

Malawi

Divorce Act

Chapter 25:04

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Commenced on 31 July 1905

[This is the version of this document at 31 December 2014.]

[Note: This version of the Act was revised and consolidated in the Fifth Revised Edition of the Laws of Malawi (L.R.O. 1/2018), by the Solicitor General and Secretary for Justice under the authority of the Revision of the Laws Act.]

[Repealed by [Marriage, Divorce and Family Relations Act \(Act 4 of 2015\)](#) on 3 July 2015]

An Act to make provision for the Dissolution of Marriages and for other matrimonial causes

1. Short title

This Act may be cited as the Divorce Act.

2. Limitations of this Act

Nothing hereinafter contained shall authorize—

- (a) the making of any decree of dissolution of marriage unless the petitioner is domiciled in Malawi at the time when the petition is presented:

Provided that where a wife has been deserted without cause by her husband, or where her husband has been deported from Malawi under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion without cause or deportation domiciled in Malawi, the Court shall have jurisdiction for the purpose of any proceedings for dissolution of marriage or judicial separation, notwithstanding that the husband has changed his domicile since the desertion without cause or deportation; or

- (b) the making of any decree of nullity of marriage unless the petitioner is domiciled in Malawi at the time when the petition is presented or unless the marriage was solemnized in Malawi.

3. Interpretation

In this Act—

“**minor children**” means, in the case of Africans, boys who have not attained the age of 14 years and girls who have not attained the age of 12 years.

4. Jurisdiction of the High Court Principles of law to be applied

Jurisdiction under this Act shall only be exercised by the High Court (hereinafter called the Court), and such jurisdiction shall, subject to this Act, be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England:

Provided that the Minister may, by notice published in the *Gazette*, authorize such subordinate courts as he may specify to exercise jurisdiction under this Act in regard to marriages celebrated under the Christian Native Marriage Ordinance, 1912: *

And provided further that the Minister shall appoint a person to exercise within the jurisdiction of the Court, subject to the directions of the Attorney General, the powers and duties assigned to the Queen's

Proctor by any law for the time being in force in England relating to matrimonial causes and matters, and the person so appointed shall be notified in the *Gazette* by the designation of State Proctor for Malawi.

[15 of 1912]

* Repealed by [Ordinance 4 of 1923](#).

Dissolution of marriage

5. Grounds for divorce

A petition for divorce may be presented to the Court either by the husband or the wife on the ground that the respondent—

- (a) has since the celebration of the marriage committed adultery; or
- (b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or
- (c) has since the celebration of the marriage treated the petitioner with cruelty; or
- (d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition,

and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment while he is detained, whether in Malawi or elsewhere, in an institution duly recognized by the Government of Malawi as an institution for the care and treatment of insane persons, lunatics or mental defectives, or is detained as a criminal lunatic under any law for the time being in force in Malawi. A certificate under the hand of the Minister that any place is a duly recognized institution for the purpose of this section shall be receivable in all courts as conclusive evidence of that fact.

6. Co-respondent

Where the husband is the petitioner and the petition is presented on the ground that the respondent has since the celebration of the marriage committed adultery, he shall make the alleged adulterer a co-respondent to the petition unless he is excused by the Court from so doing on one of the following grounds—

- (a) that the respondent is leading the life of a prostitute, and that he knows of no person with whom the adultery has been committed;
- (b) that he does not know the name of the alleged adulterer although he has made due efforts to discover it;
- (c) that the alleged adulterer is dead.

7. Duty of Court on presentation of a petition for divorce

- (1) On a petition for divorce it shall be the duty of the Court to inquire, so far as it reasonably can, into the facts alleged and where there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties and also to inquire into any counter-charge which is made against the petitioner.
- (2) If the Court is satisfied on the evidence that—
 - (a) the case for the petitioner has been proved; and

- (b) where the ground for the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and
- (c) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents,

the Court shall pronounce a *decree nisi* of divorce, but if the Court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition:

Provided that the Court shall not be bound to pronounce a *decree nisi* of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or, if, in the opinion of the Court, the petitioner has been guilty—

- (i) of unreasonable delay in presenting or prosecuting the petition; or
- (ii) of cruelty towards the other party to the marriage; or
- (iii) where the ground of the petition is adultery or cruelty, of having without cause deserted, or having without cause wilfully separated himself or herself from, the other party before the adultery or cruelty complained of; or
- (iv) where the ground of the petition is adultery or unsoundness of mind or desertion without cause, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion.

8. Restriction on petitions for divorce during first three years after marriage

- (1) No petition for divorce shall be presented to the Court unless at the date of the presentation of the petition three years have passed since the date of the marriage:

Provided that a judge of the Court may, upon application being made to him in accordance with Rules of Court, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the Court, at the hearing of the petition, that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the Court may, if it pronounces a *decree nisi*, do so subject to the condition that no application to make the decree absolute shall be made until after the expiration of three years from the date of the marriage, or may dismiss the petition, without prejudice to any petition which may be brought after the expiration of the said three years upon the same, or substantially the same, facts as those proved in support of the petition so dismissed.

- (2) In determining any application under this section for leave to present a petition before the expiration of three years from the date of the marriage, the judge shall have regard to the interests of any children of the marriage and to the question whether there is reasonable probability of a reconciliation between the parties before the expiration of the said three years.
- (3) Nothing in this section shall be deemed to prohibit the presentation of a petition based upon matters which have occurred before the expiration of three years from the date of the marriage.

9. Condonation of adultery

Adultery shall not be deemed to have been condoned unless conjugal cohabitation has been continued or subsequently resumed.

10. Grant of relief to the respondent

If the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion without cause, the Court may give the respondent, on his application, the same relief to which he would

have been entitled if a petition had been presented seeking such relief, and the respondent may give evidence of or relating to such adultery, cruelty or desertion without cause.

Nullity of marriage

11. Petitions for nullity of marriage

A husband or a wife may present a petition to the Court praying that his or her marriage may be declared null and void.

12. Grounds for decree of nullity

- (1) The following are grounds on which a decree of nullity of marriage may be made—
 - (a) that the respondent was permanently impotent at the time of the marriage; or
 - (b) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity; or
 - (c) that either party was a lunatic or idiot at the time of the marriage; or
 - (d) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such previous husband or wife was then in force; or
 - (e) that the consent of either party to the marriage was obtained by force or fraud in any case in which the marriage might be annulled on this ground by the law of England; or
 - (f) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or
 - (g) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or
 - (h) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.
- (2) If the Court finds that the petitioner's case has been proved it shall announce a *decree nisi* declaring the marriage to be null and void:

Provided that in the cases specified in subsection (1) (c), (g) and (h), the Court shall not grant a decree unless it is satisfied—

 - (a) that the petitioner was at the time of the marriage ignorant of the facts alleged;
 - (b) that the proceedings were instituted within a year from the date of marriage; and
 - (c) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.
- (3) Nothing in this section shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity has not been granted.

13. Children of annulled marriage

Where a marriage is annulled on the ground that a former husband or wife was living, and it is found that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, or where a marriage is annulled on the ground of insanity or that the respondent was at the time of the marriage suffering from venereal disease in a communicable form, children begotten before the *decree nisi* is made shall be specified in the decree, and shall be entitled to succeed in the same manner as legitimate children to the estate of the parent who at the time of the marriage was competent to contract.

14. Proceedings for decree of presumption of death and dissolution of marriage

- (1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the Court to have it presumed that the other party is dead and to have the marriage dissolved, and the Court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.
- (2) In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved.

Judicial separation and protection orders

15. Grounds for judicial separation

- (1) A husband or a wife may apply by petition to the Court for a judicial separation on the ground of cruelty, or adultery, or desertion without cause for two years or upwards, or on the ground of failure to comply with a decree for restitution of conjugal rights, and the Court, on being satisfied that the allegations of the petition are true, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.
- (2) Where the Court in accordance with the said provisions grants a decree of judicial separation, it shall no longer be obligatory for the petitioner to cohabit with the respondent.

16. Property of wife after judicial, separation

Where judicial separation has been decreed under this Act, the wife shall, from the date of the decree, and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire or which may come to or devolve upon her, and such property may be disposed of by her in all respects as if she were an unmarried woman, and on her decease, if she die intestate, shall go as it would have gone if her husband had then been dead:

Provided that if she again cohabit with her husband, all property to which she may be entitled when such cohabitation takes place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband while separate.

17. Contracts, etc., of wife after judicial separation

Where a judicial separation has been decreed under this Act, the wife shall, whilst the separation continues, be considered as an unmarried woman for the purposes of contracts, wrongs, and injuries, and of suing and being sued in any civil proceedings, and her husband shall not be liable in respect of any contract, act, or costs entered into, done, omitted, or incurred by her during the separation:

Provided that—

- (a) where alimony has been decreed or ordered to be paid to the wife upon such judicial separation, and the same is not duly paid, the husband shall be liable for necessaries supplied for her use;
- (b) nothing in this Act shall prevent the wife from joining at any time during the separation in the exercise of a joint power given to herself and her husband.

18. Petition to reverse decree of judicial separation

A husband or wife upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced may at any time thereafter present a petition praying for the reversal of such decree on the ground that it was obtained in his or her absence, and that where desertion was the ground of such decree there was reasonable excuse for the desertion alleged.

The Court may, on being satisfied of the truth of the allegations of the petition, reverse the decree accordingly.

19. Protection orders

- (1) Any wife, in whose property the husband has acquired an interest by virtue of the marriage, may, if deserted by him, apply by petition to the Court for an order to protect any property which she may have obtained, or may obtain after the desertion, against him and his creditors and any person claiming under him.
- (2) The Court may, if satisfied that the desertion was without cause and that the wife is maintaining herself, make such order.
- (3) The order shall state the time at which the desertion commenced, and shall, as regards all persons dealing with the wife in reliance thereon, be conclusive as to such time.
- (4) Position of wife under
While any such order is in force, the wife shall be, and be deemed to have been from the date of the desertion, in the like position in all respects with regard to property and contracts and suing and being sued, as she would be if she had obtained a decree of judicial separation under this Act.
- (5) Discharge and variance of—
The husband, or any creditor or person claiming under him, may apply to the Court for the discharge or variation of the order, and the Court may, if the desertion has ceased, or if for any other cause it thinks fit so to do, discharge or vary the order accordingly.
- (6) Action for seizing wife's property
If the husband, or any creditor or person claiming under him, seizes or continues to hold any property of the wife after notice of any such order, the wife may, by action, recover such property, and also a sum equal to double its value.

20. Reversal or discharge of judicial separation or protection order, effect of

- (1) The reversal, discharge, or variation of a decree of judicial separation, or of a protection order, shall not affect any rights or remedies which a person would otherwise have had in respect of any contracts or acts of the wife entered into or done between the dates of the decree or order and of the reversal, discharge, or variation thereof.
- (2) Any person who, in reliance on any such decree or order, makes any payment to or permits any transfer or act to be made or done by the wife shall, notwithstanding such decree or order may then have been reversed, discharged, or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the decree or order been discontinued, be protected and indemnified as if at the time of such payment, transfer, or act such decree or order were valid and still subsisting without variation, and the separation had not ceased or been discontinued, unless at the time of the payment, transfer, or other act such person had notice of the reversal, discharge or variation of the decree or order or of the cessation or discontinuance of the separation.

21. Divorce proceedings after grant of judicial separation

- (1) A person shall not be prevented from presenting a petition for divorce, or the Court from pronouncing a decree of divorce, by reason only that the petitioner has at any time been granted a judicial separation upon the same or substantially the same facts as those proved in support of the petition for divorce.
- (2) On any such petition for divorce, the Court may treat the decree of judicial separation as sufficient proof of the adultery, desertion without cause or other ground on which it was granted, but the Court shall not pronounce a decree without receiving evidence from the petitioner.

- (3) For the purposes of any such petition for divorce, a period of desertion without cause immediately preceding the institution of proceedings for a decree of judicial separation shall, if the parties have not resumed cohabitation and the decree has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce.

Restitution of conjugal rights

22. Restitution of conjugal rights

- (1) If a husband or wife has without reasonable excuse withdrawn from the society of the other, the wife or husband may apply by petition to the Court for restitution of conjugal rights.
- (2) The Court, on being satisfied that the allegations of the petition are true, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.
- (3) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be ground for a suit for judicial separation or for a decree of nullity of marriage.

General

23. Husband may claim damages for adultery

- (1) A husband may, by petition, claim damages from any person on the ground of his having committed adultery with the wife of the petitioner.
- (2) Such claim may be made either in a petition for dissolution of marriage or for judicial separation, or by petition for that purpose only.
- (3) The Court shall ascertain the amount of damages whether the respondent appears or not, and may in every case direct in what manner the damages shall be paid or applied, and may direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife.

24. Costs against a co-respondent

A co-respondent may be ordered to pay the whole or any part of the costs of the proceedings if adultery with the wife of the petitioner has been established against him:

Provided that he shall not be ordered to pay the costs of the petitioner—

- (a) if at the time of the adultery he had no reason to believe the respondent to be a married woman; or
- (b) if the respondent was at the time of the adultery living apart from her husband and leading the life of a prostitute.

25. Alimony *pendente lite*

In any suit under this Act the wife, whether or not she has obtained a protection order, may apply to the Court for alimony pending the suit, and the Court may thereupon make such order as it may deem just, provided that alimony pending the suit shall in no case exceed one-fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue in the case of a *decree nisi* of dissolution or nullity of marriage until the decree is made absolute.

26. Permanent alimony

- (1) On a decree absolute declaring a marriage to be dissolved, or on a decree of judicial separation obtained by a wife, the Court may order the husband to secure to the wife such sum of money as, having regard to her fortune (if any), to the ability of the husband, and the conduct of the parties, it thinks reasonable.
- (2) The Court may direct the alimony to be paid either in a lump sum or in yearly, monthly, or weekly payments for any period not exceeding the life of the wife, and for that purpose may cause a proper instrument to be executed by all necessary parties.
- (3) The Court may direct the alimony to be paid either to the wife herself or to a trustee to be approved on her behalf by the Court, and may impose such terms and restrictions, and may direct the execution of such trust deeds as it may think fit, and may from time to time appoint a new trustee.

27. Discharge or alteration of order for alimony

Where an order has been made for the payment of alimony, and the husband from any cause subsequently becomes unable to make such payments, the Court may discharge or modify, or suspend the order in whole or in part, and may again revive the order in whole or in part.

28. Settlement of the wife's property

When a decree of dissolution of marriage or of judicial separation is pronounced on account of adultery by the wife, and the wife is entitled to any property the Court may, notwithstanding the existence of the disability of coverture, order the whole or any part of such property to be settled for the benefit of the husband, or of the children of the marriage, or of both.

29. Power to vary settlements

After a decree absolute of dissolution or of nullity of marriage, the Court may inquire into the existence of antenuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or part of the settled property, whether for the benefit of the husband or wife or of the children (if any) or of both children and parents, as seems fit:

Provided that no order for the benefit of the parents, or either of them, shall be made at the expense of the children.

30. Powers of the Court as to settlements

Where the Court has power to direct any property to be settled, or to vary the terms of an existing settlement, it may appoint trustees to whom such money shall be paid and may order the necessary instruments to be prepared containing such provisions as it may think fit, and may order all necessary parties to execute the same, and may from time to time appoint new trustees, and may do all such other acts as it may deem necessary for carrying such directions into effect.

31. Custody of children

In suits for dissolution of marriage, or for nullity of marriage, or for judicial separation, the Court may at any stage of the proceedings, or after a decree absolute has been pronounced, make such orders as it thinks fit, and may from time to time vary or discharge the said orders, with respect to the custody, maintenance, and education of the minor children of the marriage, or for placing them under the protection of the Court.

32. Procedure

Subject to the provisions herein contained, all proceedings under this Act shall be regulated by the procedure followed in matrimonial proceedings in the High Court of Justice in England.

33. Petitions

- (1) Every petition shall state, as distinctly as the nature of the case permits, the facts on which the claim is based, and shall be verified as if it were a plaint, and may at the hearing be referred to as evidence.
- (2) Petitions for dissolution of marriage, or for nullity of marriage, or for judicial separation shall state that there is not any collusion or connivance between the petitioner and the respondent.

34. Service of petition

Every petition under this Act shall be served on the party to be affected thereby, either within or without Malawi, in such manner as the Court may, by general or special order, from time to time direct:

Provided that the Court may dispense with such service in case it seems necessary or expedient so to do.

35. Examination of witnesses

The witnesses in all proceedings shall be examined orally:

Provided that the parties may verify their respective cases by affidavit, but so that the deponent may be orally cross-examined and re-examined either on the application of the other party or by direction of the Court.

36. Husband and wife compellable witnesses

On any petition presented by a wife for the dissolution of her marriage on the ground of adultery coupled with cruelty or desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable to give evidence relating to such cruelty or desertion.

37. *Sittings in camera*

The Court may hear the whole or any part of proceedings under this Act with closed doors.

38. Adjournment

The Court may adjourn the hearing of any petition under this Act, and may require further evidence thereon.

39. Making *decrees nisi* decrees absolute

- (1) No *decree nisi* of dissolution or nullity of marriage shall be made absolute till after the expiration of six weeks from the date thereof or such longer period as the High Court may by Rule prescribe.
- (2) During that period any person may show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not being brought before the Court.
- (3) On cause being so shown the Court shall make the decree absolute, or reverse the *decree nisi*, or require further inquiry, or otherwise deal with the case as justice may demand.
- (4) The Court may order the costs arising from such cause being shown to be paid by the parties or such one or more of them, including a wife if she have separate property, as it thinks fit.

- (5) Where a petitioner fails to move within a reasonable time that the *decree nisi* be made absolute, the Court may dismiss the suit.
- (6) Where a *decree nisi* has been obtained, and no application for the *decree nisi* to be made absolute has been made by the party who obtained the *decree nisi*, then, at any time after the expiration of six weeks from the earliest date on which that party could have made such an application the party against whom the *decree nisi* has been granted shall be at liberty to apply to the Court and the Court shall, on such application, have power to make the decree absolute, reverse the *decree nisi*, require further inquiry or otherwise deal with the case as the Court thinks fit.

40. Enforcement of orders Appeals

All decrees and orders made by the Court in proceedings under this Act shall be enforced, and may be appealed from, as if they were decrees or orders made by the Court in the exercise of its original civil jurisdiction:

Provided that—

- (a) in suits for dissolution or nullity of marriage no respondent or co-respondent not appearing and defending the suit on the occasion of the *decree nisi* being made shall appeal against the decree being made absolute unless the Court gives leave to appeal at the time of the decree being made absolute;
- (b) no appeal from an order absolute for dissolution or nullity of marriage shall lie in favour of any party who, having had time and opportunity to appeal from the *decree nisi*, shall not have appealed therefrom.

41. Re-marriage of the parties

When the time limited for appealing against a decree of dissolution or nullity of marriage shall have expired and no appeal has been presented, or when in the result of any such appeal any marriage shall be declared to be dissolved or annulled, but not sooner, it shall be lawful for the parties thereto to marry again as if the prior marriage had been dissolved by death.

42. Clergyman not bound to marry a divorced guilty party

No clergyman in holy orders of the Church of England shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnizing, or refusing to solemnize, such marriage.

43. But must permit another clergyman

When a clergyman in holy orders or other minister of religion in charge of any church or chapel refuses to perform such marriage service between persons who would, but for such refusal, be entitled to be married in such church or chapel, he shall permit any other clergyman in holy orders of the said church to perform the service in such church or chapel.

44. Rules of Court

The Court may make Rules with respect to all matters of procedure under this Act and may also prescribe the forms to be used and the fees to be paid in proceedings taken hereunder.