separation shall be granted as follows:

- (1) A spouse who finds it intolerable to continue cohabiting with the other spouse shall be entitled to a legal separation;
- (2) A spouse may also petition the court for legal separation based on one of the grounds listed in this Act;
- (3) An order for legal separation shall be granted only at the request of one or both spouses;
- (4) The effects of legal separation shall cease if the spouses resume cohabitation for longer than 30 days, or if they continue cohabiting;
- (5) A court shall not require any period of separation prior to the consideration of an action for divorce;
- (6) Legal separation may subsist indefinitely, no divorce will follow except at the request of one or both spouses, subject to the provisions of this Act.

- This provision for legal separation is modeled after Denmark's Act on the Contraction and Dissolution of Marriage, Act No. 256 of 4 June 1969. *available at* <http://www2.law.uu.nl/priv/cefl/Reports/pdf/DenmarkApp02.pdf>.

Divorce Pursuant to Legal Separation

18. Divorce shall be granted on the basis of legal separation if the following circumstances exist at the time of the divorce action:

- (1) The spouses shall be entitled to divorce after 6 months' judicial separation if they are agreed on a divorce;
- (2) Either spouse shall be entitled to a divorce after 12 months' judicial separation;
- (3) No proof of fault or other evidence shall be required to obtain a divorce subsequent to legal separation, only the requisite length of time as stated in (1) and (2) of this section.

- This provision for divorce following legal separation derives from Denmark's Act on the Contraction and Dissolution of Marriage, Act No. 256 of 4 June 1969.
- Allowing Divorce solely upon the basis of a couple being legally separated for a set period of time is another way of providing an option for divorce that does not require a showing of fault by one of the spouses, as well as allowing an interim period of time during which the spouses can seek reconciliation if they desire.

Evidence

19. The evidence necessary to grant a divorce on the basis of each ground shall be as follows:

- (1) Irreconcilable differences of the spouses or irretrievable breakdown of the marriage shall be proven by:
 - (a) the agreement of the spouses that the marriage has broken down as a result of irreconcilable differences between them; or
 - (b) a showing that that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action; or
 - (c) a showing of evidence by either party that the marriage relationship between the parties to the marriage has reached such a state of

disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them; or

- (d) any of the assertions in (a), (b), or (c) shall be sufficient to prove the breakdown of a marriage, but may also be supported by additional proof of neglect, abuse, adultery, or polygamy by the petitioning spouse.

- The explicit provision in (d) is intended to provide a safeguard against judicial interpretation of the no-fault provision as requiring proof of a fault-based ground (such as in Zambia under the English Matrimonial Causes Act of 1973). Proof of fault by one spouse may be used to supplement a no-fault action for divorce, but must not be required by any judge to show the irretrievable breakdown of a marriage.

- (2) Incurable insanity or continued unconsciousness shall be proven as follows:
- (a) to show incurable insanity: Medical testimony of at least two psychologists that the non-petitioning spouse was incurably insane at the time of the petition, is in a facility for treatment of mental illness, and will continue to be insane, with no reasonable expectation of recovery.
- (b) to show continued unconsciousness: Medical testimony of at least two medical doctors specializing in neurology that the non-petitioning spouse is in a persistent vegetative state, and that there is no reasonable expectation of recovery.

- Incurable insanity or continued unconsciousness as a ground and the related standard of proof is closely modeled after the similar provision in the South African Divorce Act. Divorce Act (S. Afr.), art. 4, No. 70 of 1979.

- (3) Abuse of the spouse or children shall be proven by:
- (a) physical evidence of deliberate acts of violence against the petitioning spouse or the children, including actual bruises or other physical indications of violence on the person, or dated and verifiable photographs of such physical indications, in conjunction with affidavits or under-oath testimony that the non-petitioning spouse caused such injuries; or
- (b) eyewitness under-oath testimony of a third party that they personally observed, with specificity, the non-petitioning spouse committing vio-

- lence against the petitioning spouse or their children, including striking them with any object or any part of their own person; or
- (c) the threat of violence or death by the non-petitioning spouse to the petitioning spouse or their children, to be shown in writing on a verifiable document or through the under-oath testimony of at least two eyewitnesses; or
 - (d) evidence of marital rape or sexual abuse.
- (4) Unbearable living conditions shall be proven by evidence showing that the petitioning spouse or any children have been subject to economic neglect or abuse by the other spouse.
- (a) To determine neglect, the court should consider factors including but not limited to:
 - (i) adequacy of housing;
 - (ii) adequacy of resources provided for food and nutrition;
 - (iii) adequacy of resources provided for medical care.
 - (b) To determine economic abuse, the court should consider instances including but not limited to:
 - (i) taking a spouse's money or wages;
 - (ii) preventing a spouse from having a job;
 - (ii) employing a spouse without a salary; and
 - (iii) gambling away joint funds.
- (5) Adultery:
- (a) shall be proven by
 - (i) under-oath testimony of the person with whom the non-petitioning spouse committed adultery, confirming the commission of said adultery; or
 - (ii) a DNA test showing that the non-petitioning spouse has begotten a child with a person other than their spouse during the term of the marriage; or
 - (iii) eyewitness under-oath testimony of a third party that they personally observed, with specificity, the non-petitioning spouse commit adultery.
 - (b) adultery shall not be proven when the spouses have recommenced cohabitation after the discovery of the adultery, or when cohabitation has been uninterrupted.
 - (c) divorce shall not be granted on the ground of adultery unless the action for divorce is commenced within 180 days of the date that petitioning spouse becomes aware of the non-petitioning spouse's adultery.
 - (d) divorce shall not be granted on the basis of a sexual relationship which existed solely after the spouses had obtained an order for legal separation.

- The proposed standard of proof is intended to allow adultery to remain a ground for divorce, while making the burden of proof more realistic.
- Provisions (d) and (e) are intended to address the defenses of condonation and connivance that are often raised under the common law ground of adultery.

(6) Polygamy shall be proven by:

- (a) proof of the registry of more than one marriage subsisting at the same time, in which the non-petitioning spouse is named as a party; or
 - (i) the second and subsequent marriage must have been entered into within 5 years of the date of the Divorce Action.
 - (ii) the registry of a marriage as can be shown through certified photocopies of registration records, or through the presentation of actual marriage certificates.
- (b) under-oath testimony of a third party, confirming the existence of another marriage which has occurred within the past 5 years, or which will occur in the next 60 days, to which the non-petitioning spouse is a party;

Prohibition of Orders for Restitution of Conjugal Rights

20. Judicial orders for the restitution of conjugal rights shall be prohibited. Under no circumstances shall a court require evidence of a spouse's refusal to restore conjugal rights before granting the petitioning spouse a divorce.

- This explicit prohibition of orders for restitution of conjugal rights is intended to avoid any uncertainty on the part of judges regarding the obsolete and impermissible status of these orders.
- This provision amends the High Court Rules, specifically repealing § 44, regarding Restitution of Conjugal Rights.
- This prohibition is similar to that enacted in South Africa, Divorce Act (S. Afr.) art. 14, No. 70 of 1979.
- Orders for restitution of conjugal rights are dangerous and potentially life-threatening for women in situations of domestic violence, who would subject themselves to further violence in restoring conjugal rights. These orders violate women's physical integrity, freedom of association, and right to a consensual relationship by denying them a divorce on the basis of their spouse's willingness to resume cohabitation and sexual relations with them.

PART III CUSTODY

General Principles

21.

- (1) No decree of divorce shall be granted until the court is satisfied that the arrangements made for the children are satisfactory or the best that can be made under the circumstances.

- This language is inspired by recommendations by Namibia's Legal Assistance Centre. NAMIBIA PROPOSALS at 120.
- The rationale behind this provision is that children are the persons most negatively affected by divorce procedures themselves, as well as the time that it takes to complete them. Furthermore, children also benefit from divorce, because it often relieves them from the stress of violent or conflict-ridden family lives. Thus, children will benefit from the expedient solidification of all arrangements that concern them in divorce proceedings.
- The phrase "satisfactory arrangements made for the children" may include interim custody and access orders.

(2) In any proceeding between parents in which the custody of a child is raised as an issue, the best interests of the child shall be the primary consideration.

- Based upon District of Columbia Code § 16-914 (a)(1) (2006).
- The best interests standard is firmly ingrained in international law. CRC, art. 3 ("In all actions concerning children . . . the best interests of the child shall be a primary consideration."); CEDAW, art. 16(d) ("[I]n all cases the interests of the children shall be paramount."), art. 5(b) (" . . . it being understood that the interest of the children is the primordial consideration in all cases"); African Charter on the Rights and Welfare of the Child, art. 4(1) ("In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."); Women's Protocol to the African Charter, art. 7(c) ("In case[s] of separation, divorce or annulment of marriage the interests of the children shall be given paramount importance."); Human Rights Committee General Comment 17, para. 6 ("If the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children . . .").

- The domestic laws of countries worldwide similarly espouse the best interests standard. S. AFR. CONST § 28(2) (1996) (“A child’s best interests are of paramount importance in every matter concerning the child.”); Child’s Rights Act No. 26 (2003) 116:90 O.G., A451-679 § 1 (Nigeria) (“In every action concerning a child, . . . the best interest of the child shall be the primary consideration.”); *Id.* § 71 (“Where in any proceedings before a court the custody or upbringing of a child . . . is in question, the court shall, in deciding that question, regard the welfare of the child as the first and paramount consideration.”); Family Law Act, 1975, § 65E (Austl.) (“In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.”); NAMIBIA PROPOSALS at 134 (quoting the Zimbabwe Customary Law and Local Courts Act) (“[I]n any case relating to the custody of children the interests of the children concerned shall be the paramount consideration irrespective of which law or principle is applied.”); Law of Marriage Act, § 125(2), TANZ. LAWS [CAP 29 R.E. 2002] (“In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant.”); Children Act, Cap. 59, Schedule 1, § (1) (2000) (Uganda) (“Whenever the State, a court, a local authority or any person determines any question with respect to . . . the upbringing of a child . . . , the child’s welfare shall be the paramount consideration.”)

(3) The guilt or innocence of either or both parents shall in no circumstances be treated as conclusive considerations in custody determinations.

- Custody determinations should not be penalizing the guilty party in divorce proceedings, but rather focus on the child’s well-being.
- However, the guilt of a party “may have an indirect bearing,” such as when domestic violence is involved. NAMIBIA PROPOSALS at 55-56.

(4) The illegitimacy of a child shall have no bearing upon custody determinations.

- This is in line with both Swaziland’s new Constitution and international law. SWAZ. CONST. § 29 (“Children whether born in or out of wedlock shall enjoy the same protection and rights.”); UDHR, art. 25(2) (“All children, whether born in or out of wedlock, shall enjoy the same social protection.”).

- (5) The race, color, national origin, political affiliation, sex, or sexual orientation of a party shall not be conclusive considerations.

• Based upon District of Columbia Code § 16-914 (a)(1) (2006).

Custody Determination

22.

- (1) Custody may be awarded to either parent or to a third party, such as a grandparent or to a primary caretaker.
- (a) Third-party applications for custody or access can only be brought with special permission from the court.

• The language in the above provisions is inspired by NAMIBIA PROPOSALS at 107.

• An award of custody to a third party should be rare and must be predicated upon a court's finding of special circumstances.

- (2) The court shall make a determination as to the guardianship and the custody of a child. A custody order may include any combination of the following arrangements:

• Based upon District of Columbia Code § 16-914 (a)(1) (2006).

- (a) joint/sole guardianship;
 (b) joint/shared/sole custody;

• While joint custody is calls for fifty percent split of physical responsibility for the child, shared custody allows for more flexible arrangements. *E.g.*, NAMIBIA PROPOSALS at 108.

• Sole guardianship and sole custody are not presumptively in the best interests of children, because it is in their best interests to develop meaningful relationships with both its parents. However, a "court may . . . award . . . sole custody of a minor child to one of the parents if it is shown that it is in the child's best interests to do so." NAMIBIA PROPOSALS at 121.

- (c) visitation; or
 (i) Where a court awards sole custody to one or the other parent, it

may also issue an order specifying the visitation terms for the non-custodial parent;

- (ii) A court may also issue an order stating that the custodial parent is forbidden to remove the child or children from the court’s jurisdiction;

- Modeled on NAMIBIA PROPOSALS at 121.

- (iii) A court may also issue a visitation order stating that the non-custodial parent is forbidden to visit with the child without the custodial parent’s express or implied permission;
- (iv) Where a court has not specified the non-custodial parent’s visitation terms, that parent is entitled to reasonable access of the child.

- Based upon NAMIBIA PROPOSALS at 121, 134.
- The term “reasonable” is to be given meaning by a careful evaluation of the facts of each individual case.

- (A) “Reasonable access” entails access at reasonable times and in reasonable places.
- (B) The term “reasonable” is to be given meaning by a careful evaluation of the facts of each individual case;
- (B) “Access” refers to a person’s ability to be a part of or to have knowledge of a child’s life.
- (d) any other custody or guardianship arrangement the court may determine is in the “best interests” of the child.
- (3) Each custodian will have the authority to make decisions concerning the health, safety, and welfare of the child that need immediate attention.

Shared Custody Arrangements

23.

- (1) Unless the court determines that it is not in the best interests of the child, the court shall issue an order for shared custody. This shall provide for frequent and continuing contact between each parent and any minor children, enabling the sharing of child-rearing responsibilities and the continuation of a nurturing relationship between the children and parents regardless of marital status.

- Based upon District of Columbia Code § 16-914 (a)(2) (2006).
- International law recognizes that children are entitled to a relationship with both parents. CRC, art. 9(1) (“State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities . . . determine . . . that such separation is necessary for the best interests of the child.”), art. 9(3) (“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis.”), art. 10(2) (“A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents.”); African Charter on the Rights and Welfare of the Child, art. 19(1) (“Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible have the right to reside with is or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.”), art. 19(2) (“Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.”); Human Rights Committee General Comment 17, para. 6 (“If the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, . . . to guarantee personal relations with both parents.”). *See also* Family Law Act, 1975, § 60B(2)(a) (Austl.) (“[C]hildren have the right to know and be cared for by both parents, regardless of whether their parents are married, separated, have never married or have never lived together.”).
- Parents also have mutual obligations to care for children. SWAZ. CONST. § 29(7)(c) (“Parliament shall enact laws necessary to ensure that . . . parents undertake their natural right and obligation of care, maintenance and proper upbringing of their children.”); CRC, art. 18(1) (“[B]oth parents have common responsibilities for the upbringing and development of the child.”); CEDAW, 5(b) (“To ensure that family education includes . . . the recognition of the common responsibility of men and women in the upbringing and development of their children.”); CEDAW, art. 16(1) (“State Parties . . . shall ensure, on a basis of equality of men and women . . . [t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children.”); Women’s Protocol to the African Charter, art. 6(i) (“[A] woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children.”), art. 7(c) (“[I]n case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children.”).

- Joint custody both supports “greater ongoing involvement by both parents,” and avoids overburdening either parent with child care and “minimizes detrimental conflict.” NAMIBIA PROPOSALS at 180; Deborah Anna Luepnitz, *A Comparison of Maternal, Paternal, and Joint Custody: Understanding the Varieties of Post-Divorce Family Life*, J. DIVORCE 1 (Mar. 31, 1986) (citing studies that have shown that children under joint custody “retained two psychological parents in their lives,” while half of children in single parent custody, “never saw the other parent at all.”); NAMIBIA PROPOSALS at 180 (“[J]oint custody helps to combat the stereotype of mother as sole nurturer, avoids saddling either parent with overburdening arrangements and benefits children by preventing a sense of abandonment by one parent.”); Richard A. Gardner, *Guidelines for Assessing Parental Preference in Child-Custody Disputes*, 30 J. DIVORCE & REMARRIAGE 1 (June 30, 1999) (“Joint custody may help remedy many issues that accompany divorce like: burn out; childcare; money; and parental conflict.”).
- Countries around the world encourage joint custody. For instance, joint custody is favored in the United States, and most states have laws specifically allowing for it. NAMIBIA PROPOSALS at 105, 180. United Kingdom’s Children Act promotes joint custody, and Canadian courts are increasingly awarding joint custody. *Id.* at 180. Under Australia’s Family Law Act, “[P]arents jointly share duties and responsibilities concerning the care, welfare and development of their children.” Family Law Act, 1975, § 60B(2)(c) (Austl.).

(2) Where practical and in the best interests of the child, parents shall assume joint custody.

(3) There shall be a rebuttable presumption that joint or shared custody is not in the best interests of the child if a judicial officer finds that there has been an instance of domestic violence, child molestation, child abuse, child neglect, or child kidnapping.

- Based upon District of Columbia Code § 16-914 (a)(2) (2006).

(a) A parent with a history of domestic violence, child abuse, child molestation, child neglect or child kidnapping must prove beyond a reasonable doubt that access would not seriously endanger the mental physical, moral or emotional health of the child.

- (b) The possibility of special access arrangements should be considered to ensure the safety of the custodial parent and the child. Such special arrangements may include an order:
- (i) that access must be supervised by a reliable party, such as a trusted member of the extended family;
 - (ii) that the child must be transferred from one parent to the other only at specified locations; or
 - (iii) that visits may take place only at a specified venue.

• Based on NAMIBIA PROPOSALS at 179.

- (4) Joint or shared custody shall not eliminate the responsibility for child support in accordance with the applicable child support guideline as set forth in the maintenance portion of this Act.

Best Interests

24.

- (1) In determining the care and custody of the child, the best interests of the child shall be the primary consideration. To determine the best interests of the child, the court shall consider all relevant factors, including, but not limited to:

- Codification of best interests factors aims to provide courts with guidance to meaningfully assess children's best interests.
- Codification should further help reduce uncertainty and conflict surrounding divorce.

- (a) the wishes of the child where practicable;

- The child's right to be heard in these proceedings is supported by both the Swazi Constitution and international law. SWAZ. CONST. § 14 (1)(b) (recognizing "freedom of . . . expression" as one of the "[f]undamental human rights and freedoms of the individual."), § 24(1) ("A person has a right to freedom of expression and opinion."), § 331(1) ("A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly."); CRC, art. 12(1) ("States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."), art. 12(2) ("[T]he child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."); African Charter on the Rights and Welfare of the Child, art. 7 ("Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters . . ."), art. 4(2) ("In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings.").
- Comparative law supports taking the child's voice into account. *E.g.*, The Children's Charter of 1992, art. 3(1) (S. Afr.) ("All children have the right to express their own opinions and the right to be heard in all matters that affect his or her rights and protection and welfare."), art. 3(2) ("[A]ll children have the right to be heard in courtrooms and hearings affecting their future rights and protection and welfare."); Law of Marriage Act, § 125(2)(b), TANZ. LAWS [CAP 29 R.E. 2002] ("[T]he court shall have regard . . . to the wishes of the infant, where he or she is of an age to express an independent opinion.").

(b) the wishes of the child's parent(s);

(c) which parent has been the primary caretaker and each parent's potential for future performance of parenting functions;

- In the United States, many states place great importance on this factor, in “the belief that awarding custody to the primary caretaker will promote stability and continuity in the child’s life and thus promote the child’s well-being.” NAMIBIA PROPOSALS at 105. This approach also relies on “demonstrable evidence of the past rather than guesses about the future.” *Id.* at 176. Allowing the court to weigh the parents’ previous actions would also prevent “men who have no real interest in daily responsibility for child care [from] seek[ing] custody as a bargaining chip to avoid having to make high maintenance payments, or to convince the mother to settle for a less advantageous property settlement.” *Id.*
- This factor is also given great importance in Canada, where courts have “a strong inclination to grant custody to the mother in circumstances where she was the primary caregiver during the marriage.” NAMIBIA PROPOSALS at 108.

(d) the potential disruption of the child’s social and school life;

- The above two factors give weight to the child’s need for stability.

(e) the demands of parental employment;

(f) the age and number of the children;

(g) the mental and physical health of all individuals involved;

(h) evidence of domestic violence, child molestation, child abuse, child neglect or child kidnapping;

- The above two factors are crucial to ensure the child’s protection. Explicit consideration of domestic violence is especially important given its current pervasiveness in Swaziland. *E.g.*, Interview with Lindiwe Ngcamphalala, Attorney, LKM Attorneys & Legal Consultants, in Ezulwini, Swaz. (Mar. 5, 2006) (“Violence is rife in our country.”); Interview with Nkosingiphile Mbhamali, Journalist, in Manzini, Swaz. (Mar. 8, 2006) (“Almost every day, there is a report of a husband killing or seriously injuring his wife.”). Domestic violence harms children, even when it is not directed at them. NAMIBIA PROPOSALS at 179 (“They may become excessively anxious, or live in constant fear of repeated violent episodes. They may feel responsible for the violence, or guilty because they do not know how to prevent it. The presence of violence can affect children’s health, self-esteem and behaviour.”).

- (i) the capacity and willingness of the parents, individually and jointly, to share custody and guardianship;
- (j) each parent’s willingness to participate in mediation and family planning;
- (k) each parent’s parenting plan; and

- The above three factors should motivate custody determinations that encourage cooperation by parents.

- (l) the evaluations conducted by a Social Welfare Officer as set forth in Court Powers section of this Act below.
- (2) Special consideration should be given to the fact of which parent has been the primary caretaker and each parent’s potential for future performance of parenting functions. Which parent has been the primary caretaker, however, should not be treated as a conclusive consideration in such determinations.

- Based on NAMIBIA PROPOSALS at 175.

- (3) The court should not separate siblings unless there is good reason to do so.

- Based upon NAMIBIA PROPOSALS at 28.
- Courts in Canada also have “a disinclination to split siblings between parents.” NAMIBIA PROPOSALS at 108.

The Parenting Plan

25.

- (1) In any custody proceeding under this section, the court shall order each parent to submit a detailed parenting plan which delineates each parent’s position with respect to the scheduling and allocation of rights and responsibilities that will best serve the interests of the minor child. The parenting plan may include, but shall not be limited to provisions for:
 - (a) the residence of the child;
 - (b) visitation;
 - (c) holidays, birthdays, and vacation visitation;
 - (d) transportation of the child between the residences;
 - (e) education;
 - (f) religious training, if any;
 - (g) access to the child’s educational, medical, psychiatric, and dental treatment records;
 - (h) except in emergencies, the responsibility for medical, psychiatric, and dental treatment decisions;
 - (i) communication between the child and the parents;
 - (j) the resolution of conflict, such as a recognized family counseling or mediation service, before application to the court to resolve a conflict; and
 - (k) plans for the child’s continuing care and development.

- Based upon District of Columbia Code § 16-914(c) (2006).

Court Powers

26.

- (1) The court may request a report from a Social Welfare Officer if there is any doubt about what custody and access arrangements will be in the best interests of the child.
 - (a) The court may request this report even if the parents are in agreement about custody.
 - (b) Such a report may be needed:
 - (i) where there is an intention to place children in the custody of someone other than the primary caretaker or parents;

- (ii) where there is an intention to separate siblings;
- (iii) where the court has any reason for special concern.
- (c) The court should receive this report and recommendations within one month, or at least a progress report, which explains any obstacles to meeting this deadline.
- (d) The court, either parent, the child's guardian, or the child can request the Social Welfare Officer's report.

• Modeled on NAMIBIA PROPOSALS at 186.

- (2) The court, for good cause and upon its own motion, may appoint a guardian ad litem to represent the minor child's interests.
 - (a) A guardian ad litem may be especially helpful where the interests of the child may be in conflict with those of the parents.

• Based on NAMIBIA PROPOSALS at 31.

- (3) The court may order the parents to participate in mediation sessions to work out the details of custody and access arrangements. The parties may also opt to engage in mediation.

- Mediation may be a good complement to adversarial divorce proceedings. As studies have found, "an adversarial court process" may not be "an appropriate forum for resolving disputes in the highly-charged and emotional atmosphere of a divorce." NAMIBIA PROPOSALS at 142. Mediation, by contrast, would encourage spouses to reach agreement on practical issues relating to divorce and promote cooperative custody arrangements. *Id.* at 141.
- Mediation may be especially helpful when custody or visitation is contested or when there is a dispute over modification of an existing order. *Id.* at 150.

- a. A mediator may be any properly trained third party.

- Groups that “could be trained to provide mediation services” include “priests and pastors, social workers, lawyers, paralegals, traditional leaders, members of counseling organizations or NGOs and school principals and teachers.” NAMIBIA PROPOSALS at 159.

b. Agreements reached during mediation shall be subject to court approval to ensure they meet the best interests of the child.

- Court approval is necessary to ensure that the lack of formality does not just strengthen existing power dynamics and that the child’s best interests are met.

(4) The court may order either or both parents to attend family planning sessions and/or parenting classes.

Notice

27.

(1) Notice of a custody proceeding shall be given to the child’s parents, guardian, or other custodian. The court, upon a showing of good cause, may permit intervention by any interested third party.

- Based upon District of Columbia Code § 16-914 (c) (2006).

(2) The court shall require the person granted custody of a child to give at least thirty days advance notice of any change of residence to any person who has been granted access to the child.

- Based upon NAMIBIA PROPOSALS at 108.

Modification

28.

(1) An award of custody may be modified or terminated on the motion of one or both parents, the child’s guardian, the child or the court, upon a determination that there has been a substantial and material change in circumstances and that the modification or termination is in the “best interests” of the child.

(2) When a motion to modify custody is filed, the burden of proof is on the party seeking a change.

PART IV
MAINTENANCE

Child Support Guiding Principles

29. Child support will be guided by the following principles.

- Reform of the maintenance system is long overdue. Recognizing its failings, the Constitution specifically instructs, “Parliament shall enact laws necessary to ensure that . . . a child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents” and “parents undertake their natural right and obligation of care, maintenance and proper upbringing of their children.” SWAZ. CONST. § 29(7)(a), (c).
- Both the Constitution and international law require protection of citizens’ right to an adequate standard of living. SWAZ. CONST. § 59(1) (“The State shall take all necessary action to ensure that the national economy is managed in such a manner as . . . to provide adequate means of livelihood.”); ICESCR, art. 11(1) (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”); CRC, art. 27(1) (“States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”); UDHR, art. 25(1) (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . .”).

- This section explicitly establishes a parental duty to provide child support. The Maintenance Act currently does not set out the substance of support duties but rather relies on common law.

(1) A parent's first and principle obligation is to support his or her minor children according to the parent's circumstances and station in life.

- Parent's responsibility for their children is a fundamental principle under both the Swazi Constitution and international law. SWAZ. CONST. § 29(7)(c) ([P]arents undertake their natural right and obligation of care, maintenance and proper upbringing of their children."); CRC, art. 27(2) ("The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.").

(2) The father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances.

- CEDAW, article 16(1)(d) obligates state parties to ensure that men and women have "the same rights and responsibilities as parents . . . in matters relating to their children."

(3) A parent's duty to support a child exists whether or not the child was born in or out of wedlock.

- Under both the Constitution and international law, children are entitled to equal protection, regardless of their parents' marital status. SWAZ. CONST. § 29(4) ("Children whether born in or out of wedlock shall enjoy the same protection and rights."); CEDAW, art. 16(1)(d) (affirming that parents have the "same rights and responsibilities . . . irrespective of their marital status, in matters relating to their children"); ICCPR, art. 24(1) ("Every child shall have, without any discrimination as to . . . birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."); UDHR, art. 25(2) ("All children whether born in or out of wedlock, shall enjoy the same social protection.").
- The African Charter on the Rights and Welfare of the Child, article 18(3) specifically states: "No child shall be deprived of maintenance by reference to the parents' marital status."
- This overturns the customary law notion that men are allowed to "buy" out of wedlock children, obtaining custody rights over them from the maternal grandfather and thus avoiding maintenance payments. Under the current system, women opt not to pressure men for maintenance in order to retain custody of their children. BEYOND INEQUALITIES at 25; MAINTENANCE IN SWAZILAND at 49.

(5) The parents have an equal responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means.

- Australia's Family Law Act, 1975, § 72 (1)(b) (Austl.) provides for protections of incapacitated children.

Child Support Payments

30. The court may order either or both parents to pay an amount necessary for child support.

- Tanzania's Law of Marriage Act, § 130(1), TANZ. LAWS [CAP 29 R.E. 2002], establishes this norm. The Family Code, article 94, of Albania also states that the courts will make necessary child support orders. A similar provision is set forth in Civil Code of the Republic of Argentina, art. 206.

(1) Payment of child support ordered by the court shall be made by the person owing the support payment before payment of any debts owed to creditors.

- (2) The calculus for determining child support is by the formula: $CS = K [HN - (H\%) (TN)]$. The components of the formula are as follows:
- (a) CS = child support amount. K = amount of both parents' income to be allocated for child support as set forth in paragraph
 - (b) HN = high earner's net monthly disposable income.
 - (c) H% = approximate percentage of time that the high earner has or will have primary physical responsibility for the children compared to the other parent. In cases in which parents have different time-sharing arrangements for different children, H% equals the average of the approximate percentages of time the high earner parent spends with each child.
 - (d) TN = total net monthly disposable income of both parties. K (amount of both parents' income allocated for child support) equals one plus H% (if H% is less than or equal to 50 percent) or two minus H% (if H% is greater than 50 percent) times the following fraction:
Total Net Disposable:
 - (i) For more than one child, multiply CS by: 2 children (1.6); 3 children (2); 4 children (2.3); 5 children (2.5); 6 children (2.625); 7 children (2.75); 8 children (2.813); 9 children (2.844); 10 children (2.86); 11 or more children (3).
 - (e) This formula shall apply to both non-polygamous and polygamous marriages.

- This calculation is based on California Family Code § 4055.
- This formula establishes an objective, uniform, and minimum standard for maintenance in Swaziland. This should ensure children an adequate standard of living, independent of the discretion of individual judges.
- Namibia's Legal Assistance Centre noted that in England and the United States uniform support guidelines have been established as "a response to concerns that many child support awards were too low and that there was too much variation between awards in similar cases. NAMIBIA PROPOSALS at 103. The report further argues that maintenance is more reliable when "it is calculated with reference to formulas or guidelines." *Id.* at 182.

- (3) If the amount calculated under the formula results in a positive number, the higher earner shall pay that amount to the lower earner. If the amount calculated under the formula results in a negative number, the lower earner shall pay the absolute value of that amount to the higher earner.
- (4) In any default proceeding where proof is by affidavit or in any proceeding for child support in which a party fails to appear after being

duly noticed, H% shall be set at zero in the formula if the noncustodial parent is the higher earner or at 100 if the custodial parent is the higher earner, where there is no evidence presented demonstrating the percentage of time that the noncustodial parent has primary physical responsibility for the children. H% shall not be set as described above if the moving party in a default proceeding is the noncustodial parent or if the party who fails to appear after being duly noticed is the custodial parent. A statement by the party who is not in default as to the percentage of time that the noncustodial parent has primary physical responsibility for the children shall be deemed sufficient evidence.

- (5) Unless the court orders otherwise, the order for child support shall allocate the support amount so that the amount of support for the youngest child is the amount of support for one child, and the amount for the next youngest child is the difference between that amount and the amount for two children, with similar allocations for additional children. However, this paragraph does not apply to cases in which there are different time-sharing arrangements for different children or where the court determines that the allocation would be inappropriate in the particular case.

<ul style="list-style-type: none"> • This calculation is based on California Family Code § 4055.

- (6) The court may adjust the child support order as appropriate to accommodate seasonal or fluctuating income of either parent.
- (7) A deduction for hardship shall be allowed under exceptional circumstances.
- (a) Circumstances include the following:
- (i) Extraordinary health expenses for which the parent is financially responsible
 - (ii) Uninsured catastrophic losses.
- (b) If a deduction for hardship expenses is allowed, the court shall:
- (i) State the reasons supporting the deduction.
 - (ii) Document the amount of the deduction and the underlying facts and circumstances.
 - (iii) Whenever possible, the court shall specify the duration of the deduction.

- This calculation comes from the California Family Code § 4070-72.
- For the sake of equity, the statute provides for hardship deductions. Hardship deductions are allowed in nearly all nations with divorce statutes.

(8) Subsequent Spouses in the Determination of Support

- (a) The income of the obligor parent's subsequent spouse or nonmarital partner shall not be considered when determining or modifying child support, except in an extraordinary case where excluding that income would lead to extreme and severe hardship to any child subject to the child support award. In this case, the court shall also consider whether including that income would lead to extreme and severe hardship to any child supported by the obligor or by the obligor's subsequent spouse or nonmarital partner.
- (b) For purposes of this section, an extraordinary case may include a parent who voluntarily or intentionally quits work or reduces income, or who intentionally remains unemployed or underemployed and relies on a subsequent spouse's income.

- This calculation is based on California Family Code § 4055.

Spousal Support Payments

31. The court may order either spouse to pay spousal support to the other for an appropriate period of time during a marriage, during a separation or divorce proceeding, or after the separation or divorce proceeding.

- Spousal support, though less commonly ordered than child support, "is necessary to enable an ex spouse to get back on his or her feet." NAMIBIA PROPOSALS at 104.
- Many common law countries uphold the principle that spouses must maintain one another. Family Law Act 1975, § 72(1) (Austl.); Canada's Divorce Act § 15.2(1). Tanzania's Law of Marriage Act § 115(1)(a)-(g), TANZ. LAWS [CAP 29 R.E. 2002], provides that a maintenance order can be made at any time.
- Countries commonly provide for interim spousal support. E.g., Canada Divorce Act § 15.2(2); Sweden's Marriage Code, ch. 6 § 7(2).

In ordering spousal support under this part, the court shall consider all of the

following circumstances:

- (1) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:
 - (a) The marketable skills of the supported party;
 - (b) The job market for those skills;
 - (c) The time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and
 - (d) The possible need for retraining or education to acquire other, more marketable skills or employment.
- (2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.
- (3) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.
- (4) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.
- (5) The duration of the marriage.
- (6) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.
- (7) Documented evidence of any history of domestic violence, between the parties.

- Similar factors for determining spousal support can be found in Australia's Family Law Act, 1975, § 75 (2)(a)-(p) (Austl.), Canada's Divorce Act § 15.2(4), and the California Family Code § 4320.

Modifications

32.

- (1) Orders for support payments may be modified or terminated on the motion of one or both parents, on the motion of the child's guardian, or on the court's own motion, upon a determination that there has been a substantial and material change in circumstances.
- (2) When a motion to modify support is filed, the burden of proof is on the party seeking a change.

Recovery for Support

33. Parties may recover for support obligations neglected in the past.

- (1) An order for child and/or spousal support may cover retroactive payments.

- The Marriage Code of Denmark, Ch. 6, § 9 provides for retroactive maintenance recovery.

- (2) The state can obtain reimbursement for support furnished to a child.
- (3) If a parent neglects to provide articles necessary for the parent's child who is under the charge of the parent, according to the circumstances of the parent, a third person may in good faith supply the necessaries and recover their reasonable value from the parent.

Enforcement

34. Support payments can be enforced as follows:

- (1) Parties can bring actions to enforce support payment either on their own or with the aid of an attorney.

- In allowing parties to bring actions on their own or with the aid of an attorney, this provision empowers parties to enforce child and spousal support orders without depending upon public officials.
- The WLSA report recommends, "The law should make provision for self-processing of maintenance claims This would also speed up the processing of maintenance cases. This system has proved to be successful in Zimbabwe." MAINTENANCE IN SWAZILAND at 68 (1992).

- (2) The State may proceed on behalf of a child to enforce support payments.
- (a) Social Welfare Officers are authorized to bring forth these cases.
- (b) Social Welfare Officers shall receive adequate and appropriate training for handling maintenance cases.

- This provision is based on Maintenance Act, § 5(1).
- As the current Maintenance Act recognizes, the government has a responsibility to look after the well-being of children. *See also* SWAZ. CONST. § 27(4) (“[C]hildhood [is] entitled to special care and assistance by society and the State.”); CRC, art. 27(4) (“States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child.”), art. 3(2) (“States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being.”).
- However, prosecutors are unsuited by both training and temperament to handle these cases. MAINTENANCE IN SWAZILAND at 34, 36-37; Interview with Maxine Lengwemya, Lecturer of Law, University of Swaziland, in Kwaluseni, Swaz. (Mar. 7, 2006). Social Welfare Officers are better situated to take on the role. But, they must receive the necessary training in order to fulfill their duties. As the WLSA report recommends, “Social Welfare Officers should receive adequate and appropriate training to enable them to carry out their jobs efficiently as far as processing maintenance cases is concerned.” MAINTENANCE IN SWAZILAND at 61.

- (3) The court may proceed in the absence of a party as long as the party was summoned at least one month prior to the hearing date. Maintenance orders can then be made against a party in his or her absence.

- The Maintenance Act § 6(6) provides for the hearing of a maintenance case even if the respondent fails to attend without reasonable cause after having been summoned to attend the inquiry.
- However, this never happens in practice as the respondent’s failure to attend results in postponement. MAINTENANCE IN SWAZILAND at 25. The proposed statute thus attempts to strengthen this provision and end current delays by specifying an amount of time after which the court can proceed.

- (4) A court shall authorize payment of support by an employer on behalf of an employee within one month of the employee’s default. These payments may be made from an employee’s salary, wages, remuneration, or allowance.

- This language is based § 12 of the Maintenance Act. However, the provision makes garnishee orders more automatic and easier to obtain. This is in line with the recommendation of the WLSA report. MAINTENANCE IN SWAZILAND at 67.
- The garnishing of wages is a common means of enforcing maintenance orders. The United States, in 1984, passed a law required automatic wage withholding where there are default support payments. NAMIBIA PROPOSALS at 104; *see also* Children's Act of Uganda, § 77.

(a) A notice under this section shall have precedence over any other order of court requiring payments to be made from the employee's salary, wages, remuneration, or allowance.

(5) The court can attach any property, including pensions and annuities, to cover support payments.

- This language is based on § 11(2) of the Maintenance Act. However, this provision has been broadened to cover any property and thus reach those working in the informal sector.
- This is in line with the international trend towards stricter and more expansive means of collecting maintenance. NAMIBIA PROPOSALS at 125.

(6) Fine or Imprisonment

- (a) A person who fails to comply with any terms of a maintenance order shall be guilty of an offence and liable on conviction to a fine at least equivalent to what this person owes and or a period of imprisonment of six months.
- (i) Imprisoned defaulters shall be provided with work according to their skills and ability so that they can earn money to pay off their maintenance debts.

- The Maintenance Act allows a defaulting party to get out of all support payments by paying a fine of 200 emalangeni. Maintenance Act § 11(1).
- Swazi interviewees were “unanimous” in recommending “the imprisonment of defaulters who would then be provided with work according to their skills and ability. Salary received for such work would be apportioned among the dependents.” MAINTENANCE IN SWAZILAND at 48.

Reciprocity with Other Countries

35. Whenever the Minister is advised that in any other country there is in force a law:

- (1) recognizing the orders of a court under this Act and
- (2) providing for their enforcement in the jurisdiction of that other country,
- (3) the Minister may, by notice published in the Gazette, make corresponding and reciprocal regulations providing for the recognition and enforcement, in Swaziland, of orders made in that other country under a law similar to this Act.

- This provision is based on § 16 of the Maintenance Act.

PART V PROPERTY

Valuation of Assets and Liabilities

36. For the division of property upon divorce, the court shall value assets and liabilities as near as practicable to the time of trial or administrative proceeding.

- This section is based on Illinois Marriage and Dissolution of Marriage Act [750 ILCS 5/204] § 503 (b)(2)-(3).

Community Property

37. All stocks, pension funds, and interests—including leases, granted to either spouse after the marriage has commenced, are presumed to be part of the community property.

- This section is based on California's Family Code § 2620.
- Property encompasses not only tangible forms of property but also all interests that give women an economic resource that can be used to increase the value of tangible property or contribute to the adequate financial maintenance of herself and her children.
- Benefits are a source of financial security that women rely on to care for themselves and their children. CEDAW mandates "all appropriate measures to eliminate discrimination against women in . . . areas of economic and social life in order to ensure women . . . the right to family benefits." CEDAW, art. 13.

Individual Property

38. The following are not to be included in community property:

- (1) Lobola
 - (a) Lobola is an unrecoverable gift.

- This section aims to eradicate the use of lobola paid to the wife's family upon marriage to commodify women and trap them in unhappy or abusive marriages. A common perception is that by paying lobola a man acquires the wife's productive and reproductive capacities, and that if she seeks to then leave the marriage, her family must return the payment. BEYOND INEQUALITIES at 34-35; MARRIAGE AND DIVORCE at 48; A.K. Armstrong & R.T. Nhlapo, LAW AND THE OTHER SEX: THE LEGAL POSITION OF WOMEN IN SWAZILAND at 16 (1987). This provision thus clarifies that lobola is a gift that cannot be recovered or returned. After all, the bride's family gives the groom's family gifts, and these are unconditional. Ronald T. Nhlapo, *The Legal Situation of Women in Southern Africa*, in WOMEN AND LAW IN SOUTHERN AFRICA 2, 113 (Julie Stewart & Alice Armstrong eds., 1990).
- Lobola and other gifts exchanged can continue to cement the bonds between families even after divorce. Divorce ends the marital bond, but it need not end the relationship between families. Children especially can benefit from the continuation of family relationships.

- (2) Property acquired by gift, inheritance, or before the commencement of the marriage, which includes:
- (a) any property acquired in exchange for property acquired before the commencement of the marriage; or
 - (b) any property acquired in exchange for property acquired by gift or inheritance.
- (3) Property excluded by valid agreement of the parties such as:
- (a) an ante-nuptial contract entered into with the full, free, and informed consent of both parties; or
 - (b) a statement in the deed or other title document that the property is separate and not community property and proof that the parties have made a written consensual agreement to this effect.

- In order to protect parties from exploitation, all agreements regarding property must be with the full consent of both parties to the marriage. *See* Edwardson v. Edwardson 798 S.W.2d 941 (KY1990).

Securing Children a Home

39. Upon divorce, the custodial parent shall retain the right to own or occupy the marital home until all of the children have reached the age of majority.

- This section is based on NAMIBIA PROPOSALS at 210; Illinois Marriage and Dissolution of Marriage Act [750 ILCS 5/204] § 503; California Family Code § 2581 (a)-(b).
- Ensuring that the custodial parent remain in possession of the marital home would protect the children's best interests and help ensure an adequate standard of living. The Committee on Economic, Social, and Cultural Rights stresses the importance of adequate housing as a precondition for the enjoyment of other rights: "The human right to adequate housing, . . . derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights." CESCR General Comment 4, para. 1.

Property Division for In-Community of Property Marriages

40.

- (1) Upon divorce of an in-community of property marriage, property shall be divided 50-50 between the spouses.
- (2) The court may award one spouse an additional amount to offset misappropriation by the other spouse in managing joint property.

- This provision is based on California Family Code § 2602.
- For in-community property marriages, a husband automatically has marital power, which includes sole management of all the couple's property. This provision seeks to address the potential for a husband's misuse of joint property.

- (3) For a fair and just division of property, the court may consider the following factors to increase a spouse's award:

- Although the default is for a 50-50 division of property, additional factors should be considered to address certain obstacles women face.
- A woman who has been married for a long period may have sacrificed obtaining an education or professional skills that would allow her to pursue a career upon divorce. NAMIBIA PROPOSALS at 173.
- Likewise, women who experience domestic violence are denied opportunities and face greater challenges to financial security due to the emotional, psychological, and physical constraints placed on them by the abuse. A 2002 study found that “the employment rate of abused women, regardless of current marital status, is lower than that for non-abused women.” Audra J. Bowles & Shannon N. Seitz, “Domestic Violence, Employment and Divorce,” at 3 (2002), *available at* http://www.econ.yale.edu/seminars/labor/lap04/Bowlus_033104.pdf.
- In these cases, compensation in the form of property can provide the wife and her children the safety net necessary for an adequate standard of living and a new start in life.

- (a) the sale or administration of the community property by one spouse without consent of the other spouse;
- (b) the length of marriage and economic circumstances of each party at the time of the divorce, including their respective earning capacities;

- This section is based on Illinois Marriage and Dissolution of Marriage Act [750 ILCS 5/204] § 503 (c)(d)(1)-(12).

- (c) Abuse of a spouse or children; and
- (d) clearly disproportionate direct or indirect contributions made by a spouse to community property.

Property Division for Out-of-Community of Property Marriages

41. Upon divorce of an out-of-community of property marriage, ownership of property shall be assessed by both direct and indirect contributions to its acquisition and maintenance.

- (1) Direct financial contributions include:
 - (a) payments toward mortgage of home;
 - (b) payments toward land titles;
 - (c) payments toward home improvements;
 - (d) payments that reduce the principal of a loan used to finance the purchase or improvement of the property;

- (e) payments toward the interest on the loan or payments made for the financial maintenance of the property; or
- (f) payments toward insurance.

• This section is based on California Family Code § 2640.

(2) Indirect financial contributions include:

- (a) cultivation of land;
- (b) maintenance and improvement of property;
- (c) making products from materials taken from the property;
- (d) marketing or vending products from the property; or
- (e) cleaning and cooking for members of the household.

- This provision seeks to ensure the recognition of women's indirect contributions to property and address historic devaluation of women's essential domestic activities.
- As the CEDAW Committee explained, "In all societies women who have traditionally performed their roles in the private or domestic sphere have long had those activities treated as inferior." CEDAW General Recommendation 21, para. 11. However, "[S]uch activities are invaluable for the survival of society, and there can be no justification for applying different or discriminatory laws or customs to them." *Id.* at para. 12.
- This has implications upon divorce. "In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight." CEDAW General Recommendation 21, para. 32.

Property Division for Customary Law Marriages

42.

- (1) Upon dissolution of a monogamous customary marriage, property shall be divided in the same way as for in-community of property marriages.
- (2) Upon dissolution of a polygamous marriage,
 - (a) A wife's share of property shall be calculated according the following formula:

$$\text{Wife's Share} = \frac{(\text{Total Family Property} - \text{Wife's Home}) (\text{Years of Wife's Marriage})}{\text{Total Years of Marriage by All of the Wives}}$$

- (b) The divorcing wife shall additionally be provided with a home, or the funds for a home, located outside of the homestead. The value of the new home must equal the fair market value of the home in which she currently resides.

- Polygamy is a severe violation of women's equality and dignity, and the hope is that polygamous marriages will no longer be an option under Swaziland's new Constitution. As the Human Rights Committee stated, "Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist." Human Rights Committee General Comment 28, para. 24; *see also* CEDAW General Recommendation 21, para. 14 ("Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited.").
- This provision seeks to protect the property rights of women currently in polygamous marriages who desire a divorce and to discourage the further practice of polygamy. A woman should have a share of property for which her labor, time, or money contributed to its acquisition, maintenance, or increased value.

Debts Incurred

43. Qualified debts incurred by either spouse before the date of divorce shall be offset by community property prior to division. Qualified debts shall include the following:

- (1) accounts established, or charges incurred, to purchase necessary household goods for the use of all members of the household; or
- (2) accounts established, or charges incurred, to purchase items used to maintain or repair property.

- This section is based on California Family Code § 2621.
- This provision seeks to eliminate the unfair burden of debt on women, as they are the ones who incur debts with market vendors or stores to buy necessary household goods.

Civil Damages

44. A judgment for civil damages for any tort, shall be enforced against the share

of property belonging to the party at fault after division and not that of the innocent party in the divorce proceeding.

- This section is based on California Family Code § 2603.5.
- This provision can apply to cases where damages have been awarded in civil domestic violence cases. Such damages attempt to mitigate some of the adverse barriers created by domestic violence and provide a survivor with the opportunity for a new beginning.

PART VI JUDGMENTS AND COSTS

Final Judgments

45. Final judgments and orders shall be filed with the court, and copies sent to both parties in the action.

- (1) Judgments both granting or denying nullification, divorce, or legal separation must be entered.
- (2) All judgments must specify the court's reasons.

- These provisions formalize the process so that there will be a record for appeal regardless of whether one uses the civil or customary system.
- Currently, when a court issues a maintenance order, a copy is sent to the respondent but no copy is given to the complainant. When the respondent refuses to pay it is sometimes difficult to locate the maintenance order for enforcement. Sending copies to both parties would resolve this issue. MAINTENANCE IN SWAZILAND at 40.

Appeals

46.

- (1) Judgments in the Magistrate and Swazi Courts can be appealed to the High Court.
 - (a) The High Court shall review factual issues decided by Magistrate Courts for clear error.
 - (b) The High Court shall review factual issues decided by Swazi Courts de novo.
 - (c) The High Court shall review legal questions de novo.

- This provision attempts to strike a compromise between customary and civil law. On one hand, the Act does not want to strip the customary courts of these matters because they are central to Swazi society. On the other hand, this provision recognizes and addresses the problem of forum shopping by preventing one party from unilaterally picking a forum and thereby denying the other party's access to the other forum.

- (2) The filing of an appeal does not stay the effect of a judgment insofar as it relates to restoring the parties to the status of unmarried persons unless the moving party specifies in the notice of appeal an objection to the termination of marriage status.
- (3) No party may make such an objection to the termination of marriage status unless such an objection was also made at the time of the initial action.

Costs

47. The court may order reasonable attorneys' fees and court costs to:

- (1) persons entitled to child or spousal support payments;
- (2) state parties bringing a child support action;
- (3) persons seeking divorce on the basis of a fault ground; or
- (4) persons seeking divorce, based on irreconcilable difference or irretrievable breakdown, or legal separation if unable to pay and upon consideration of the parties' incomes and needs.

- Awarding costs will make divorce proceedings more accessible. Many Swazis find the current system cost-prohibitive. Interview with Media Representative, Save the Children, in Mbabane, Swaz. (Mar. 6, 2006); Interview with Nurse, Health Clinic, in Mbabane, Swaz. (Mar. 8, 2006); Interview with Lorraine Mlophe, Magistrate, Magistrate Court, in Ezulwini, Swaz. (Mar. 7, 2006).

SCHEDULE I

REPEALS AND AMENDMENTS

1. Repeals and replaces the Maintenance Act.
2. Amends § 16 of the Deeds Registry Act so as to ensure that property acquired during the marriage is equality divided upon divorce and to prevent either spouse from unilaterally transferring any community property upon the initiation of legal separation or divorce proceedings.
3. Repeals § 44 of the High Court Rules, which provides orders for the restitution of conjugal rights under.
4. Repeals and replaces § 43 of the High Court Rules, which provides for interim maintenance, custody, access to a child, and court costs while litigation is pending.