

**DETERMINING MATRIMONIAL PROPERTY RIGHTS ON  
DIVORCE: AN APPRAISAL OF THE LEGAL REGIMES IN  
BOTSWANA**

by

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## SUMMARY

The bulk of the matrimonial property regimes operating in Botswana were inherited from the country's colonial past. Since independence there has not been any realistic attempt to reform them. The thesis set out to appraise the legal regimes governing the determination of matrimonial property on divorce to ascertain their efficacy in realising the legitimate aspiration of married couples. Comparisons were made with similar countries to determine how these have tackled problems relating to determination of matrimonial property on divorce.

The study found that where there is a dispute about matrimonial property in marriages out of community, the courts have no discretion to readjust the rights of the parties. This situation adversely affects non-working wives who spend most of their time looking after their husbands and children without being able to acquire capital assets. Recognition is not given to such domestic contribution to the welfare of the family. It was also found that the exercise of the marital power by husbands of marriages in community of property deprives wives of those marriages the right to administer the joint estate. The patriarchal nature of customary law, which governs the majority of disputes about

matrimonial property, discriminates against women.

Consequently, the following, *inter alia*, are suggested as reform measures.

- (a) The courts should be given a wide discretionary power, circumscribed by statutory guidelines, to reallocate matrimonial property on divorce irrespective of the matrimonial property regime that governs the marriage. The underlying principle should be equality of sharing but this may be departed from where the circumstances of the particular case warrant it.
- (b) A spouse's domestic contribution towards the welfare of the family should be recognised.
- (c) The marital power of husbands should be abolished.
- (d) The provisions of the Matrimonial Causes Act should be made applicable to customary marriages.

### **KEY TERMS**

Matrimonial property; Husband and Wife; Divorce; Division of assets; Customary-law principles; Common-law principles; Statutory provisions; Judicial discretion; Law reform

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|                  |                                  |
|------------------|----------------------------------|
| 1. A.C.          | Appeal Cases                     |
| 2. A.D.          | Appellate Division               |
| 3. All E.R.      | All England Reports              |
| 4. All E.R. Rep. | All England Reports Reprint      |
| 5. B.L.R.        | Botswana Law Reports             |
| 6. C.C.          | Current Cases                    |
| 7. Ch.           | Chancery Division                |
| 8. C.P.D.        | Cape Provincial Division         |
| 9. Cox Eq. Cas.  | Cox's Exchequer Cases            |
| 10. D.L.R.       | Dominion Law Reports             |
| 11. Div. Ct.     | Divisional Court                 |
| 12. E.D.C.       | Eastern Districts Courts         |
| 13. E.D.L.       | Eastern Districts Local Division |
| 14. Fam.         | Family Division                  |

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|-----------------|---|
| 15. Fam. Law    | Family Law                              |
| 16 F.L.R.       | Family Law Reports                      |
| 17. G.L.R.      | Ghana Law Reports                       |
| 18. H.C.T.L.R.  | High Commission Territories Law Reports |
| 19. K.B.        | King's Bench Division                   |
| 20. L.R. P & D. | Law Reports Probate and Divorce         |
| 21. N.A.C       | Native Appeal Courts                    |
| 22. N.P.D.      | Natal Provincial Division               |
| 23. N.L.R.      | Natal Law Reports                       |
| 24. O.P.D.      | Orange Free State Provincial Division   |
| 25. P.          | Probate Division                        |
| 26. Red.        | Redwar's Gold Coast Reports             |
| 27. Sar. F.L.R. | Sarbah Fanti Law Reports                |
| 28. S.A.        | South African Law Reports               |
| 29. S.C.        | Session Cases                           |

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- 30. S.J. Solicitors' Journal
- 31. T.L.R. Times Law Reports
- 32. T.P.D. Transvaal Provincial Division
- 33. T.S. Transvaal Supreme Court
- 34. U.S. United States Reports
- 35. W.A.L.R. West African Law Reports
- 36. W.L.D. Witwatersrand Local Division
- 37. W.L.R. Weekly Law Reports

## INTRODUCTION

### 1. PRELIMINARY CONSIDERATIONS

Matrimonial property as a concept for this study will be taken to have the same meaning as that used to describe “matrimonial” or “family” assets in the English case of *Wachtel v. Wachtel*.<sup>1</sup> In that case, Lord Denning M.R. said:

*“The phrase ‘family assets’ is a convenient short way of expressing an important concept. It refers to those things which are acquired by one or other or both of the parties, with the intention that they should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole...The family assets can be divided into two parts: (i) those which are of a capital nature, such as the matrimonial home and the furniture in it; (ii) those which are of revenue producing nature, such as the earning power of husband and wife. When the marriage comes to an end, the*

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<sup>1</sup> [1973] 1 All E.R. 829 (C.A.) at p. 836.

*capital assets have to be divided: the earning power of each has to be allocated.*<sup>2</sup>

The term “family assets” as used in the above *dictum* was criticized in *P. v. P.*<sup>3</sup> in that it did not form part of s. 25 of the English Matrimonial Causes Act 1973 under which section the court is to decide the proprietary rights of spouses on divorce. Despite this criticism, it is respectfully adopted as the meaning of “matrimonial property” in this thesis. Why is this definition appropriate? The present legal regimes regulating this type of property in Botswana, allow for the acquisition of individual or joint property by spouses married, for instance, out of community of property or under customary law. The property of those

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See also H. Marsh Jr. *Marital Property in Conflict of Laws* Seattle, University of Washington Press, 1952 at p. 11 where a similar term is defined as signifying an interest which accrues to one spouse, with respect to things owned or acquired by the other spouse, solely by virtue of the existence of the marital relation, but excluding from it the prospect of inheritance upon the intestate death of the other. For the reasons given in the text Lord Denning’s definition is adopted for this thesis.

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[1978] 3 All E.R. 70 at p. 73 *per* Ormrod L.J. See also Lord Upjohn in *Pettitt v. Pettitt* [1970] A.C. 777 at p. 817F.

spouses married in community of property is regarded as joint property under the management of the husband.<sup>4</sup>

Thus, the definition not only takes care of the interests of spouses under all three marriage regimes, but it encapsulates the type of property which spouses in a marriage in Botswana may usually acquire. For, as aptly noted by the English Law Commission<sup>5</sup>, in family life, such property frequently takes the form of the matrimonial home, its furniture and contents, the car and savings (cash, insurance policies, bank account, savings certificates, shares etc.).

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<sup>4</sup> In South Africa, a country with which Botswana shares a common Roman-Dutch common law tradition, there is uncertainty as to the meaning of "matrimonial property." J. Sinclair assisted by J. Heaton *The Law of Marriage* vol. I, Kenwyn, Juta & Co., 1996 at p. 373 submit that the term refers to the joint estate where the spouses are married in community, and to their separate estates where they are married out of community. However, D.J. Joubert *Law of South Africa* vol. 16 "Marriage" (revised by A. de W. Horak), Durban, Butterworths, 1992 (first reissue, 1998) argues that, in a marriage out of community of property, only property acquired during the marriage by the joint efforts or contributions of the spouses would fall within the meaning of the term. In a marriage in community of property, he submits that all the property of the spouses will be "matrimonial property."

<sup>5</sup> See Working Paper No. 42 published on 26th. October 1971 titled *Family Property Law* at p. 3.

It must be noted that the word “family”, the institution through which this type of property is accumulated, when used in the African context may not coincide with the European meaning of the term. In the African context, “family” generally means a large social group of people all tracing descent from a common ancestor, male or female.<sup>6</sup> The social group, the members of which are lineally descended in a direct female line from a common ancestor is known as the matrilineal family. That in which the members are lineally descended in a direct male line from a common ancestor is known as the patrilineal family. The general rubric for these types of family is the extended family. In the European context “family” generally refers to all members of a household, including husband, wife and children.<sup>7</sup> This is the sense in

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<sup>6</sup> See for example, J.M. Sarbah *Fanti Customary Laws* (3<sup>rd</sup> ed.), London, Frank Cass, 1968 at p. 33, N.A. Ollennu *The Law of Testate and Intestate Succession in Ghana*, London, Sweet & Maxwell, 1966 at pp. 139-143, 171-174, N.A. Ollennu & G.R. Woodman *Principles of Customary Land Law in Ghana*, Birmingham, Cal Press, 1985 Chap. 10, K. Bentsi-Enchill *Ghana Land Law*, London, Sweet & Maxwell, 1964 at p. 25, A.K.P. Kludze *Ewe Law of Property*, London, Sweet & Maxwell, 1973 at p. 32 and J.C. Bekker “Interaction between constitutional reform and family law” (1991) *Acta Juridica* 1 at pp. 2-3. See also the Ghanaian cases of *Amarfio v. Ayorkor* (1954) 14 W.A.C.A. 554 and *Mills v. Addy* (1958) 3 W.A.L.R. 357.

<sup>7</sup> See P.M. Bromley & N.V. Lowe *Family Law* (8<sup>th</sup> ed.) London, Butterworths, 1992 at p. 1. See also H.J. Erasmus *et al Lee & Honore Family, Things and Succession* (2<sup>nd</sup> ed.) Durban, Butterworths, 1983 para. 4.

which “family” is used in the context of matrimonial property in this thesis. This latter meaning had not, in the main, attracted the attention of African jurists until recent times, while the former has had a distinguished record of exposition in African sources.<sup>8</sup>

The study of matrimonial property is important because the family is not only of immense social importance but it is also an important economic unit. As stated by Miller:<sup>9</sup>

*“A consideration of the principles relating to family property and financial provision for a family is dominated by problems which arise on a break up of a family unit based upon marriage, for generally, it is only then that the law is called upon to play*

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<sup>8</sup> See E.K. Quansah “Ownership of matrimonial property under African customary law - A search for criteria” (1988) *University of Calabar Law Journal* 109; G.R. Woodman “Acquisition of family land in Ghana” (1963) *Journal of African Law* 136; M.I. Jegede “Nature and extent of a family member’s rights and interest in family land in Nigeria” (1970) 3 *East African Law Review* 229; M.I. Jegede “The changing features of family ownership of land in Nigeria” (1971) 5 *Nigeria Law Journal* 19 and A.B. Kasunmu and R.W. James *Alienation of Family Property in Southern Nigeria*, Ibadan, University Press, 1966.

<sup>9</sup> J.G. Miller *Family Property and Financial Provision* (2<sup>nd</sup> ed.) London, Sweet & Maxwell, 1983 at p. 1.

*an active role in seeking to reconcile the conflicting financial and proprietary interests of its members. In the case of a family based upon a successful marriage these principles do not often have to be considered, for the law is rarely called upon to play an active role in regulating the management of its financial affairs and the allocation of its resources as between its members, except on the death of one of the spouses.”*

Another important reason for studying the family as an economic unit is that Botswana has experienced the most dramatic economic development in the last few years. From a poverty-stricken agrarian, largely pastoral base at independence, the country has evolved into one of the most impressive economies in Sub-Saharan Africa. By 1992 the World Bank characterised it as one of the richest countries in Sub-Saharan Africa with a per capita national income of almost \$3,000 - about even with that of South Africa.<sup>10</sup> With such tremendous economic achievements many a family's economic circumstances have been improved dramatically, thus enabling them to accumulate property

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<sup>10</sup> See World Bank Report No.11267-BT - *Opportunities for Industrial Development in Botswana: An Economy in Transition* dated 28th. April 1993 at p. i.

they previously only dreamt of.<sup>11</sup> This economic advancement, coupled with the steady increase in the divorce rate will pose an increasing challenge to the courts to resolve the rights of the spouses when a marriage ends.<sup>12</sup>

## 2. STATEMENT OF THE PROBLEM

Before the enactment of the Married Persons Property Act 1970,<sup>13</sup> the Roman-Dutch common law concept of community of property was the primary matrimonial property regime that governed marriages contracted under the Marriage Act unless an antenuptial contract, which provided for an alternative regime, preceded the marriage.<sup>14</sup> The

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<sup>11</sup> It must be noted that the Report mentioned in note 10 *supra* did acknowledge that income distribution remains highly skewed. The fruits of economic growth and social transition have been disproportionately shared among the citizens of Botswana. See also K. Good "At the ends of the ladder: Radical inequality in Botswana" (1993) 30(1) *Journal of Modern African Studies* 127.

<sup>12</sup> Records of the High Court in Lobatse indicate that in 1994, 1995 and 1996, 279, 316 and 258 divorce cases were recorded respectively.

<sup>13</sup> Cap. 29:03.

<sup>14</sup> See E.K. Quansah "Determining property rights between spouses on divorce: A tale of two jurisdictions (Ghana and Botswana)" (1993) 5 *African Journal of International and Comparative Law* 389.

community of property concept entails the pooling of all the assets and liabilities of the spouses in co-ownership, in equal undivided shares, under the sole control of the husband. The wife could not exercise any rights over her share until death or divorce dissolved the community. In such an event the assets are divided equally between the spouses subject to the possibility of an order of forfeiture of benefits against the guilty party upon divorce.<sup>15</sup> There was also, and still is, the customary law regime, which subscribes to separate property of spouses.

The community of property concept came under severe criticism, especially from women's groups. A typical example of such criticism was that made by Molokomme:<sup>16</sup>

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<sup>15</sup> H.R. Hahlo, *The South African Law of Husband and Wife* (5th. ed.) Cape Town, Juta & Co., 1985 at pp. 157-161. Hereinafter referred to as "*Husband and Wife*"

<sup>16</sup> A. Molokomme, "Marriage: What every woman wants or a declaration of 'civil death'? Some legal aspects of the status of married women in Botswana" (1984) 1 *Pula - Botswana Journal of African Studies* at p. 76. See also A. Molokomme *Legal and cultural barriers which prevent women's participation in national development*, Report on the national conference for women, Ministry of Home affairs, Gaborone, 1984 and "A summary of women's legal status under Botswana family law" in *Women and the Law in Botswana* Report of the proceedings of a seminar held in the University of Botswana, 3<sup>rd</sup> -5<sup>th</sup> July 1987, Emang Basadi/Women's Affairs Unit, Ministry of Home Affairs. For similar criticism see *Children, Women and Development in Botswana: A Situation Report*, Government of

*“Although the property aspect of the marital power may be excluded under common law by an antenuptial contract or by merely marrying out of community of property after January 1<sup>st</sup> 1971, its automatic inclusion in marriages in community of property is equally objectionable. In Botswana, this is especially so because it retains its arbitrary common law flavour, it is an absolute power allowing the husband to do what he likes with the matrimonial property or his wife's separate property without consulting her.”*

In answer to such criticism the Legislature enacted the Married Persons Property Act 1970. S. 3 of this Act provides that all marriages contracted after 1st. January 1971 (the date of commencement of the Act) are deemed out of community of property, unless the spouses before the marriage execute a written instrument exempting their marriage from the provisions of the Act. Thus, the marriage of persons who are not subject to customary law will be out of community of property. Should they wish to be married in community of property, the

same section permits them to fill in the form specified in the first schedule to the Act to do just that.

The property of persons subject to customary law will generally be held according to customary law. A “*person subject to customary law*” is not defined but can be ascertained from the following statutory provisions. S. 2 of the Customary Courts Act<sup>17</sup> defines customary law as:

*“In relation to any particular tribe or tribal community, the customary law of that tribe or tribal community...”*

This definition shows that customary law is applicable to members of a tribe or tribal community. Therefore, to be subject to customary law, one has to belong to a tribe or tribal community. Such a person is called a “tribesman”, a term defined by the same s. 2 as one who is a:

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<sup>17</sup> Cap. 4:05 1987 Rev.

*“member of a tribe or tribal community of Botswana or of any other African country prescribed by the Minister by order published in the Gazette for the purposes of the Act.”*

The Minister has as yet issued no prescription of an African country for the purposes of the Act. Consequently, the term “*person subject to customary law*” is presently limited to persons who are members of a tribe or tribal community within Botswana. If such persons do not wish customary law to govern their property rights but wish to avail themselves of the common law property regime, they may, if they wish to marry out of community of property, fill in Form A under the second schedule to the Act. If they wish to exclude customary law but be married in community of property they would fill in Form B also under the second schedule.<sup>18</sup>

Once a particular form of property regime is chosen, altering it during the marriage is not possible. This is the result of the application of the immutability principle of Roman-Dutch common law by which parties to a marriage cannot by postnuptial agreement change their matrimonial

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<sup>18</sup> See s. 7 of the Act.

property system.<sup>19</sup> The main reason usually given for this is that there should be certainty as to the property rights of spouses so that third parties (creditors) can know where they stand. However, a concession was made to those who were married in community of property before the inception of the Act to opt out of it by notarial deed, notice of which must be published in the Government Gazette and registered in the Deeds Registry within 28 days of its execution. As s. 4 of the Act permits the parties “*at any time...[to] express their wish that this Act shall so apply,*” the concession is open-ended as to time.

The effect of the 1970 Act was merely to reverse the pre-1970 position without substantially addressing the main criticism of the earlier law. Though the memorandum to the Bill, which preceded the 1970 Act stated that “*community of property should in general disappear, and be replaced by a matrimonial regime which puts the wife in the same*

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<sup>19</sup> See the South African cases of *Ex parte Smuts* 1914 C.P.D. 1034 at p. 1037 *per Kotze J.*, *Union Government (Minister of Finance) v. Larkan* 1916 A.D. 212 at p. 224 *per Innes C.J.*, *Edelstein v. Edelstein NO & Ors.* 1952 (3) S.A. 1 (A) at 15 *per Van den Heever J.A.*, *Sperling v. Sperling* 1975 (3) S.A. 707 (A) at p. 721 *per Corbett J.A.* and *Honey v. Honey* 1992 (3) S.A. 609 at p. 611 *per Du Plessis J.* The situation in South Africa has been changed by s. 21 of the Matrimonial Property Act 88 of 1984 under which spouses may, in exceptional cases, and with the permission of the High Court, amend the matrimonial property system under which their marriage falls.

*position as any adult*,<sup>20</sup> this aim has not been realised because the marital power was not abolished.

Be that as it may, the primary matrimonial property regime is now one of out of community of property. The effect of this is to place the spouses in the same patrimonial position as they were before the marriage. Each spouse retains his or her separate estate, which he or she possessed before the marriage and continues to do so with any other property acquired during the subsistence of the marriage.<sup>21</sup> This situation will in the main work to the disadvantage of a wife. In many marriages the natural division of economic functions makes the husband the breadwinner, and deprives the wife who devotes her time and energy to looking after the husband and children, of an equal opportunity to acquire property. Thus, when the marriage ends in divorce she may be left destitute because she has not acquired any property of her own.<sup>22</sup>

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<sup>20</sup> See Government Gazette No. 50 of 1970.

<sup>21</sup> See D.S.P. Cronje & J. Heaton *South African Family Law* Durban, Butterworths, 1999 at p. 117 and Hahlo "*Husband and Wife*" *op. cit.*, at pp. 287-288.

<sup>22</sup> See A. Molokomme "Women's law in Botswana and research needs" in *The legal situation of women in Southern Africa - Women and law in Southern Africa* vol II Stewart and Armstrong (eds.) Harare, University of Zimbabwe

As will be seen later,<sup>23</sup> the courts have interpreted the power given to them to determine the mutual property rights of spouses on divorce so that ownership is ascertained according to the strict principles of the law of property. Unless it is proved that the wife has made some kind of financial contribution towards the acquisition of the matrimonial property, she acquires no proprietary interest in such property. Moreover no economic value is attached to the domestic services rendered by the wife, which services enabled the husband to exploit his earning potential to the fullest. Consequently, years of devoted service to the husband and the children will go unrecognised. She even has no claim, under common law, for maintenance against her deceased husband's estate.<sup>24</sup> However, under the Succession (Rights of Surviving Spouses and Inheritance Family Provisions) Act<sup>25</sup> such a spouse may

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1990 at p. 18.

<sup>23</sup> See Chapter Two *infra*.

<sup>24</sup> See the South African case of *Glazer v. Glazer* 1963 (4) S.A. 694 (A) at p. 707 *per* Steyn C.J. The case is criticized by B. Beinart in (1965/66) *Acta Juridica* 285. See also B. Beinart "Liability of a deceased estate for maintenance" (1958) *Acta Juridica* 92. The situation has now been rectified in South Africa by the Maintenance of Surviving Spouses Act 27 of 1990.

<sup>25</sup> Cap. 31:03.

ask the High Court to make reasonable provision for her upkeep from her deceased husband's estate.<sup>26</sup>

It is therefore imperative that some legal mechanism should be put in place to enable the court to determine and adjust matrimonial property in case of divorce. The Matrimonial Causes Act 1973<sup>27</sup> attempted to do this by giving the courts power to “*determine the mutual property rights of husband and wife*” on divorce.<sup>28</sup> However, the courts have interpreted this power to mean that they have no discretion to adjust matrimonial property equitably between spouses on divorce.<sup>29</sup> The lack of a discretion in such circumstances is compounded by the fact that customary law governs the proprietary consequences of the marriage of

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<sup>26</sup> See *Herholdt v. Fraenkel N.O. & Ors.* Civil cause 5/1971 unreported (26<sup>th</sup> February 1971), High Court, Lobatse, where the applicant successfully applied for reasonable maintenance out of the estate of her deceased husband. The husband had bequeathed R100 per annum out of his estate for the maintenance of the wife. This was varied to R100 per month. The South African currency unit, the Rand, was legal tender in Botswana until 1976.

<sup>27</sup> Cap. 29:02.

<sup>28</sup> See s. 13 of the Act.

<sup>29</sup> See for example, *Molomo v. Molomo* [1979-80] B.L.R. 250.

persons subject to customary law who marry under the Marriage Act,<sup>30</sup> subject to their opting out of it under the Married Persons Property Act. Customary law is not known for its benevolence towards women. If anything, it generally treats women inequitably regarding property rights.<sup>31</sup> Tswana society is predominantly patrilineal. Descent is traced through the father and property and rank normally passes to the son, or the next male member of the lineage.<sup>32</sup> Thus, the regulation of the proprietary consequences of marriage of persons subject to customary law by that law, will not enhance women's rights.

It is true that the Dissolution of Marriage of Persons Subject to Customary Law (Disposal of Property) Act 1926 allows a court to apply

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<sup>30</sup> See s. 2 of Dissolution of Marriage of Persons Subject to Customary Law (Disposal of Property) Act 1926.

<sup>31</sup> See P.E. Kidd *et al Botswana Families and Women's Rights in a changing environment*, Gaborone, Women and Law in Southern Africa Research Trust, 1997 at pp. 47-57 and O. Gulbrandssen *Access to agricultural land and communal land management in Eastern Botswana*, Gaborone, Ministry of Local Government and Lands, 1984.

<sup>32</sup> On the organization of Tswana society see I. Shapera *A Handbook of Tswana Law and Custom*, London, Frank Cass, 1938 Chap. 1 and A. Molokomme "Children of the Fence" - *The maintenance of extra-marital children under law and practice in Botswana*, PhD. thesis, University of Leiden, 1991, deposited at the University of Botswana Library.

the common law instead of the customary law to the disposal of property where it would appear unjust and inequitable to apply customary law.<sup>33</sup> The criteria for the exercise of this discretion are not clear and in the rare occasion when it has been exercised, the criteria adopted seemed artificial. In *Molomo v. Molomo*<sup>34</sup> the discretion was exercised because the couple, in the words of the court, were “*sophisticated people*”<sup>35</sup>, a concept which the court did not elaborate upon. It seems from the facts however that persons who have attained tertiary-level education and have more or less lived an urbanised lifestyle, qualify to be called “*sophisticated*”. Consequently, it may be deduced from this case that this mode-of-life exemption will only benefit those who have lived such a “*sophisticated*” lifestyle. Accordingly, the “*unsophisticated*” Motswana,<sup>36</sup> that is one who has little or no formal education and has lived a rural lifestyle, will hardly benefit from the exercise of this discretion. This will create a very

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<sup>33</sup> See note 30 *supra*.

<sup>34</sup> *Supra*.

<sup>35</sup> *Ibid* at p. 256.

<sup>36</sup> A word used to describe one citizen of Botswana, more than one is referred to as Batswana.

unsatisfactory situation bearing in mind that the majority of Batswana live in the rural areas.<sup>37</sup>

At present a situation exists in Botswana where the three possible matrimonial regimes have inadequate schemes for resolving disputes as to the rights of spouses in respect of matrimonial property in case of divorce. The thesis will critically analyse the existing legislative regimes in the light of contemporary social and economic changes to the structure of the family and assess their impact on married couples. A suggestion will be made for a socially responsive regime to bring the law as near as possible to the social reality.

### **3. OBJECTIVE OF THE STUDY**

The study is intended to analyse the present matrimonial property regimes and how they are applied to determine division of matrimonial property on divorce. An assessment will be made as to their efficacy as legal tools for the redress of conflict about division of matrimonial property. A comparative study will consist of matrimonial property

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Of the total population of 1,325,291 (1991 Population and Housing Census) 1,008, 944 lived in the rural areas whilst 316,347 lived in the urban areas.

regimes in South Africa, England and Ghana to ascertain how the problem has been dealt with in those jurisdictions. This is in the belief that matrimonial problems transcend national boundaries. The first two jurisdictions were selected because they have had a long historical connection with Botswana. In fact, the British introduced the bulk of the existing matrimonial property regimes into the country.<sup>38</sup> Ghana was chosen because it has had a colonial experience, which is similar to that of Botswana. Finally a suggestion will be made of a matrimonial regime, which will be flexible enough to avoid the shortcomings of the present system.

The study will be done under the following main headings:

- (a) The nature and development of the matrimonial property regimes in Botswana.

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<sup>38</sup> See The General Law Proclamation of 1909, s. 19 of which applied the laws in force in the colony of the Cape of Good Hope on the 10<sup>th</sup> of June 1891 to Botswana. These laws included matrimonial laws which became the foundation of the present community of property regime.

(b) The application of the matrimonial property regimes to (i) marriage in community of property, (ii) marriage out of community of property and (iii) marriage under customary law.

(c) An assessment of the efficacy of the regimes in resolving conflict between spouses.

(d) A comparative study of matrimonial property regimes in South Africa, England and Ghana.

(e) A suggested matrimonial regime that will be flexible to fit the social reality of Botswana.

## CHAPTER ONE

# THE NATURE AND DEVELOPMENT OF THE MATRIMONIAL PROPERTY REGIMES IN BOTSWANA

### 1. HISTORICAL BACKGROUND

The evolution of the present matrimonial property regimes is inextricably bound with the development of the legal system as a whole from the declaration of the Protectorate over Bechuanaland<sup>39</sup> in 1885 to the attainment of independence in 1966.<sup>40</sup> The declaration of the

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<sup>39</sup> The bulk of this territory became Botswana at independence in 1966.

<sup>40</sup> For a detailed explanation of the development of the legal system of Botswana during this period, see E.K. Quansah *Introduction to the Botswana Legal System* Gaborone, University of Botswana, 1998, Chap. 1; B. Otlhogile *The History of the Higher Courts of Botswana 1912-1990* Gaborone, Mmegi Publishing House, 1994, A. Aguda "Legal developments in Botswana from 1885 to 1966" (1973) 5 *Botswana Notes & Records* 52; B. Foster "Introduction to the history of the administration of justice in the Republic of Botswana" (1981) 13 *Botswana Notes & Records* 89; J.R. Crawford "History and nature of the judicial system of Botswana, Lesotho, and Swaziland etc." (1969) 86 & (1970) 87 *South African Law Journal* 485 and 76 respectively; and J.H. Pain "The reception of English and Roman-Dutch law in Africa with reference to Botswana, Lesotho and Swaziland" (1978) IX *Comparative and International Law Journal of Southern Africa* 137.

Protectorate came about because of the fears of the Bechuanaland tribesmen about the expansionist intentions of the Boers of Transvaal. Formal steps were not taken until 1885 when a Proclamation was issued declaring that the southern part of the territory should be British territory and that the northern part should, in the words of the Proclamation, “*continue to be as at present under Her Majesty’s protection*”.<sup>41</sup> The former was subsequently annexed to the Cape of Good Hope in 1895<sup>42</sup> and became part of the Republic of South Africa.

The constitutional implication of the declaration of the Protectorate was that the territory’s defence and external affairs and the internal administration came under the unlimited jurisdiction of the British Government.<sup>43</sup> This omnipotence of the British Government was later

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<sup>41</sup> See Order in Council of January 27, 1885; Proclamation of September 30, 1885, and State Papers, vol. 76 at pp. 982 and 986. See also H. Zins “The international context of the creation of the Bechuanaland Protectorate” (1997) 11 *Pula-Botswana Journal of African Studies* 54.

<sup>42</sup> See British Bechuanaland Order in Council, 1895, S.R.O. & S.I. Rev. XXI, 323.

<sup>43</sup> See Robert-Wray *Commonwealth and Colonial Law* London., Stevens, 1966, at pp. 47-48.

challenged in *Tshekedi Khama v. High Commissioner*<sup>44</sup> in which the validity of certain Proclamations was called into question. The British Secretary of State certified under s. 4 of the Foreign Jurisdiction Act, 1890 that Her Majesty had unfettered and unlimited power to legislate for the government and administration of the Protectorate and that treaty or agreement did not limit this power.<sup>45</sup> This notwithstanding it was agreed that the chiefs were to be allowed to continue to administer their internal affairs according to native law and custom provided these were not openly incompatible with good government.

The most significant date in the development of the legal system was the 9<sup>th</sup> of May 1891. On this date, in exercise of powers conferred upon her under the Foreign Jurisdiction Act,<sup>46</sup> Queen Victoria of Great Britain established a rudimentary form of government for the Protectorate by the Bechuanaland Protectorate Order in Council 1891. Under the Order, the High Commissioner was authorised to exercise on

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<sup>44</sup> (1936) [1926-1953] H.C.T.L.R. 9.

<sup>45</sup> For a commentary on the case see B. Otlhogile "Tshekedi Khama and Anor. v. High Commissioner: The making of the court" (1993) 25 *Botswana Notes & Records* 29.

<sup>46</sup> See ss. 53 and 54 Vic. C.37.

Her Majesty's behalf all powers and jurisdiction, which Her Majesty had, or might have had, subject only to such instructions as he might from time to time receive from Her Majesty.<sup>47</sup> In a pursuance of this Proclamation, the High Commissioner issued, on the 10<sup>th</sup> of June 1891, a Proclamation, section 19 of which reads:

*“Subject to the foregoing provisions of this Proclamation, in all suits, actions, or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope: Provided that no Act passed after this date by the Parliament of the Colony of the Cape of Good Hope shall be deemed to apply to the said territory.”*

In 1909, this section was repealed and replaced by one which provided that:

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See Art.2 of the Order in Council.

*“Subject to the provisions of any Order in Council, in force in the Bechuanaland Protectorate at the date of the taking effect of this Proclamation, and to the provisions of any proclamation or regulation in force in the said Protectorate at such date...the laws in force in the Colony of the Cape of Good Hope on the 10<sup>th</sup> of June, 1891, shall mutatis mutandis and so far as not inapplicable be the laws in force and to be observed in the said Protectorate, but no statute of the Colony of the Cape of Good Hope, promulgated after the 10th. day of June, 1891, shall be deemed to apply, or to have applied, to the said Protectorate unless specifically applied thereto by Proclamation.”<sup>48</sup>*

This section effectively imported the common law and statutes of general application existing on the stipulated date in the Cape Colony into Bechuanaland. Consequently, the Roman-Dutch common law - or

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<sup>48</sup> The use of the word “laws” in the section led to some uncertainty as to whether or not there was proper authority for the application of both the common law and the statutes of the Colony of the Cape of Good Hope in the Protectorate. This question was resolved by the General Law (Cape Statutes) Revision Proclamation 1959 which confirmed that the Roman-Dutch common law was applicable but provided that all Cape statutes except those already expressly applied and a further list of 36 Acts contained in a schedule, should cease to have force in the Protectorate.

what has been dubbed "Cape colonial law"<sup>49</sup> - became part and parcel of the Botswana legal system. After this Proclamation it became the practice, especially after the establishment of the Union of South Africa, to incorporate South African statutes in Bechuanaland by Proclamation with almost no modification.

## 2. THE CUSTOMARY LAW PROPERTY REGIME UNDER COLONIAL RULE

Before the imported Roman-Dutch law of marriage is looked at, it must be pointed out that the 1891 Proclamation stressed that in making Proclamations the High Commissioner must:

*"....respect any native laws and customs by which the civil relations of any native chiefs, tribes or populations under Her Majesty's protection are now regulated, except so far as such may be incompatible with the due exercise of Her Majesty's power and jurisdiction".<sup>50</sup>*

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<sup>49</sup> See I.G. Brewer, "Sources of the Criminal Law of Botswana" (1974) 18 *Journal of African Law* 24.

<sup>50</sup> See Art. 4 of the 1891 Order.

The courts established under the Proclamation were denied jurisdiction over matters in which natives were concerned “*unless in the opinion of such court, the exercise of such jurisdiction is necessary in the interest of peace, or for the prevention or punishment of acts of violence to person or property*”. The combined effect of these provisions was to alienate the natives from these courts and confine them to their traditional institutions especially in family matters. Although a Proclamation in 1896<sup>51</sup> gave the common law courts jurisdiction over and against all persons in civil and criminal cases, the natives continued to use their traditional institutions of adjudication to resolve their family matters.

The effect of tribal marriage on ownership of property at this period may be gleaned from the writings of Schapera who notes that:

*“There is no ‘community’ of property between husband and wife. Any property a woman possesses at marriage, or acquires during the marriage, is never looked upon as part of the husband's estate, but must be looked after separately by him;*

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<sup>51</sup> No. 2 of 1896.

*and the wife has full right and say in the disposal of such property. If there is a good understanding between husband and wife, he can freely use her cattle, but in doing so he is always bound to recognize that they actually belong to her and not to him. Such property can never be seized to pay the husband's debts. In case of divorce the wife is entitled to take it all back with her.*"<sup>52</sup>

This view suggests that the principle of separate property form the basis of the law of matrimonial property under customary law. However, Roberts has suggested that the situation was more complicated than this.<sup>53</sup> He pointed out that although a woman can acquire property rights, such rights were usually exercised for her by her guardian - the guardian being her father before her marriage and after that her husband. The woman cannot dispose of or otherwise deal with the property without her guardian's consent. At the time of his research, Roberts found evidence of women increasingly dealing with their

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<sup>52</sup> I. Schapera *op. cit.*, at p. 153. See also B. Morton "The evolution of women's property rights in colonial Botswana, 1890-1966"(1998) 12 *Pula-Botswana Journal of African Studies* 5 at pp. 6-10.

<sup>53</sup> *Restatement of African Law: Botswana I Tswana Family Law*, London, Sweet & Maxwell, 1972 at p. 41.

separate property without the consent of their guardians. He stated that it was unclear whether this phenomenon was due to social change or to dereliction of duty by such guardians. This view may suggest that while the principle of separate property existed under customary law, the husband exercised some power over the wife's separate property. This is reminiscent of the husband's marital power under common law. A similar view is held by Molokomme who has stated that there is no specialised matrimonial property regime in customary law. Household property is in theory accessible to all members of the household but it is the husband who controls property of value, mainly cattle and land, over which the wife has only usufructuary rights.<sup>54</sup>

### 3. THE IMPORTATION OF THE ROMAN-DUTCH LAW OF MARRIAGE

S. 22 of the 1891 Proclamation provided that:

*“Any marriage celebrated by any Minister of the Christian Religion according to the rites of the same, or by any civil marriage officer, duly appointed by the High Commissioner to*

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<sup>54</sup> See “Women’s law in Botswana and research needs” *op. cit.* at p. 16.

*solemnize marriages, shall be taken to be in all respects as valid and binding, and to have the same effect upon the parties to the same and their issue and property as a marriage contracted under the marriage laws of the Cape Colony.”*

By this section the marriage law of the Cape Colony was made applicable to Bechuanaland.

An insight into the early Cape law of marriage can be gleaned from the writing of Botha,<sup>55</sup> who said that the requisites for a valid marriage then were:

- (a) The parties had a general capacity of marriage or can marry each other.
- (b) They had to obtain the consent of their parents.

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C.G. Botha “Early Cape matrimonial law” (1914) 31 *South African Law Journal* 250.

(c) Certain ceremonies had to be observed, for example, the parties had to appear before the Matrimonial Court,<sup>56</sup> banns had to be published and the marriage had to be celebrated by a religious ceremony in church.

In 1804, Commissary General J.A. de Mist passed an Ordinance to allow the performance of a secular ceremony. This was to be conducted before the Landdrost and two Heemraden of the district in which the bride had lived for three weeks before the ceremony. The Ordinance also gave the Commissioners of the Matrimonial Court a discretion to allow the marriage ceremony to take place in private houses. Sir David Baird annulled this Ordinance in 1806 but in 1838 the Marriage Order in Council restored the secular ceremony. Thus by the time the Cape colonial marriage laws became part of the law of Botswana because of the 1891 Proclamation, secular and religious marriage ceremonies had been established.

The Marriage Proclamation 1917<sup>57</sup> repealed s. 22 of the 1891 Proclamation and was made applicable to all marriages solemnised in

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<sup>56</sup> This court was set up on 28<sup>th</sup> December 1676 by a Resolution of the Council of Policy. See Botha *op. cit.*, at p. 251.

<sup>57</sup> No. 1 of 1917.

the Protectorate except those under customary law.<sup>58</sup> The Proclamation maintained the basic prerequisites for contracting a marriage, which applied under the law of the Cape Colony. It provided for a procedure for the publication of banns, the issue of licences, the appointment of marriage officers, solemnisation and registration of marriages, prohibited degrees of consanguinity and affinity, and penalties for the infringement of the provisions of the Act. These were based on Christian notions of marriage.

Africans were for the first time provided with an alternative to customary marriage but this option could not be reconciled with the jurisdictional limitations imposed upon the common law courts. The African was faced with a dilemma about which court could give him matrimonial relief if he were to marry under Christian rites or by a civil ceremony under the Marriage Proclamation of 1917. The common law courts were not allowed to hear cases involving Africans and the customary courts were ill-equipped to deal with matters governed by the common law.<sup>59</sup> To solve this dilemma, but only partially, the Native

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<sup>58</sup> See s. 2 of the Proclamation.

<sup>59</sup> See Roberts *op. cit.*, at p. 9.

Marriage Proclamation of 1926<sup>60</sup> was passed to give Resident Magistrates jurisdiction in actions for divorce where the spouses were Africans married according to the Marriage Proclamation.<sup>61</sup> This jurisdiction however did not extend to other forms of matrimonial relief, such as maintenance or claims relating to children born to Africans who contracted a marriage under the Marriage Proclamation. However, s. 4(1) of the 1926 Proclamation as originally enacted provided for division of property on divorce. The said section provided that:

*“Where at the taking effect of this Proclamation a marriage subsists between native spouses having been duly solemnised by a marriage officer or according to the rites of the Christian religion if contracted before the first day of April, 1917, and if contracted on or after that date having been solemnised by a marriage officer appointed under Chapter 117 [The Marriage Proclamation], and where on the dissolution of such marriage by decree of a competent court or by death of one of the spouses a question arises as to the disposal or devolution of any*

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<sup>60</sup> No. 19 of 1926.

<sup>61</sup> See s. 2 of the 1926 Proclamation.

*property of either or both of the spouses such question shall be heard and determined in accordance with the law of the Bechuanaland Protectorate by the court of a Resident Magistrate having jurisdiction in ordinary civil cases unless it shall appear to that court on application made to it that regard being had to the mode of life of the spouses or to any disposition of the property made by either of the spouses during the subsistence of the marriage it would be just and equitable that such property should be dealt with according to native law and custom.”*

The traditional authorities took exception to the above section and after they made representations to the High Commissioner, the Secretary of State authorised the rephrasing of the section.<sup>62</sup> The new phraseology, which affected the latter part of the section, read as follows:

*“...if it shall appear to the court on application made to it that regard being had to the mode of life of the spouses or to any disposition of the property made by either of the spouses during*

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<sup>62</sup> See Roberts *op. cit.*, at p. 10.

*the subsistence of the marriage it would not be just and equitable that such property should be dealt with according to native law and custom.”*<sup>63</sup>

In 1942 another Proclamation<sup>64</sup> amended the 1926 Native Marriage Proclamation in relation to property of tribesmen married under the 1917 Marriage Proclamation by providing that:

*“Such form of marriage shall not, in the absence of an antenuptial contract duly registered in the Deeds Office, affect the property of the spouses which shall be held, may be disposed of, and, unless disposed of by will, shall devolve according to Tswana law and custom.”*

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<sup>63</sup> This amendment was published in Proclamation No. 6 of 1928. See *Tlametlo Maranyane v. Olebile Maranyane* Special Court of the Bechuanaland Protectorate unreported (12<sup>th</sup> August 1937) where Millin K.C. held that where no application has been made under the section the property of the spouses must be referred to the appropriate native court for division of the property in accordance with native law. The amendment is now contained in s. 2 of the Dissolution of Marriage of Persons Subject to Customary Law (Disposal of Property) Act (Cap. 29:05).

<sup>64</sup> No. 18 of 1942 amending s. 19 of the principal Proclamation.

The Marriage Proclamation 1917, now styled the Marriage Act,<sup>65</sup> still governs the statutory marriage in Botswana today with minor amendments.

#### 4. THE LEGAL CONSEQUENCES OF MARRIAGE UNDER THE MARRIAGE PROCLAMATION

As is evident from the provisions of s. 22 of the 1891 Proclamation and its subsequent affirmation by the Marriage Proclamation of 1917, the legal consequences of a Roman-Dutch-law marriage were those applicable in the Cape Colony on the reception date. These consequences fall into two categories, namely, invariable consequences and variable consequences. The former is personal in nature and includes, *inter alia*, the spouses' obligation to cohabit with one another, to reserve to one another exclusive conjugal rights, support one another

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<sup>65</sup> Cap. 29:01 1987 Rev. This statute is about to be repealed and re-enacted with amendments by the Marriage Bill No. 16 of 2000. The proposed Act, *inter alia*, will make it obligatory for Customary, Muslim, Hindu and other religious marriages to be registered, raise the marriageable age to 18 years, and allow minors to apply to the court for consent to marry, where the consent of one parent is given but that of the other is refused.

and not to marry anyone else during the subsistence of the marriage.<sup>66</sup> These consequences automatically apply to the marriage by operation of law when the marriage is concluded and the parties cannot exclude them.<sup>67</sup>

The variable consequences of the marriage are more germane to this study. These involve the proprietary consequences of the marriage and are community of property and of profit and loss (universal community of property) and the marital power. These would apply to the marriage unless expressly excluded by an antenuptial contract entered by the parties before their marriage. They must notarially execute and register the contract in the Deeds Registry Office.<sup>68</sup> Thus, their application depended on whether the parties chose to marry “in” or “out” of community.

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<sup>66</sup> For a detailed discussion of these consequences reference should be made to the leading South African texts of Hahlo “*Husband and Wife*” *op. cit.*, chap. 9; *Boberg’s Law of Persons and the Family* (2<sup>nd</sup> ed.) by B. Van Heerden *et al.*, (eds.) Cape Town, Juta & Co., 1999 at pp. 170-188; Cronje & Heaton *op. cit.*, chap. 5 and Sinclair assisted by Heaton *op. cit.*, chap. 11.

<sup>67</sup> See Sinclair assisted by Heaton *op. cit.*, at p. 415 and Cronje & Heaton *op. cit.*, at p. 57.

<sup>68</sup> See ss. 4 and 6 of the Antenuptial Contracts Act 1891 (Cap. 29:02).

### (a) Marriage in community of property

The exact origin of the concept of universal community is shrouded in mystery but a South African authority has asserted that by the end of the thirteenth century the concept had taken roots in Holland and Zeeland.<sup>69</sup> It could therefore be confidently asserted that by the time the 1891 Proclamation was enacted for Bechuanaland, the concept of universal community was operating in the Cape Colony and so, by virtue of s. 22 of that Proclamation, was applicable to the then Bechuanaland Protectorate.

The nature of universal community has been described by Hahlo<sup>70</sup> as follows:

*“Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares.”*

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<sup>69</sup> Cronje & Heaton *op. cit.*, at pp. 83-84. See further Chapter Four *infra*.

<sup>70</sup> *“Husband and Wife” op. cit.*, at pp. 157-158. See also Van Heerden *et al op. cit.*, at pp. 182-188.

He states that although there has been some controversy about the exact legal nature of community, the above view of it is generally accepted as correct.<sup>71</sup> An accompanying right attached to the universal community was the exercise by the husband of the marital power of the marriage.<sup>72</sup> This power in its widest sense embraced three elements namely:<sup>73</sup>

(a) The husband's power as the head of the family. By virtue of which he had the decisive say in all the matters concerning the common life of the spouses and determined, *inter alia*, where and in what style they were to live.

(b) The husband's power over the person of his wife, including her representation in legal proceedings and

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<sup>71</sup> See Hahlo "*Husband and Wife*" *op. cit.*, at p. 158 and Cronje & Heaton *op. cit.*, at pp. 85-86. See also pp. 148-151 *infra*.

<sup>72</sup> See Hahlo "*Husband and Wife*" *op. cit.*, chap. 12 and Cronje & Heaton *op. cit.*, chap. 7.

<sup>73</sup> See Hahlo "*Husband and Wife*" *op. cit.* at p. 189 and A. van Aswegen "Transactions between a spouse and a third party: The effect of the Matrimonial Property Act 88 of 1984" (1984) 6 *Modern Business Law* 140 at p. 141.

(c) The husband's power over the property of the wife. This enabled the husband in his absolute discretion to deal with the joint estate as its administrator and to do the same with the separate assets of his wife, which did not form part of the joint estate.<sup>74</sup>

The power under (a) was one of the invariable consequences of marriage and could not be excluded by antenuptial contract.<sup>75</sup> The powers under (b) and (c) however were variable and they together made up the narrower sense in which the term was used. The overall effect of the husband's use of the marital power was to subject the wife to the husband's guardianship, effectively making the status of a married woman analogous to that of a minor.<sup>76</sup> Nevertheless, as rightly pointed

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<sup>74</sup> This aspect of the husband's marital power was reiterated in *Modise v. Modise* Misca. 49/91 unreported (16th. September 1991) High Court Lobatse in which Livesey Luke C.J. approved the *dictum* of Vieyra J. in the South African case of *Strausz v. Strausz* 1964 (1) S.A. 720 (W) at p. 722. See also *Govender v. Chetty* 1982 (3) S.A. 1078 (C) at p. 1080 *per* Berman J. and Cronje & Heaton *op. cit.*, at p. 95.

<sup>75</sup> See the South African cases of *Webber v. Webber* 1915 A.D. 239 at p. 246 and *King Confections (Pty.) Ltd. v. Harris* 1955 (3) S.A. 545 (E) at p. 546

<sup>76</sup> See Hahlo "*Husband and Wife*" *op. cit.*, at p. 191. See also *Joina & Associates v. Bakwena Modikwa* and *Jane Ndome v. Mpiwa Komboni infra*.

out by Hahlo,<sup>77</sup> whereas the guardianship of a minor serves the interests of the minor, the marital power primarily serves the interests of the husband. It is therefore no surprise that the marital power became a symbol of oppression in the eyes of many a married woman. It inevitably attracted criticism from commentators.<sup>78</sup> Attempts were made in South Africa by statute to improve the unacceptable face of the use of the marital power. The Matrimonial Affairs Act No. 37 1953, for example, restricted the husband's power of disposition in respect of certain classes of immovable property and diminished his power in respect of certain classes of movable property, especially the wife's wages, savings and bank account. The marital power was eventually abolished.<sup>79</sup>

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<sup>77</sup> *Op. cit.*, at p. 194.

<sup>78</sup> See for example, the South African Law Commission's Report on the Matrimonial Property Law No. RP 26/1982 paras. 13.1.3- 13.1.4, Molokomme "Marriage: What every woman wants..." *op. cit.* and Government of Botswana/UNICEF Report *op. cit.*, at pp. 208-209.

<sup>79</sup> See s. 11 of Matrimonial Property Act 88 of 1984, s. 1 (e) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, General Law Fourth Amendment Act 132 of 1993 and Justice Laws Rationalisation Act 18 of 1996. See *infra* note 282.

In Botswana, however, universal community and the marital power are applied in their pristine purity without any attempt to curb the excess of the marital power.<sup>80</sup> Although the common law provided some safeguards against the abuse of the marital power,<sup>81</sup> there were difficulties in the way of their use. For example, in *Moisakamo v. Moisakamo*<sup>82</sup> an ex-wife applied for a common law interdict to restrain her ex-husband from disposing of property pending the division of their joint estate. The interdict was refused on the ground, *inter alia*, that she

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<sup>80</sup> See *Joina & Associates v. Bakwena Modikwa* CA 8/1998 unreported (23<sup>rd</sup> July 1999) where the Court of Appeal reiterated that a woman married in community of property and subject to her husband's marital power cannot sue or be sued without the consent of her husband. In *Jane Ndome v. Mpiwa Komboni* Civil Case No. F1931/95 unreported (8<sup>th</sup> September 1998) High Court, Francistown, the court held that if a woman married in community of property sues her husband for divorce on account of his adultery and in the same action sues his paramour, she need not be assisted by her husband. However, if she brings an action for damages against her husband's paramour without suing for divorce, she must be assisted by her husband unless given leave by the court to sue unassisted.

<sup>81</sup> For example, by giving a wife or her estate recourse against her husband where he had made a donation out of the joint estate to a third party in deliberate fraud of his wife - see the South African case of *Merrington & Adams v. Welt* (1898) 15 S.C. 313.

<sup>82</sup> [1979-80] B.L.R. 131.

had failed to show an actual or well-founded apprehension of great loss.<sup>83</sup>

In 1970 the legislature tried to rectify some of the perceived shortcomings of universal community by the enactment of the Married Persons Property Act. When presented to Parliament, the object of the Bill was said to be:

*“...to amend the law relating to the ownership and control of the property of married persons...[U]nder the common law the property of married persons, who are not Africans, falls into a common pool which, although jointly owned by the spouses, is entirely controlled by the husband unless the spouses execute an antenuptial contract before marriage. This places the wife, in relation to the property of the marriage, in almost the same position as a minor child. This is considered to be inconsistent with the status of women today. The Bill makes provision for*

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<sup>83</sup> The South African case of *Maroudus v. Curich* 1924 W.L.D. 249 was relied upon by the court. *Cf. Mokoba v. Mokoba* Miska. F190/96 unreported (21st. March 1997) High Court, Francistown, where a rule *nisi*, later made absolute, was made against a husband to restrain him from selling a motor vehicle which formed part of the joint estate and to release a car for use of his wife pending the conclusion of the divorce proceedings.

*community of property to disappear after 1<sup>st</sup> January 1971 unless the spouses wish to be married in community.*"<sup>84</sup>

Despite this prediction of the withering away of community of property, what the Act does in effect is merely to reverse the previous presumption in favour of community in the absence of an antenuptial contract, to one in favour of marriage without community. S. 3(1) of the Act provides that community of property and community of profit and loss and the marital power or any liabilities or privileges resulting from it shall not attach to any marriage solemnised between spouses whose matrimonial domicile is in Botswana, which is entered on or after the commencement of the Act. Provision is however made for the couple to opt for community if they so wish, by filling in the form specified in the first schedule to the Act.<sup>85</sup>

This development notwithstanding, the proprietary consequences of Africans ( a term later to be styled "*persons subject to customary law*")

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<sup>84</sup> *Hansard* vol. 34 1970 at p. 16 per Hon. Masisi, Minister of State.

<sup>85</sup> For a commentary on the Act, see F.X. Rooney "A decade of legal reform in Botswana" (1975) 92 *South African Law Journal* 97 at p. 101.

married under the Marriage Proclamation continue to be governed by customary law unless they specifically opt out of that law.<sup>86</sup>

Two modes for opting out of customary law are provided in the second schedule to the 1970 Act. The first mode enables persons subject to customary law who wish to exclude customary law and be married “out” of community of property, without the marital power, to fill in Form A. Mode two is for those who wish to exclude customary law but be married “in” community of property with the marital power to fill in Form B.<sup>87</sup>

The rationale for granting these options to persons subject to customary law was “*that most Africans here still prefer their customary law to be applied as far as their property is concerned.*”<sup>88</sup> Thus, a situation now exists where, on the granting of a divorce of couples who are subject to

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<sup>86</sup> See s. 7(1) of the 1970 Act.

<sup>87</sup> See *Setlhare v. Setlhare* MC F115/95 unreported (31st. July 1997) High Court, Francistown, where Cotran J. held that, to be excused from s. 3(1) of the Married Persons Property Act, spouses have to sign the requisite instrument.

<sup>88</sup> *Hansard* vol. 34 1970 at p. 17 *per* Hon. Masisi.

customary law, the High Court usually remits the division of the matrimonial property to a customary court.<sup>89</sup> Nevertheless, when the division of the property proves unsatisfactory, as it usually is, the parties, especially the wife, again institute proceedings in the High Court for the division of such property. It must be pointed out that the High Court possesses the power to divide the property of such couples as such division is clearly an ancillary matter to the divorce. The practice of remitting the case to the Customary Court was born out of convenience as, more often than not, such matrimonial property is situated where these customary courts are and the couple will likely be residing within the area of the jurisdiction of the customary court.<sup>90</sup>

The 1970 Act was the only attempt in the last three decades to reform a matrimonial property regime inherited from the colonial government but it was only a superficial reform.

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<sup>89</sup> See for example, *Moisakamo v. Moisakamo* (2) [1981] B.L.R. 126. For the historical background to this practice, see B. Morton *op. cit.*, at p. 15.

<sup>90</sup> See remarks of Hayfron-Benjamin C.J. in *Moisakamo v. Moisakamo* (2) [1981] B.L.R. 126 at p. 135.

## **(b) Marriage out of community of property**

As has been pointed out above, before the enactment of the Married Persons Property Act 1970, the general presumption relating to marriage under the Marriage Proclamation was that it was in community of property in the absence of an antenuptial contract. The purpose of such an antenuptial contract was to exclude either all, or some of, the common law consequences of marriage under the Proclamation.<sup>91</sup>

In deciding the type of matrimonial regime one wishes to marry under, care must be taken for, once it has been chosen, it cannot later be altered. The opportunity given to married South Africans to alter their matrimonial property regime by s. 21(1) of the Matrimonial Property

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<sup>91</sup> The concept of the “antenuptial contract” is said by Cronje & Heaton *op. cit.* at pp. 107-108 to be misleading because the “contract” may have such a varied content. “Contract”, they say, is a word used to denote an agreement which is entered into with the intention of creating an obligation(s). While this is true of the antenuptial contract, the primary object of the agreement is not to create obligations but to determine the matrimonial property system between the marriage partners by excluding either partially or wholly the normal consequences of marriage. Viewed in this light, they conclude that the antenuptial contract is by no means a contract but the usage of the term is so entrenched in common parlance and legal terminology, that its continuous usage is not only desirable but highly convenient. For provisions relating to antenuptial contracts in Botswana, see the Antenuptial Contracts Act 1891, Cap 29:02.

Act 1984<sup>92</sup> is not available to Batswana.<sup>93</sup> The principle of immutability, by which the matrimonial property system chosen by the spouses cannot be changed after the marriage, applies to the matrimonial property law in Botswana although s. 4(1) of the Married Persons Property Act 1970 allowed a limited relaxation of this principle. This section permits parties married in community of property prior to 1<sup>st</sup> January 1971 to change their matrimonial property regime to that of out of community at any time by entering into a notarial deed expressing their wish that the provisions of the 1970 Act should apply to their marriage. Such a notarial deed is to be published in the Government Gazette and registered in the Deeds Registry.<sup>94</sup>

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<sup>92</sup> Under this section a husband and wife who married either before or after the commencement of the Act on 1<sup>st</sup> November 1984 may jointly apply to the court for leave to change the matrimonial property system applicable to their marriage. For the court to grant such a change, the spouses must set out the proposed new system in a notarial contract for the court's approval. Notice of the proposed change must be given to all creditors of the spouses. The court will only approve the change if sound reasons exist and the change will not prejudice third parties. See *Ex parte Lourens* 1986 (2) S.A. 291 (C) and *Ex parte Le Roux*; *Ex parte Von Berg* 1990 (2) S.A. 70 (O) for guidelines for application under the subsection.

<sup>93</sup> See note 36 *supra*.

<sup>94</sup> See p. 12 *supra*.

The legal consequence of marriage out of community is that it creates two separate estates, each comprising the separate assets and liabilities of one party. Everything that each party had before the celebration of the marriage and everything that he or she acquires during the subsistence of the marriage, with their liabilities, belongs to the separate estate of that party.<sup>95</sup> This matrimonial regime, though conferring full legal capacity on the wife, is not free from criticism. A housewife, who does not earn an independent income outside the home, is deprived from sharing in the matrimonial property at the end of the marriage.<sup>96</sup> This, coupled with the fact that the power of the court to determine the mutual property rights of the spouses on divorce has been narrowly interpreted to exclude a discretion to adjust property rights equitably, makes any attraction that this matrimonial property regime may appear to have for women illusory in practice.

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<sup>95</sup> See Hahlo "*Husband and Wife*" *op. cit.*, at p. 287 and Cronje & Heaton *op. cit.*, at p. 117.

<sup>96</sup> See the Government of Botswana/UNICEF Report, *op. cit.*, at p. 209.

## 5. DIVORCE AS AN EVENT FOR THE DETERMINATION OF PROPERTY RIGHTS OF SPOUSES

Roman-Dutch law recognised only two grounds of divorce, namely, adultery and malicious desertion although from the records of the old Court of Justice in the Cape Colony, it appears that perpetual imprisonment or banishment also grounded a divorce.<sup>97</sup> In South Africa, the legislature intervened in 1935 to extend the existing grounds of divorce by an additional two grounds. These were incurable insanity and long imprisonment.<sup>98</sup> These additional grounds were inapplicable in Botswana, the South African Parliament being incompetent to legislate for the then Bechuanaland Protectorate. The High Commissioner, uncharacteristically, did not enact a Proclamation to make the additional grounds applicable to Bechuanaland. Thus Bechuanaland and later Botswana continued to apply the unchanged Roman-Dutch law grounds as inherited from the Cape Colony until 1973.

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<sup>97</sup> See Botha, *op. cit.*, at p. 258.

<sup>98</sup> See s. 1 of Divorce Laws Amendment Act 32 of 1935.

In that year the Botswana legislature took steps to break the umbilical cord, which had tied the divorce law of the country to that of South Africa by the enactment of the Matrimonial Causes Act 1973.<sup>99</sup> The provisions of the Act were based entirely on the English Divorce Reform Act 1969. The intention was to replace the common law with the provisions of the Act as was evident from the parliamentary proceedings during the passage of the Bill through Parliament. On the second reading of the Bill the then Minister of Labour and Home Affairs said the following:

*“As stated in the memorandum, the proposed law makes for the first time in Botswana statutory provision as to the circumstances in which marriages can be dissolved by divorce or annulments and for matters incidental to such dissolutions. The difference will be that, all these matters which hitherto, have been governed by Roman Dutch Law, will now be dealt with under the provisions of the new Act.”*<sup>100</sup>

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<sup>99</sup> See E.K. Quansah, *Law of Marriage and Divorce in Botswana* 2<sup>nd</sup> ed. Gaborone, University of Botswana, 1998 pp. 3-7.

<sup>100</sup> *Hansard* vol. 41 1972 at p. 15 per Hon. M.P.K. Nwako.

Despite the professed intention to supplant Roman-Dutch law with the provisions of the Act, questions abound about how successfully this has been achieved.<sup>101</sup> To take but one example, s.13 of the Act gives the court the power to make an order “*determining the mutual property rights of the husband and the wife*” but what amounts to those property rights is not explained in the Act. One could therefore conclude that the Roman-Dutch law still governs these property rights as the legislature is deemed not to intend a change in the common law without express words to that effect.<sup>102</sup> If that is correct, conflict between the principles of Roman-Dutch and English property law in the determination of the spouses’ mutual property rights is likely as the Act is based on English law.

Nevertheless, the Matrimonial Causes Act 1973 altered the Botswana common law of divorce by stating the sole ground of divorce to be the

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<sup>101</sup> See C.M.G. Himsworth “Effects of matrimonial causes legislation in Botswana” (1974) 18 *Journal of African Law* 173 and A.J.G.M Sanders, “Ten years of Botswana Matrimonial Causes Act - Further proposals for divorce reform” (1982) 26 *Journal of African Law* 163.

<sup>102</sup> See G.M. Cockram, *Interpretation of Statutes* (3<sup>rd</sup> ed.), Cape Town, Juta & Co., 1987 at pp. 98-99.

irretrievable breakdown of the marriage.<sup>103</sup> Thus the emphasis was shifted from the apportionment of blame for a marital breakdown to the recognition of the fact of such a breakdown no matter whose fault it was. In that event s.13 empowers the court to determine the mutual property rights of the spouses. Previously the effect of divorce on the property rights of the spouses depended upon whether they were married in or out of community of property and whether they were subject to customary law. It further depended upon whether the court made an order for forfeiture of benefits against the defendant. When the plaintiff claimed forfeiture, the court had no discretion to withhold the order.<sup>104</sup> These factors still apply to the determination of the mutual property rights under the 1973 Act. Himsworth<sup>105</sup> however contends that because the forfeiture of benefit order is incompatible with the new statutory provisions, its revocation must be implied. It is respectively submitted that this should be the case.

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<sup>103</sup> See s. 14 of the Act and *Mombala v. Mombala* [1976] B.L.R. 31.

<sup>104</sup> See *Murison v. Murison* 1930 A.D. 157 at p. 161 *per* Curlewis, J.A.; *Anthony v. Anthony* 1946 C.P.D. 871 at p. 877 *per* Searle, A.J. and *Bhengu v. Bhengu* 1949 (4) S.A. 22 (N) at pp. 24-25 *per* Broome, J.A.

<sup>105</sup> *Op. cit.*, at p. 176.

In applying the above factors to the determination of the matrimonial property on divorce, the courts did not have a discretion to vary the quantum of property to be given to either spouse.<sup>106</sup> The 1973 Act did not rectify this lack of discretion to adjust the mutual property rights of the spouses. Rather, the courts' narrow interpretation of s.13 of the 1973 Act has confirmed it.<sup>107</sup> The effect of this interpretation on the courts' power to adjust the property rights of the spouses on divorce will be discussed in the next chapter.

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<sup>106</sup> Cf. the present position in South Africa under the Matrimonial Property Act No. 88 of 1984, s. 36 of which inserted ss. 7(3) to 7(6) into the Divorce Act No. 70 of 1970. Under those subsections the courts are empowered, in specified circumstances when the parties are married out of community of property, to make an order that all or some of the assets belonging to one of the spouses, be transferred to the other spouse. See pp. 207-226 *infra*.

<sup>107</sup> See *Molomo's case op. cit.*

## CHAPTER TWO

# JUDICIAL APPLICATION OF THE MATRIMONIAL PROPERTY REGIMES

### 1. INTRODUCTION

The survey of the historical evolution of the matrimonial property regimes in the previous chapter shows that the various regimes developed within separate compartments. In practice however, this is not entirely true, there is some interaction between them. For example, s. 7(1) of the Married Persons Property Act<sup>108</sup> makes customary law the governing legal regime for the proprietary consequences of a marriage contracted under the Marriage Act by persons subject to customary law.<sup>109</sup> In respect of such marriages the High Court has power under s. 13 of the Matrimonial Causes Act to determine the mutual property

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<sup>108</sup> Cap. 29:03.

<sup>109</sup> This application of customary law is subject however to the discretion to apply common law given by s. 2 of the Dissolution of Marriages of Persons Subject to Customary law (Disposal of Property) Act (Cap. 29:05). S. 7(2) of the Married Persons property Act also enable the spouses to opt out of the application of customary law to the proprietary consequences of their marriage by signing an instrument to that effect prior to the marriage.

rights of the spouses. In determining these mutual property rights the court applies customary law, and it awards the spouses only that which they would be entitled to under customary law.<sup>110</sup> If however the parties to a marriage under the Marriage Act are not subject to customary law, then the common law will determine the proprietary consequences of the marriage. Thus marriages contracted under the Marriage Act can be governed either by the common law or the customary law depending on whether or not the parties are subject to customary law.

This chapter will take a detailed look at how the courts apply these regimes in practice to determine the division of matrimonial property on divorce and how they interact with one another. It must however be pointed out that there have not been many opportunities for the courts to apply the regimes to resolve matrimonial property disputes. The reason for this is difficult to fathom, but one can speculate that this is because many couples can agree to their property rights at the pre-trial stage, which agreement is usually made an order of court.<sup>111</sup>

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<sup>110</sup> See *Moisakamo v. Moisakamo (2)* 1981 B.L.R. 126.

<sup>111</sup> See for example, *Marumo v. Marumo* MC No. F95/1994 unreported (20<sup>th</sup> June 1997) High Court, Francistown and *Mathiba v. Mathiba* MC No. F100/1995 unreported (22<sup>nd</sup> November 1996) High Court, Francistown. Experience at the University of Botswana Legal Clinic, where the bulk of the

Alternatively, this may be due to the lack of property to quarrel about to enable the court to be called upon to intervene.

## 2. JURISDICTION - APPLICABLE LAW

Before the discussion on the courts' application of the regimes, their jurisdiction to decide matrimonial causes and *a fortiori* to determine matrimonial property rights will be briefly discussed. As a prelude to the discussion it must be noted that the applicable law for the determination of the spouses' property rights is the law of the country of the husband's domicile at the time of the marriage. This is an absolute rule of Roman-Dutch common law<sup>112</sup> to which Botswana subscribes. When the applicable law has been ascertained, the specific rule of that law to be used to determine the proprietary rights of the spouses must also be ascertained. If the husband was domiciled in Botswana at the time of the marriage, the next issue would be to

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work is matrimonial causes, also bears this out - see G.M. Kakuli, "Experimenting in clinical legal education in Botswana" (1989) 5 *Lesotho Law Journal* 433.

<sup>112</sup> See the South African cases of *Brown v. Brown* 1921 A.D. 478 at p. 482, *Frankel's Estate v. The Master* 1950 (1) S.A. 220 (A.D.) at p. 241 and *Sperling v. Sperling* 1975 (3) S.A. 707 (A) at p. 716.

ascertain which system of Botswana law, customary or general law, applies to the case. The type of marriage entered into by the parties determines the applicable law. Thus, as indicated above, where the parties are subject to Botswana customary law the customary law will apply to the proprietary consequences of the marriage irrespective of whether the marriage is customary or under the statute.<sup>113</sup> Where the parties are not subject to customary law and they marry under the Marriage Act the common law will govern the proprietary consequences of the marriage.<sup>114</sup>

### 3. JURISDICTION IN MATRIMONIAL CAUSES

As is evident from the discussions in chapter one, the law of Botswana recognises two types of marriages, that is, marriage contracted under the various customary laws and that contracted under the Marriage Act.

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<sup>113</sup> See note 109 *supra*.

<sup>114</sup> See p. 56 *supra*. In terms rule 2 of the internal conflict rules provided for by s. 6 of the Common Law and Customary Law Act 1969, it is possible for a person not subject to customary law to agree to a transaction, which the rule says includes marriage, of which he is a party, to be governed by customary law.

Jurisdictions over these two types of marriages seem to be concurrently vested in the Customary and High Courts.

**(a) Jurisdiction over customary marriage**

Jurisdiction over this type of marriage at first instance, appears to be conferred on customary courts. S. 10 of the Customary Courts Act<sup>115</sup> provides that:

*“Subject to the provisions of section 12 and of subsection (2), a Customary Court shall have and may exercise civil jurisdiction over causes and matters in which -*

*(a) the matter is justiciable under any law administered by the court under section 14, and-*

*(i) all the parties are tribesmen, or*

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<sup>115</sup> Cap. 04:05. For a more detailed discussion of these courts, see C.M.G. Himsworth “The Botswana Customary Law Act 1969” (1972) 16 *Journal of African Law* 4, S. Roberts “The survival of the traditional Tswana courts in the national legal system of Botswana” (1972) 16 *Journal of African Law* 102 and D. Manga “Customary courts in the judicial system of Botswana” in *The Law, The Convict and the Prisons*, (K. Frimpong ed.) Gaborone, University of Botswana, 1987.

- (ii) *the defendant consents in writing to the jurisdiction of the court;*
- (b) *the defendant is ordinarily resident within the area of jurisdiction of that court, or the cause of action arose wholly therein...*”

The provisions of s. 12 referred to in the above section relate to matters excluded from the ordinary jurisdiction of customary courts. One such matter is any cause or proceedings by which divorce, a declaration of nullity of marriage, or an order for judicial separation is sought where such marriage has been contracted other than “*in accordance with customary law*”.<sup>116</sup> Thus, by this provision customary marriages come under the jurisdiction of the customary courts. It has been held that once a claim for divorce or nullity in respect of a marriage under the Marriage Act is included in an action, s. 12 not only denies jurisdiction to grant the order for divorce or nullity but also ousts the jurisdiction of

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<sup>116</sup> See s. 12(b) of the Customary Courts Act 1986. See also *Mafokate v. Mafokate* MC 166/2000, unreported (29<sup>th</sup> November 2000) High Court, Lobatse at pp. 14-15 of the transcript.

the customary courts over the whole proceedings despite the nature and number of ancillary reliefs claimed.<sup>117</sup>

The jurisdiction conferred on customary courts to adjudicate over customary marriages is not exclusive. The High Court, it has been held, has concurrent jurisdiction. In *Moisakamo* the court emphasised this by overruling a preliminary objection that the High Court has no jurisdiction to hear a case in which a division of property on divorce is governed by customary law.<sup>118</sup> This conclusion is based on the provisions of s. 95 of the Constitution of Botswana which confers unlimited jurisdiction over any matter, civil or criminal, on the High Court.<sup>119</sup> This constitutional provision seems to override s. 4 of the Matrimonial Causes Act, which apparently ousts the jurisdiction of the

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<sup>117</sup> Per Hayfron-Benjamin C.J. in *Moisakamo v. Moisakamo(2) supra*, at p. 137.

<sup>118</sup> See 1981 (1) B.L.R. 126 at p. 135.

<sup>119</sup> See *Botswana Railways Organization v. Setshogo & Ors.* CA No. 51/1995 unreported at p. 60 of the transcript and *Mafokate v. Mafokate op. cit.* where a three-panel High Court (Nganunu C.J, Lisimba and Kirby JJ.) held that by virtue of s. 95(1) of the Constitution the High Court has jurisdiction over customary marriages and that s. 3 of the Matrimonial Causes Act 1973, which provides that the Act shall not apply to any marriage contracted in accordance with customary law, is not an impediment to the Court exercising jurisdiction over customary-law marriages.

High Court over polygamous marriages.<sup>120</sup> Thus, both the Customary Court and the High Court have jurisdiction over customary marriages. Nevertheless, it is acknowledged that the dissolution of customary marriages and ancillary matters arising therefrom are matters eminently suited to be brought before customary courts than the High Court. The Customary Courts have special advantages compared with the High Court in ascertaining the proper grounds for divorce in the tribe to which the couple belong. Furthermore, Customary Courts are spread throughout the country within easy and convenient reach of litigants and it can generally be said that a divorce hearing would be faster and less expensive than an action in the High. It is therefore submitted that actions for divorce of a customary marriage at first instance will usually

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<sup>120</sup> The said section reads as follows: “*Nothing in this Act shall authorize any court to pronounce a decree of divorce, nullity, judicial separation or presumption of death and dissolution of marriage or to make any other order than an order dismissing an action unless the marriage to or in respect of which the decree or order relates was a monogamous marriage.*” The High Court acknowledged this restriction on its power in *Mafokate v. Mafokate op. cit. supra* when it said, (at p. 8 of the transcript), “*It is true that section 4 of the Act curtails the jurisdiction of the High Court to grant divorces in any polygamous marriage, but that is not the case here.*” The court however, neither ruled on the effect of the section on its power to adjudicate over customary marriage nor its validity in the light of s. 95(1) of the Constitution.

be brought in the Customary Court while the High Court will concern itself with appellate matters.<sup>121</sup>

One aspect of the jurisdiction of Customary Courts over customary marriages needs to be highlighted. This is that only tribesmen are amenable to that jurisdiction, although in a rare case a defendant may consent in writing to the court's jurisdiction although he is not a tribesman.<sup>122</sup> Who is a "tribesman" for this purpose? The answer appears from the definition of the word in s. 2 of the Act. That section defines a tribesman to mean:

*"any member of a tribe or tribal community of Botswana or of any other country in Africa prescribed by the Minister by order in the Gazette for the purposes of this Act."*

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<sup>121</sup> See *Andries Kangooyui v. Commissioner of Customary Courts & Ors.* Misc. No. F16/1996 unreported (26<sup>th</sup> September 1996), High Court, Francistown where the High Court, on appeal from the Customary Court of Appeal, confirmed the customary divorce and distribution of the joint assets of the parties. See also the remarks of Nganunu C.J in *Mafokate v. Mafokate op. cit. supra* at p. 15 of the transcript.

<sup>122</sup> See s. 10 of the Customary Courts Act 1986. See also rule 2 of the choice of law rules in s. 6 of the Common Law and Customary Law Act 1969.

Eight principal tribes are recognised in Botswana.<sup>123</sup> However, this does not disqualify members of any minority tribes being subject to customary law. At present other tribes from Africa are not included in the definition as the Minister has not yet prescribed any of them as envisaged by s. 2 of the Act. In its exercise of jurisdiction over customary law marriages, the Customary Court is obliged to apply customary law,<sup>124</sup> hence, customary law marriages are governed purely by customary law.

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<sup>123</sup> See s. 77 of the Constitution of Botswana 1966 which provides, *inter alia*, that the House of Chiefs shall consist of eight *ex-officio* members and s. 78 which specifies that the *ex officio* members shall be such persons as are for the time being performing the functions of the office of Chief in respect of the Bakgatla, Bakwena, Bamalete, Bamangwato, Bangwaketse, Barolong, Batawana and Batlokwa tribes respectively. Thus only these eight tribes can be represented *ex officio* in the House of Chiefs. This provision has given rise to allegation of discrimination against other tribes not specifically mentioned. Consequently, a Commission of Inquiry has been instituted by the State President to determine the appropriate construction of s. 77 and other sections of the Constitution to ensure a non-discriminatory position of the Constitution on tribal matters. See Government Notice No. 274 of 2000 in *Government Gazette (Extraordinary)* of 31<sup>st</sup> July 2000.

<sup>124</sup> See s. 14 of the Customary Court Act 1986. Apart from administering customary law, this section empowers the court to also administer any written law made under s. 15 by the designated Minister. The only written laws that have been designated by the Minister are criminal in nature - see, for example, Customary Courts (Enforcement of Specified Laws) Order 1981 [S.I. Nos. 65 of 1981 and 131 of 1987.] and Establishment and Jurisdiction of Customary Courts (Amendment) Order 1997 [S.I. No. 99 of 1997].

**(b) Jurisdiction over marriage contracted under the Marriage Act**

By s. 2 of the Marriage Act, the Act applies to all marriages solemnised in Botswana except those contracted in accordance with any customary law. By s. 7(1) of the Matrimonial Causes Act 1973, a court, which is defined by s. 2 to include the High Court and subordinate matrimonial court, has jurisdiction to try an action for divorce or judicial separation with regard to marriages contracted under the Marriage Act. Although the creation of subordinate matrimonial courts was envisaged by s. 5 of the Act, none has yet been created.<sup>125</sup> Thus, the High Court, for the moment, has exclusive jurisdiction over this type of marriage.

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The reason for establishing such subordinate courts was to lessen the distances which litigants have to travel to the High Court, to obtain matrimonial relief - see, for example, the view of the Hon. B.E. Gasetiwe CBE (Member for Kanye South) during the second reading of the Bill - Hansard 41 Part I 1972 at pp. 20-21. See also A Molokomme "Disseminating family law reforms: Some lessons from Botswana" (1990-1991) 30 & 31 *Journal of Legal Pluralism and Unofficial Law* 303 at p. 313. It is unfortunate that such a laudable facility has not yet been brought to fruition.

#### 4. POWERS OF THE COURTS TO ADJUST PROPERTY RIGHTS ON DIVORCE

##### (a) Customary marriage

No express power is given by the Customary Court Act to Customary Courts for the determination of property rights on divorce. Such a power may however be ancillary to the jurisdiction conferred by s. 12(b) of the Act. Indeed Roberts<sup>126</sup> clearly considers the division of property as an ancillary remedy in divorce proceedings. In his discussion of the Ngwaketse customary law, for instance, he deals with divorce under the heading of “*orders made in matrimonial proceedings*” and states:<sup>127</sup>

*“Apart from any compensation which may be awarded to either spouse on divorce, the court is also normally called upon to divide the household property”.*

The principles for determining the property rights of spouses on divorce are derived from the customary rules of the tribe concerned. Because

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<sup>126</sup> *Op. cit.*

<sup>127</sup> At p. 224.

of poor record keeping in the Customary Courts, it is difficult to learn from court records the guiding principles used to divide matrimonial property on divorce. What principles there are, can be gleaned from the efforts of researchers. Roberts,<sup>128</sup> for instance, has stated that:

*“Traditionally, clear-cut rules determined this division. A woman took away with her, following divorce, little property which had not been derived from her own descent group, as it was assumed that she could rely upon members of it for her subsequent maintenance. Today, property disposition made on divorce vary widely from case to case, and any rule stated can be no more than a broad generalisation. However it is clear from the court records that the two considerations accorded most weight by the court in making a division are the matrimonial ‘fault’ of the respective parties and the need to maintain the woman and the children of the marriage following divorce.”*<sup>129</sup>

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<sup>128</sup> *Op. cit.*, at pp. 50-51.

<sup>129</sup> See Schapera *op. cit.*, at p. 160 for similar views.

Griffiths confirms this situation,<sup>130</sup> in research among the Bakwena tribe. She found that if a party is judged to be overwhelmingly at fault that party may receive nothing on divorce. She cited, as an example of the customary court's attitude in such situations, the case of *Busang v. Busang*.<sup>131</sup> In that case, the husband was granted a divorce by the High Court on allegations of witchcraft and desertion. The chief's court, which was to divide the matrimonial assets, accepted the decree of the High Court as proof of a fault by the wife and refused to give her any property. Sometimes however, despite the finding of a fault by a spouse, he is not totally deprived of a share in the matrimonial assets. Some property, however small, is given to such a spouse. In *Leswape v. Leswape*,<sup>132</sup> for example, the wife admitted adultery upon which the divorce was granted. However, she was awarded eight heads of cattle and certain household goods. On appeal to the High Court, the court

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<sup>130</sup> "Legal duality: Conflict or concord in Botswana?" (1983) 27 *Journal of African Law* 150 at pp. 152-153.

<sup>131</sup> MO 378/1982 unreported High Court, Lobatse. See also *Seitshiro v. Seitshiro* unreported cited by Griffiths in her article *supra* and *Leswape v. Leswape* [1976] B.L.R. 73.

<sup>132</sup> *Supra*.

acknowledged the importance of a fault in customary divorce but confirmed the Customary Court's award.

Griffiths also found in other research<sup>133</sup> that on termination of a marriage the division of property was based on the concept of "family ownership" and the number of children (particularly male children). The concept of "family ownership" applies to property, especially cattle, which is passed down from father to son from one generation to the next. Such property is not to be divided on divorce because it must remain with the husband to be passed on to his male children. An application of this concept is found in *Seitshiro v. Seitshiro*<sup>134</sup> where the parties were married out of community of property. By s. 7 of the Married Persons Property Act the division was according to customary law. The High Court did not carry it out but by the usual practice the division was referred to a Customary Court. The ex-wife was a member of the Bakwena tribe and the ex-husband was from the Batlokwa tribe. There was an allegation by the ex-husband of bias by the Chief of the Batlokwa and consequently, the Commissioner of Customary Courts

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<sup>133</sup> *Law and family in Botswana today*, a research report NIRD 94/983 kept at the National Institute of Research and Documentation, Gaborone.

<sup>134</sup> Unreported but cited by Griffiths "Legal duality ..." *op. cit.*

appointed Chief Linchwe of Bakgatla to do the distribution. The property consisted of a Bar/Cocktail Bar and Bottle Store/Butchery all on the same premises, plough lands, cattle and modern dwelling house. Mrs Seitshiro was awarded the Bottle Store/Butchery part of the premises, 83 heads of cattle ( 23 of which was because the ex-husband lied about the number of cattle they had acquired jointly and sold many without consulting his ex-wife), ½ share of the plough lands, 3 oxen to compensate her for her half share of the house, which was to be held by the ex-husband for their last born son. Mr. Seitshiro was awarded the Bar/Cocktail Bar part of the premises, ½ share of the plough lands, the dwelling house to hold for their last born son, 161 herd of cattle and 40 calves (these formed part of “family property” which is not subject to division on divorce because it is to be passed on from father to son from one generation to the other).

Chief Linchwe did not lay emphasis on the question of fault, in fact every time the ex-husband tried to discuss his ex-wife’s failings he was prevented from doing so. He concentrated on the jointly acquired property of the spouses, which he said must be shared by the spouses on divorce. He is reported to have said that *“a woman should not go back to her parents with nothing at all. A reasonable subsistence is a matter*

to be decided by the Chief and the men who are listening and discussing the case at the kgotla".<sup>135</sup> He therefore awarded Mrs. Seitshiro four heads of cattle besides those which he awarded her by joint acquisition. He also relied on decisions of the High Court, especially *Molomo's* case, when dealing with the divisions of the lands and the businesses. He said: "I am not going to act according to my personal opinion. I will lean to the decisions arrived at for the cases which were referred to which were heard at the High Court." *Molomo's* case, it must be noted, dealt with a marriage in community of property. In this regard, Griffiths has commented that the whole tenor of Chief Linchwe's approach here was to bring customary law division of property on divorce in line with that of the common law.<sup>136</sup>

Griffiths also reported that she was frequently told that in the customary system property is held "in community property", but this did not mean that the man and the woman owned the property equally and that there

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<sup>135</sup> See Griffiths "Legal duality..." *op. cit.*, at p. 157. The Kgotla is a central place in a ward or village where public assemblies take place and disputes are settled.

<sup>136</sup> See "Legal duality..." *op. cit.*, at p. 158.

would be a 50-50 split on termination of the marriage.<sup>137</sup> The concept of individual ownership was not as prominent as under the Roman-Dutch system and the emphasis was placed on the preservation of property for the children within the family. This research reinforced the fact that distribution of matrimonial property depended on the source of the property and the apportionment of blame for the break up of the marriage.

The application of the customary principles usually works to the disadvantage of the wives as they tend to be bias in favour of husbands. Aggrieved wives therefore invariably turn to the High Court for redress of what they see as unfair treatment. In *Moisakamo v. Moisakamo (2)*, the High Court dissolved a marriage contracted under the Marriage Act, the proprietary consequence of which was governed by customary

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<sup>137</sup> However, in *Andries Kangootui v. Commissioner of Customary Courts & Ors. op. cit. supra*, Cotran J. opined at p. 10 of the transcript, that under Tawana customary law “where there is only one wife (i.e. one house) as here, the property acquired during the marriage is divided roughly equally on divorce, the children, if any, getting a portion.” This position runs counter to that of Bakwena customary law upon which the view expressed by Griffiths in the text was based.

law.<sup>138</sup> The division of the matrimonial property was referred to the Customary Court of the area where the parties resided. The wife being dissatisfied with the division by the Customary Court, applied to the High Court for relief. As indicated above, the court overruled a preliminary objection that it did not have jurisdiction to deal with the matter. One reason given for the rejection of the submission of lack of jurisdiction by the court was the large sum of money involved in that case, which was said to exceed the jurisdiction of the Customary Court concerned.<sup>139</sup> Furthermore, the court was of the view that since it granted the divorce the division of the matrimonial property was

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<sup>138</sup> Under s. 7 of the Married Persons Property Act 1970, the proprietary consequences of marriages of persons subject to customary law is governed by customary law in the absence of evidence to the contrary. A court however may exercise a discretion and apply the common law under s. 2 of Dissolution of Marriages of Persons subject to any Botswana Customary law (Disposal of Property) Act 1926.

<sup>139</sup> See note 117 *supra*. Under the civil jurisdiction of a Customary Court, limits as to the claim or value of the matter in dispute are usually set out in the warrant setting up the court. See s. 10(1)(c) of the Customary Court Act 1986. In *Moisakamo's* case the warrant of the relevant Customary Court limited its jurisdiction in civil matters to claims in respect of property not exceeding P800 in value. The valuation of the matrimonial property in the case was P100 000. In *Lesotho v. Lesotho* MC No. 227/1993 unreported (28<sup>th</sup> May 1998), High Court, Lobatse, Dibotelo J. abandoned the idea of referring the distribution of the joint estate to the customary court when he realized that the estate consists of, *inter alia*, mortgage bonds, a concept unknown to customary law.

ancillary to those proceedings and so fell within its jurisdiction. In this respect, the court used its power under s. 13 of the Matrimonial Causes Act 1973 to determine the mutual property rights in the properties concerned. In determining these mutual rights the parties were awarded only that which they would be entitled to under the relevant customary law.<sup>140</sup> The court accordingly divided the said properties by Ngwaketse customary law.<sup>141</sup>

The properties involved in the case were: a restaurant in Kanye, a modern house and traditional yard at Kanye, plough lands/buildings at Mosoke/Mhudutswe, cattle posts, bore holes, 2 vans, 2 tractors, agricultural implements and some 1 550 cattle. Mrs. Moisakamo was given the following: The restaurant at Kanye, plough lands/buildings at Mhudutswe (originated from her descent group), ½ share of the house in Kanye to be paid by an award of cattle, ½ share of the cattle (725 beasts), van, tractor and ½ share of the agricultural implements. Mr. Moisakamo got: The house at Kanye (½ share to be paid to the wife in

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<sup>140</sup> See *Moisakamo's* case *supra* at p.133.

<sup>141</sup> See also *Mfa v. Mfa and Mogorosi* MC No. F112/1993 unreported (11<sup>th</sup> October 1996) High Court, Francistown, *Gabanakgosi v. Gabanakgosi* MC No. F116/1994 unreported (22<sup>nd</sup> November 1996) High Court, Francistown and *Lesotlho v. Lesotlho op. cit. supra*.

the form of cattle), a traditional yard at Kanye, plough lands/buildings at Masoke, cattle posts/boreholes, ½ share of the cattle (725 beasts), van, tractor, and ½ share of the agricultural implements.

One observation made about customary law in the above case needs to be noted. The court observed that “*custom of course plays an important role in how people choose to live, but changing social and economic conditions affect and mould customs.*”<sup>142</sup> One of the changes noted by the court was “*increasing urbanisation.*” In applying customary law the court was of the view that:

*“Too much reliance on customary practices is likely to lead the court into making findings as to how the parties should have ordered their lives and not as to how their lives were actually ordered. The facts of each case must be ascertained. It is only when these facts have been ascertained, and how the matrimonial property was acquired has been determined, that*

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<sup>142</sup>

At p. 139.

*the court applies the rules of customary law in determining which property should be allocated to which spouse.”<sup>143</sup>*

This means that the rapid changes occurring in contemporary society should be taken into account in assessing the social utility of customary rules. In the court’s opinion, “*a rule that may have been just and suitable in a subsistence farming community may work grave hardship and injustice in a commercial farming economy.*”<sup>144</sup>

Certain basic principles can be discerned from the above judgment. These are:

- (a) The maintenance needs of the wife will be taken into account, although in the present case it did not play a part because that need was settled by an agreement of the parties.
  
- (b) The fault of the parties, if any, may be taken into account. The defendant in this case admitted adultery and the divorce was granted on this ground. However, the court accepted the circumstances in which

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<sup>143</sup> At p. 140.

<sup>144</sup> At p. 147.

it was committed as a mitigating factor and eliminated his fault as a factor in the division of the property.<sup>145</sup>

(c) Barrenness of a spouse can in no circumstances be regarded as fault.<sup>146</sup> However, it is a frequently cited reason in actions for divorce under customary law.<sup>147</sup> In fact, in the instant case it was the wife's inability to have children that led to the husband committing adultery and consequently to the divorce action.

(d) The maintenance needs of children of the marriage, if any, will be taken into account. This factor did not feature in the case because the purported adoption of his adulterine children by the husband was declared a nullity as the Customary Court before which the application was brought lacked jurisdiction to make the order because the application was not brought jointly by the spouses.

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<sup>145</sup> See p. 148 of the judgment.

<sup>146</sup> See p. 149 *per* Hayfron-Benjamin C.J.

<sup>147</sup> See Schapera *op. cit.*, at p. 159 although it is said to be dying out. In fact, Roberts *op. cit.*, does not mention it as one of the justifications commonly advanced on a plea for divorce.

**(b) Marriage under the Marriage Act**

With regard to divorce under the Matrimonial Causes Act, the court's powers to adjust the property rights of the spouses and to make financial provision for the wife are set out in ss. 13(1) and 25(2) of the Act.

S. 13 provides that:

*“Any court which tries an action for divorce or for judicial separation under this Act shall also have jurisdiction to make an order-*

*(a) determining the mutual property rights of the husband and the wife;...”*

S. 25(2) provides that:

*“On any decree for divorce or nullity of marriage, the court may, if it thinks fit, order-*

*(a) that the husband shall to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her*

*fortune, if any, to the ability of her husband and the conduct of the parties, the court may deem reasonable; and*  
*(b) that the husband should pay to the wife, during their joint lives, such periodical sum for the maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or instead of an order made under subsection (1)...”<sup>148</sup>*

The power under s. 13 will be dealt with first and then a look will be taken at the powers under s. 25(2). The latter power may have a direct bearing on the first for if a husband is ordered to secure a gross sum for his ex-wife this may affect his property rights as he may have to secure such a gross sum on, for instance, his house in which the wife has no proprietary interest.

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The proviso to s. 13 confers jurisdiction on a subordinate matrimonial court to make the orders specified in the section where the property in dispute or the amount claimed does not exceed P2000. Where the claim is in excess of this amount, the matter must be transferred to the High Court. As mentioned earlier, subordinate matrimonial courts have not yet been established.

## 5. EXERCISE OF THE POWER UNDER S. 13 OF THE MATRIMONIAL CAUSES ACT

Unlike the English Divorce Reform Act 1969, which was used as a model for the Act,<sup>149</sup> no guidelines were provided for the court in the determination of the mutual property rights. Nor were such property rights defined by the Act.<sup>150</sup> The task therefore fell to the court, not only to interpret the extent of this power, but also to decide what is matrimonial property. In the leading case of *Molomo v. Molomo*<sup>151</sup> an

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<sup>149</sup> See the memorandum accompanying the Matrimonial Causes Bill 1972, which makes this reliance on the English statute clear. See also C.M.G. Himsworth "Effects of matrimonial causes legislation in Botswana" *op. cit.* at p. 174.

<sup>150</sup> Under s. 25 of the English Matrimonial Causes Act 1973, an Act consolidating the 1969 Act, the court was enjoined to have regard, *inter alia*, to the income and financial resources of the parties; their financial needs; their standard of living; their age; the duration of the marriage and their conduct. The section was subsequently amended by the Matrimonial and Family Proceedings Act 1984 and the Family Law Act 1996. The 1996 Act does not affect the broad general principles governing the exercise of the court's discretion. It has however given effect to one of the cardinal principles which led to the enactment of the 1996 Act, namely, that financial arrangements be made before the dissolution of the marriage - see the English Law Commission's Report, *The Ground for Divorce*, Law Com. No. 192 (1990).

<sup>151</sup> [1979-80] B.L.R. 250 at p. 251.

opportunity arose for the court to determine the extent of the power conferred on it by s. 13 of the Act. Hannah, J. expressed the view that:

*“The powers of the court under section 13 are substantially the same as in any other proceedings where the ownership or possession of property is in issue. The discretion is no wider and no narrower than the ordinary discretion of the court in such cases.”*<sup>152</sup>

This conclusion was arrived at after the learned judge had rejected a submission that the section conferred a wide power to adjust property rights by principles of equity and fairness. It also rejected a suggestion that the section should be interpreted in accordance with the rationale behind s. 24 of the English Matrimonial Causes Act 1973 upon which the Botswana statute was based.<sup>153</sup> The learned judge ruled that there is nothing in s. 13, which shows an intention by the legislature to confer

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<sup>152</sup> In *Tlale v. Tlale* MC No. F112/1994 unreported (8<sup>th</sup> August 1997) High Court, Francistown, Gaefele A.J. held that the power under s. 13 can be exercised by the court even though there was no prayer for the division of property in the plaintiff's Declaration.

<sup>153</sup> The section empowers the court to make various property adjustment orders on the grant of a divorce.

such a wide and almost unfettered discretion on the court to divide matrimonial assets between spouses.

Having disposed of this objection the issue that fell to be decided was whether the matrimonial assets were to be divided by customary law or the common law. By s. 7(1) of the Married Persons Property Act, the proprietary consequences of a marriage of persons subject to customary law are to be governed by customary law unless they have expressly opted out of that law. This subsection is made subject to s. 2 of the Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act 1926, which provides that:

*“Where at the commencement of this Act a marriage subsists between spouses, subject to any Botswana customary law, having been duly solemnized by a marriage officer or according to the rites of the Christian religion if contracted before the 1st day of April, 1917, and if contracted on or after that date having been solemnized by a marriage officer appointed under the Marriage Act, and where on the dissolution of such marriage by decree of a competent court or by the death of one of the spouses a question arises as to the disposal or devolution*

*of any property of either or both of the spouses such question shall be heard and determined in accordance with the law of Botswana by a court presided over by a Magistrate Grade I if it shall appear to the court on application made to it that regard being had to the mode of life of the spouses or to any disposition made by either of the spouses during the subsistence of the marriage it would not be just and equitable that such property should be dealt with according to customary law.”*

It was argued on behalf of the husband that the effect of s. 7 of the Married Persons Property Act is that the property of the spouses is held according to customary law. Since the spouses did not take advantage of the exempting provisions contained in s. 7 the determination of the respective rights of the spouses must be done by customary law. Furthermore, it was argued that the provision of s. 2 of the Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act did not apply.

The court had to decide whether the spouses can, without executing the exempting instrument required by s. 7 of the Married Persons Property Act, take advantage of the provisions of s. 2 of the 1926 Act. The court

held that on the proper interpretation of s. 2 of the 1926 Act, that section covers marriages solemnised both before and after the commencement of the Act.<sup>154</sup> Consequently, it was the view of the court that where the conditions set out in s. 7 of the Married Persons Property Act are fulfilled, the court can consider whether having regard to the mode of life of the spouses or any disposition of property made by them applying customary law in determining property rights when exercising its powers under s. 13 of the Matrimonial Causes Act would not be just and equitable. The court concluded that, taking account of their mode of life, the couple were “*sophisticated people with business acumen and I have no doubt that the provisions of the Dissolution of African Marriages (Disposal of Property) Act<sup>155</sup> was enacted precisely to deal with a situation such as this.*” It therefore held that determining their mutual property rights by applying customary law would not be just and equitable. Accordingly the common law was applied.

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<sup>154</sup> Cf. the contrary ruling on this point by Hayfron-Benjamin C.J. in *Moisakamo v. Moisakamo*(2) *infra* note 170.

<sup>155</sup> The statute was re-styled Dissolution of Marriages of Persons Subject to Customary law (Disposal of Property) Act in 1987 when the laws of Botswana were revised.

In *Moisakamo v. Moisakamo* (2) Hayfron-Benjamin C.J. accepted this interpretation of s. 13 when he said:<sup>156</sup>

*“Hannah J. in that case had excluded the application of customary law, and Section 13 by itself does not empower the Courts to alter the property rights of the parties. The question is whether or not the position is different where the Court is called upon to apply customary law. Roberts<sup>157</sup> ([p.] 24) says - ‘The dispositions, which are made vary very widely from case to case, but the two most important considerations are the ‘fault’ of the respective parties and the necessity of maintaining the children of the marriage following divorce.’*

*...[I]t seems to me therefore that quite apart from the jurisdiction conferred on the High Court under section 13 of the Matrimonial Causes Act to determine the rights of the parties in any matrimonial property consequent upon divorce, it has also, where the property is held in accordance with customary law, power to divide the matrimonial property between them*

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<sup>156</sup> [1981] B.L.R. 126 at pp. 147-148.

<sup>157</sup> *Op. cit.*

*'according to the circumstances of the case' (See Schapera<sup>158</sup> p. 160). There is a discretion in the Court, where fault or any of the factors are established to alter the property rights of the spouses by allotting to one spouse what in law belongs to the other spouse.'*

Thus, while there may be agreement that the court has no discretion to adjust matrimonial property rights when the common law governs the proprietary consequences of the marriage, it seems that this is not so where customary law governs the consequences. Hayfron-Benjamin C.J. emphasised in *Moisakamo's* case that the court must always bear in mind that the discretion given by s. 13 of the Matrimonial Causes Act is extraordinary as it effects an alteration in property rights and must therefore be exercised only in clear cases.

What then is the “*ordinary discretion of the court*” referred to by the court in *Molomo's* case? In deciding what has been called “*the cold legal question*”<sup>159</sup> of who owns what on divorce the court is likely to

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<sup>158</sup> *Op. cit.*

<sup>159</sup> *Per* Lord Denning in the English case of *Gissing v. Gissing* [1969] 2 Ch. 85 at p. 93.

find an answer in the question “*whose is this?*” rather than “*to whom shall this be given?*”<sup>160</sup> The answer will also depend on the type of matrimonial regime under which the couple was married. If they were married in community of property, very little discretion exists to determine their mutual property rights because on dissolution of the marriage the matrimonial property is divided equally by operation of law unless there has been an order of forfeiture of benefits.<sup>161</sup> Such an order was designed to punish the “guilty” spouse who, it is said, must not be allowed to benefit from a marriage he has wrecked.<sup>162</sup> Schreiner J. succinctly described the effect of the order in the South African case of *Smith v. Smith*:<sup>163</sup>

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<sup>160</sup> Per Lord Morris in the English case of *Pettitt v. Pettitt* [1970] A.C. 777 at p. 798. For a discussion of this case, see J.G. Miller “Family Assets” (1970) 86 *Law Quarterly Review* 98.

<sup>161</sup> See Hannah J’s *dictum* in *Molomo v. Molomo supra* at p. 252.

<sup>162</sup> See Hahlo “*Husband and Wife*” *op. cit.*, at p. 373, Cronje *op. cit.*, at p. 266, *Murison v. Murison* 1930 A.D. 157 and *Harris v. Harris* 1949 (1) S.A. 254 (A). Under s. 9(1) of the Divorce Act 70 of 1979, the South African courts have a discretion to order a spouse to forfeit the patrimonial benefits either wholly or partly.

<sup>163</sup> 1937 W.L.D. 126 at pp. 127-128.

*“What the defendant forfeits is not his share of the common property but only the pecuniary benefits that he would otherwise have derived from the marriage...It [the order for forfeiture] is really an order for division plus an order that the defendant is not to share in any excess that the plaintiff may have contributed over the contributions of the defendant.”*

If the “innocent” spouse requests such an order, the court has no discretion to refuse it.<sup>164</sup> The survival of this order under the Matrimonial Causes Act, which abolished fault-based divorce, is debatable.<sup>165</sup> It is submitted that this order is in a complete antithesis to the professed rationale behind the Matrimonial Causes Act that fault should no longer be a determinant for the granting of a divorce.<sup>166</sup> It is

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<sup>164</sup> See the South African case of *Murison v. Murison* 1930 A.D. 157.

<sup>165</sup> In South Africa, the order has been retained under s. 9(1) of the Divorce Act 70 of 1979 although that Act abolished fault-based divorce. Hahlo *op. cit.*, at p. 373 opines that the forfeiture rule under s. 9(1) of the 1979 Act has little in common with the pre-1979 forfeiture rule, except the word “forfeiture”. His reasons for this view are that “substantial misconduct” under s. 9(1) is only one of the factors which the court may take into account in granting the order and that furthermore, the court has a discretion whether to grant the order or not, which was not the case before the 1979 Act.

<sup>166</sup> Under s. 25(1) of the Act, however, the conduct of the parties is a factor to be taken into account in awarding a gross or annual sum to the wife.

therefore submitted that the forfeiture of benefits order must be taken to have been impliedly abolished.<sup>167</sup> However, if the matrimonial regime is out of community of property or governed by customary law, there is potentially more room for the exercise of the discretion. A look will now be taken at how the courts have exercised the discretion concerning the matrimonial regimes.

**(a) Exercise of the s. 13 power in relation to marriage in community of property**

Subject to the doubtful application of the order of forfeiture of benefits, when a marriage in community of property is dissolved by a divorce decree, the joint estate, which the marriage brought about is divided equally between the spouses. In *Molomo's* case, Hannah J., having delimited the ambit of s. 13, held that:

*“It follows from my view of s. 13 that if it be held that a marriage was in community of property and of profit and loss*

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See Himsworth *op. cit.*, at p. 176. A similar conclusion has been reached in relation to s. 9(1) of the South African Divorce Act 70 of 1979 - see Hahlo and Sinclair *The Reform of the South African Law of Divorce*, Cape Town, Juta & Co., 1980 at pp. 51-52.

*then on a dissolution the court in exercising its powers under s. 13 will hold that the matrimonial assets with certain possible exceptions are in joint ownership and fall to be divided in equal shares<sup>168</sup>...In determining the parties' mutual property rights I must therefore proceed on the basis that the rights in issue were in joint ownership and I must endeavour to effect a division in equal shares."<sup>169</sup>*

In that case a marriage in community of property of spouses subject to customary law was dissolved by divorce. The parties agreed that the *corpus* of the matrimonial property would devolve upon the children of the marriage but that the High Court should divide the usufructuary rights in the assets between them. The property consisted of a Bar/Bottle Store in Gaborone, a Bar/Bottle Store in Mogoditshane, a house in Gaborone, a residential yard at Mogoditshane and some 250-290 herd of cattle. The court divided the properties as follows: Mrs

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<sup>168</sup> [1979-80] B.L.R. 250 at p. 252. See also Aboagye J. in *Setlhare v. Setlhare* MC 207/1993 unreported (19<sup>th</sup> February 1996) High Court, Lobatse, at pp. 4-5 of the transcript and Allanbridge J.A in *Ruwona v. Ruwona* CA 40/1997 MC F35/1995 unreported (24<sup>th</sup> July 1998) Court of Appeal at p. 4 of the transcript.

<sup>169</sup> [1979-80] B.L.R. 250 at p. 257.

Molomo was given the Bottle Store part of the Gaborone Bar/Bottle Store, the Bar/Bottle Store in Mogoditshane, and the Gaborone house. The income from these properties was P17,600. Mr. Molomo was given the Bar part of the Gaborone Bar/Bottle store, the residential yard at Mogoditshane and the herd of cattle. The income from these properties was P17,580.

Although the parties were subject to customary law, the court applied the mode-of-life exemption under s. 2 of the Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act<sup>170</sup> to exclude the operation of s. 7 of the Married Persons Property Act and the customary law. The latter section makes customary law the applicable matrimonial regime of persons subject to customary law who marry under the Marriage Act unless specifically excluded. The former

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Cap.29:05. In *Moisakamo v. Moisakamo(2)* *supra* at p. 131 Hayfron-Benjamin C.J. expressed the view that the application of the statute in *Molomo's* was *per incuriam* because in *Frankel N.O. and Anor. v. Sechele* [1964-67] B.L.R. 5 at p. 11, Murray A.J.A. in the Bechuanaland Court of Appeal held that the opening words of the statute refer to a single point in time. Hence post 1<sup>st</sup> of January 1929 marriages are not affected by its provisions. Parties to such marriages should take advantage of the provisions of the Married Persons Property Act 1970. However, this view does not derogate from the interpretation given to the ambit of s. 13 of the Matrimonial Causes Act in *Molomo's* case.

section does the same but gives the court a discretion to apply the common law:

*“if it shall appear to the court on application made to it that regard being had to the mode of life of the spouses or to any disposition of the property made by either of the spouses during the subsistence of the marriage it would not be just and equitable that such property should be dealt with according to native law and custom”.*

The spouses were married prior to the coming into effect of the Married Persons Property Act 1970. There was no antenuptial contract and the spouses had not taken advantage of the provisions of s. 4 of that Act to make the provisions of the Act applicable to their marriage, the marriage was therefore in community of property.

The “mode of life” exemption was applied because:

*“After the marriage they first lived at Molepolole and then Mochudi. The husband then spent two years in Canada and upon his return to Botswana lived at Serowe for three years and*

*from 1967 until the separation, in Gaborone. Originally both husband and wife were school teachers and then the husband became a senior civil servant in the Ministry of Education. More recently the husband has been engaged as a lecturer in Educational Psychology at the University of Botswana and Swaziland. The parties' matrimonial home was a three bedroom house in Gaborone and the principal business built up by them was a bar and bottle store with a substantial turnover in Gaborone. They were, if I may be permitted to say so, sophisticated people with business acumen and I have no doubt that the provisions of the Dissolution of African Marriages (Disposal of Property) Act<sup>171</sup> was enacted precisely to deal with a situation such as this."*

Thus, the criterion for the application of the discretion under s. 2 of Dissolution of Marriages of Persons Subject to Customary law (Disposal of Property) Act may be evidence of such a person having adopted a sophisticated way of life. The features of such life highlighted by the court were education, travel, a modern dwelling

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This Act was subsequently renamed the Dissolution of Marriages of Persons Subject to Customary law (Disposal of Property) Act Cap. 29:05.

house in an urban area and business acumen. These features, it is submitted, may eliminate most of Batswana from the exercise of the discretion under s. 2 as the bulk of the population live in rural settings.<sup>172</sup>

In the exercise of the discretion in relation to marriages in community of property the only thing the courts seem to do is to decide which of the matrimonial property will go to the ex-husband or the ex-wife. No discernible principles for the exercise of the discretion emerge from the case law although it seems that the needs of minor children favour the spouse who has custody of them. In *Molomo's* case, for instance, Mrs Molomo was given the house in Gaborone because she had custody of the minor children. Also in *Setlhare v. Setlhare*<sup>173</sup> although spouses were awarded joint custody of the children, in dividing the joint estate,

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<sup>172</sup> Of the enumerated population of 1,326,796 in 1991, 54.3% lived in the rural areas while 45.7% lived in the urban areas. In 1981 the proportion of rural/urban inhabitants was 82.3% and 17.7% respectively. The increase in the urban population was due to a reclassification of some rural areas as urban centres. See *1991 Census of Population and Housing: Population Composition and Distribution* Central Statistics Office Brief No. 94/3, Gaborone, Government Printer, 1994 and *1991 Population and Housing Census Dissemination Seminar*, Gaborone, Government Printer, 1995 pp. 54, 60 and 65.

<sup>173</sup> MC. F115/95 unreported (31<sup>st</sup> July 1997) High Court, Francistown.

the wife was given the matrimonial home because the children were so much attached to it. Finally, in *Ruwona v. Ruwona*<sup>174</sup> the husband was awarded the larger of two residential plots and the bulk of the movable property because he had custody of three of the four children of the marriage.

**(b) Exercise of the s. 13 power in relation to marriage out of community of property**

As mentioned above, this type of marriage does not affect the proprietary rights of the spouses. Therefore the general rule is that on divorce each spouse takes his or her property.<sup>175</sup> If there is evidence of joint ownership or one of the spouse's claims to be entitled to a share in the other's property by virtue of a contribution, whether in cash or in kind, then it is the duty of the court to determine the proper share which each spouse has in the said property. In the light of the restrictive ambit

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<sup>174</sup> MC No. F35/1995 unreported, (30<sup>th</sup> June 1997) High Court, Francistown. The husband appealed against certain aspects of the judgment of the High Court but the Court of Appeal did not alter the division of the joint estate as stated in the text. See CA40/1997 MC F35/1995 note 168 *supra*.

<sup>175</sup> See Hahlo "*Husband and Wife*" *op. cit.*, at pp. 287-288 and Cronje & Heaton *op. cit.*, at p. 117.

drawn by Hannah J., it seems that the mutual property rights of the spouses must, adopting the words of Lord Upjohn,<sup>176</sup> be

*“judged on the general principles applicable in any court of law when considering questions of title to property, and though the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims between those not so related, while making full allowances in view of the relationship.”*

What then are these allowances, which the court is to make in view of the marital relationship between the parties? The limited powers the English courts had to adjust property rights on a breakdown of marriage before the enactment of s. 4 of the Matrimonial Proceedings and Property Act 1970<sup>177</sup> demanded that a spouse establish, wherever possible, a beneficial interest in property such as the matrimonial

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<sup>176</sup> *Pettitt v. Pettitt* [1970] A.C. 777 at p. 813 and also at p. 803 *per* Lord Morris and at p. 821 *per* Lord Diplock.

<sup>177</sup> Re-enacted as s. 24 of the Matrimonial Causes Act 1973 which conferred upon the courts wide powers to adjust property rights on the granting of a decree of divorce, nullity or judicial separation. The position in Botswana is similar to that of English Law prior to the enactment of the 1970 Act.

home.<sup>178</sup> Where the property had been purchased in the sole name of the husband, for instance, without the wife making any direct contribution to the purchase price or without the parties making an agreement or declaration regarding the beneficial interest in the property, there was a *prima facie* inference that the husband was the sole legal and beneficial owner.<sup>179</sup> That inference could only be displaced if the court could impute, from the conduct of the couple down to the date of their separation, a common intention that the wife was to have a beneficial interest in the property. That in turn depended on whether the wife had made a substantial financial contribution towards the expenses of the couple's household, which could be linked to the acquisition of the property.<sup>180</sup> Consequently the courts resorted

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<sup>178</sup> See *Button v. Button* [1968] 1 W.L.R. 457 at p. 462.

<sup>179</sup> See *Pettitt v. Pettitt* [1969] 2 W.L.R. 966 at p. 989. The term "legal and beneficial owner" is used to describe ownership coupled with benefits as opposed to a bare title where the ownership is for the benefit of another. This duality of ownership is a historical development of the English Common Law and Equity. For further details see E. H. Burn *Cheshire and Burn's Modern Law of Property* (13<sup>th</sup> ed.) London, Butterworths., 1982 Chap. 3.

<sup>180</sup> See *Burns v. Burns* [1984] 1 All E.R. 244; *Gissing v. Gissing* [1971] A.C. 886 and *Bernard v. Joseph* [1982] Ch. 391. For the South African position on the point, see Hahlo "*Husband and Wife*" *op. cit.*, at pp. 290-291.

to equitable principles to do justice in individual cases<sup>181</sup> but this device was often found not to be a sound basis for resolving the problem of awarding a share of matrimonial property to a spouse who had not contributed to its acquisition.<sup>182</sup>

In Botswana an opportunity arose in *Rabantheng v. Rabantheng*<sup>183</sup> to articulate some relevant principles to resolve this issue. In that case the property in dispute was the matrimonial home, the title deed of which was in the name of the husband. The parties married on the 19<sup>th</sup> of October 1972 and did not take the necessary steps to opt out of s. 3 of the Married Persons Property Act, which abolished the community of property regime for marriages contracted after 1<sup>st</sup> of January 1971. Consequently, the marriage was out of community of property. The parties were found to be subject to customary law and thus, *prima facie*, customary law governed the matrimonial property regime. However,

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<sup>181</sup> See J.G. Miller *Family Property and Financial Provision op. cit.* Pt. I.

<sup>182</sup> See *Pettitt v. Pettitt op. cit.*, especially Lord Upjohn's judgment. Developments in the English matrimonial law will be discussed in chapter four.

<sup>183</sup> [1988] B.L.R. 260.

relying on *dicta* in *Molomo*,<sup>184</sup> the court held that the parties lived a “sophisticated” way of life. It therefore exercised its discretion not to apply customary law to the determination of the rights of the parties. Hallchurch J., having adverted to the cases of *Molomo* and *Moisakamo*, said:

*“In this case, I find as a fact that the said parties lived a ‘sophisticated’ way of life, the plaintiff/wife is an accountant by profession and is employed by the Botswana Building Society and the defendant/husband is a Civil Servant employed in the Information Department in Gaborone. The parties have acquired capital assets namely a house in Tonota, a house in Gaborone, cattle and furniture. Having regard to their mode of life, it would not be just and equitable to determine their mutual property rights by applying customary law. Therefore, adopting the reasoning by Hannah, J. in Molomo’s case I propose to consider the division of the estate according to Common Law.”*<sup>185</sup>

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<sup>184</sup> See *Molomo v. Molomo* [1979-80] B.L.R. 250 at p. 256.

<sup>185</sup> [1988] B.L.R. 260 at p. 263.

The wife argued that they intended the house to be their joint property and that they put it in the name of the husband because he was the head of the family. In the alternative, she argued that she made a substantial direct contribution towards the purchase and maintenance of the house.<sup>186</sup> The evidence led revealed that she contributed P675 towards the mortgage repayment and P1,601.01 towards the payment of rates on the house, the purchase price of which was P2,813.78. She also made indirect financial contribution for food and general housekeeping. The value of the house had risen to P68,000 at the time of the litigation. The judge posed the following questions<sup>187</sup> to help him determine the property rights in the house:

*“(1) Was there, at or before the date when the house was purchased, an express intention by the spouses to pool all their resources so that it could be said by a court that a unique partnership had been formed entitling both spouses to share the assets, including the former matrimonial home in equal shares?”*

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<sup>186</sup> At p. 267.

<sup>187</sup> At p. 266.

*(2) Was there, at the time when the house was purchased, an expressed intention by the spouses to share equally in the de facto ownership of the former matrimonial home so that it could be said by a court that a unique partnership has been formed entitling both spouses to share in the equity of the house in equal shares?*

*(3) In the absence of an expressed intention on the part of the spouses, can an intention be implied by the court that the wife has acquired an interest which amounts to unique partnership between the spouses in the equity of the said house?*

*(4) Where the answers are in the affirmative in (1) and (2) above the spouses share equally but different considerations apply in (3) above and the question is what share is a spouse entitled to where she has established to the court's satisfaction on the balance of probabilities that she has a substantial interest in the former matrimonial home?"*

He concluded,<sup>188</sup> after reviewing the evidence, that the spouses never pooled their resources to form a unique partnership, a term that he may

have used as synonymous to universal partnership. This is so because earlier on in the judgment<sup>189</sup> he had relied on Hahlo's description of the universal partnership as a possible basis for the wife's claim. He therefore answered question (1) above negatively. He also answered the second question negatively after preferring the husband's evidence on that point to that of the wife. He found some difficulty in answering the third question. It was common cause that the wife had made a direct contribution to the purchase and maintenance of the house. Considering all the evidence, especially the total purchase price, he came to the conclusion that the wife's contribution was substantial and so answered question (3) affirmatively. In answering question (4) the judge said:<sup>190</sup>

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<sup>189</sup> At p. 265 relying on the description of the concept at p. 290 of the 5<sup>th</sup> ed. of the author's book *op. cit., supra*. However, it may also seem from the judge's acceptance of the *dictum* of Berman J. in *Kritzinger v. Kritzinger* 1987 (4) S.A. 85 (C) at p. 94, in which the term "a unique form of partnership" was used, that he was using the term in the sense used in that case. The requirements of universal partnership were set out in the South African case of *Muhlmann v. Muhlmann* 1981 (4) S.A. 632 (W) at pp. 634-635 *per* McCreath J. confirmed on appeal in 1984 (3) S.A. 102 (A) and *Pezzutto v. Dreyer* 1992 (3) S.A. 379 (A) at p. 390 *per* Smalberger J.A. See further, Sinclair assisted by Heaton *op. cit.*, at pp. 278-280.

<sup>190</sup> At p. 267.

*“In answering the final question (4) I exercise my discretion taking a number of factors into consideration. As this was not a marriage de jure in community of property and there was no de facto agreement to share their assets jointly on the former matrimonial home, I do not consider that an equal division should be made in this case; I consider that the wife is entitled to a one third share in the equity of the former matrimonial home and I so hold.”*

The court did not explain the basis for the arrival at a one third share for the wife. One would however, suspect that it is the application of the English practice of awarding one third of the joint assets of the spouses to a wife in such situations.<sup>191</sup> This one third share in the equity of the house translated into P22,667 which the court ordered that the husband pay to the wife within three months. Although the judge said he was considering many factors in determining the share of the wife, it is not clear from the judgment what these factors were. What is clear is that the wife’s financial contribution was the sole determinant. One factor that was clearly not taken into account though was the indirect

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<sup>191</sup>See pp. 392-398 *infra*.

contribution made by the wife during the subsistence of the marriage. This could be inferred from the court's reliance<sup>192</sup> on the following principle of South African law articulated by Hahlo:<sup>193</sup>

*"...the mere fact that the wife has worked in her husband's business or on his farm is not sufficient. It must be shown that she made a substantial financial contribution or regularly rendered services going beyond those ordinarily expected of a wife in her situation; the courts will not readily imply a partnership agreement."*

This non-recognition of the wife's indirect contribution may work injustice to many a housewife who does not go out to work after the marriage but devotes her time to caring for her husband and children, thus sacrificing the opportunity of acquiring any capital asset.<sup>194</sup> Had there not been evidence of a substantial financial contribution from the

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<sup>192</sup> At p. 265.

<sup>193</sup> *Op. cit.*, at p. 290.

<sup>194</sup> See E.K. Quansah "Determining property rights between spouses on divorce: A tale of two jurisdictions (Ghana and Botswana)" *op. cit.*, p. 398.

wife towards the purchase of the house, the court would not have awarded her a share in the enhanced value of the matrimonial home.

Martin Horwitz J was faced with a similar problem in *Sebina v. Sebina*.<sup>195</sup> There the applicant had obtained a rule *nisi* against the respondent to stop the respondent from interfering in the running of a bakery, which he claimed formed part of the joint estate owned by him and his deceased wife. The applicant claimed that he and his deceased wife were married in community of property. Nevertheless, on the return day of the rule *nisi* the evidence revealed that the marriage took place on the 28<sup>th</sup> of March 1971 and that they had not signed the necessary form under the Married Persons Property Act opting out of its provisions.<sup>196</sup> Consequently, their marriage was out of community of property. Horwitz J. held:

*“[T]herefore, without more the applicant cannot maintain that he is a part owner, a joint owner or any other kind of owner of this business. Even if he were to be believed that he had been*

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<sup>195</sup> Misca. 1/1991 unreported (11th. February 1991) High Court, Lobatse.

<sup>196</sup> See s. 3(1) of the Act.

*a person who had advanced the money by the use of his motor car that would not conclude the matter. He made no allegation of an agreement which he reached with his late wife or giving him an interest in the business.*"<sup>197</sup>

He accordingly discharged the rule *nisi*. This case reiterates the principle that in a marriage out of community of property, for a spouse to get a share of the property that belongs to the other spouse, he must adduce evidence pointing to having contributed substantially to the acquisition of the property concerned.

In *Mbenge v. Mbenge*<sup>198</sup> the Court of Appeal applied the concept of the universal partnership to divide the assets of cohabitees. The possible criteria that a court may use in dividing assets of couples married out of community of property may be inferred from this case. The appellant in the court *a quo* had sought an order for equal division of all the property acquired by the parties while living together as husband and wife from 1958 to 1986. She also sought a division of progeny of

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<sup>197</sup> At pp. 5-6 of the transcript.

<sup>198</sup> Civil Appeal No. 17/1995 unreported (5<sup>th</sup> February 1996).

livestock from 1986 to the date of the division and the proceeds of all property disposed of by either party up to the division of the property. Her claim was based on an assertion that she was married to the respondent and was accordingly entitled to claim 50% of the property he had acquired during the period they were married. The evidence however showed that no marriage had ever taken place and her counsel conceded this at the trial. Aboagye J. held that:

*“The evidence clearly shows that the plaintiff has ignorantly elevated her adulterous cohabitation with the defendant to the status of a lawful marriage in community of property. In that situation, I have no doubt in my mind that whatever she did whilst she was with the defendant was regarded by her as normal contribution of a wife to the establishment of a happy family life without any profit motive.*

*As the basis of the plaintiff's claim, according to her evidence, is at variance with what is stated in her declaration the claim must fail and it is hereby dismissed.”*

On appeal, a review of the evidence revealed that the appellant played a part in the running of various commercial enterprises during their 28

years of cohabitation. The respondent's counsel, while not abandoning his client's case, conceded that the evidence did indeed establish a universal partnership and that some apportionment should be decreed. The parties were given an opportunity to divide the assets but this proved impossible and they asked that the court decide the matter. Consequently, the Court of Appeal unanimously held:<sup>199</sup>

*"I am satisfied, on a reading of the evidence and having considered the Heads of Argument on both sides that the learned Judge a quo erred in placing undue emphasis on the plaintiff/appellant's evidence that her claim was based essentially on the assertion that she was the wife of the respondent. In my view the equities of the situation required that she be found entitled to a 50% share of the respondent's assets acquired by the joint efforts of the parties..."*<sup>200</sup>

This conclusion may be the result of the acceptance of the appellant's contention that since it was impossible to quantify the contribution of

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<sup>199</sup> At p. 4 of the transcript *per* Wyle J.A.

<sup>200</sup> At pp. 4-5 of the transcript *per* Wyle J.A.

each party the court should make a finding that they contributed in equal proportions. Thus the court, taking into account all the circumstances of the case, was able to exercise its discretion in favour of equal division of the assets.

This willingness by the highest court to do substantial justice between cohabitants augurs well for couples married out of community of property. From the evidence in the case, when the couple first met in 1958 in Cape Town, the appellant gave up her employment, at the instance of the respondent, to live together as his wife. When the parties came to live in Botswana, the appellant was involved in the purchase and sale of livestock, made possible by the proceeds of a thatching grass business in which both parties were engaged. The appellant moved to a cattle post when they moved the cattle there in 1977, dug a well and looked after the cattle. There was no evidence that the appellant contributed any money towards the acquisition of the various properties. Nor was there any express agreement to create a partnership. What was clear though was the fact that she expended considerable labour towards the acquisition of the properties, which she maintained. All these activities were directed towards the maintenance of the parties and their two children. If the court could accept these

indirect contributions of a cohabitee as creating a tacit universal partnership entitling her to a share in the property acquired because of such contributions, it is thinkable that a similar result could be reached in a case involving spouses married out of community of property.

The discussions above show that there is some interaction among the three matrimonial property regimes. This is especially so where the spouses are subject to customary law. The striking feature revealed by the cases is that even where the common law rules of community of property were used to divide the matrimonial property as in *Molomo's* case or where the customary law rules were used as in *Moisakamo's* case, they produce remarkably similar results.<sup>201</sup> The "mode of life" exemption was applied in *Molomo's* case. In *Moisakamo's* the exemption was deemed inapplicable, yet the distribution of the matrimonial property was similar. The results thus render any difference between customary and common law principles in this respect illusory. Significantly, the customary courts apply principles of the common law in dividing matrimonial property. This is evident from

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<sup>201</sup> See Griffiths "Legal duality..." *op. cit.*, at p. 158.

the case of *Seitshiro*<sup>202</sup> where Chief Linchwe applied the principles used in *Molomo*'s case to divide the matrimonial property of the spouses. Griffiths has expressed the view that this interrelationship between customary law and common law reflect an acquiescence by the former to the latter and that the customary system is applying the common law in the guise of a "customary" label. This relationship she describes as "a symbiotic one and one which involves a process of mutual adaptation."<sup>203</sup> Thus, the interdependence between customary law and the common law in the division of matrimonial assets is obvious. This is a clear demonstration of the potential of customary law to imbibe new ideas to enhance its efficacy in contemporary society.

## 6. MAINTENANCE AND PROPERTY RIGHTS ON DIVORCE<sup>204</sup>

As stated above, s. 25(2) empowers the court, if it thinks fit, to order the husband to secure, to the satisfaction of the court, a gross sum of money

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<sup>202</sup> See note 131 *supra*.

<sup>203</sup> Griffiths "Legal duality..." *op. cit.*, at p. 158.

<sup>204</sup> See G. Miller "Maintenance and property" (1971) 87 *Law Quarterly Review* 66 on the situation in England prior to the enactment of the Matrimonial Proceedings and Property Act 1970, a situation similar to the one existing currently under the Botswana Matrimonial Causes Act 1973.

or an annual sum of money to the wife. It also empowers the court to order the husband to pay to the wife, during their joint lives, such periodic sums for the maintenance and support of the wife as the court thinks fit. The principal object of s. 25(2) is the provision of income for the maintenance of the wife. The rationale behind the subsection may be discovered from the following contribution by the then Attorney-General to the third reading of the Bill:

*“In the case of a woman, this Bill says that a woman shall not support a man, only a man shall support a woman and that is in fact, the whole principle throughout this Bill...I think it is fair to say that in our law in this country we have tended to feel that it is the women who are to be supported not for them to support the men...we do not as a nation, expect a husband ever to ask support, financial support from his wife. He is the main partner who is the bread winner. If you are not capable of winning bread, you should not marry in order to be subsidised by your wife’s family.”<sup>205</sup>*

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See the Report of the Select Committee on the Matrimonial Causes Bill 1972 *Hansard* at pp. 22-23 and p. 92.

The question that may be asked and answered here is: Does this power have any relationship with the determination of the mutual property rights under s. 13 especially regarding the rights of the husband who is the target of the orders under s. 25(2)? If the court decides to exercise its discretion to order a secured gross sum of money or an annual sum, it is required to have regard, *inter alia*, to the fortune of the wife, if any, and, presumably, to the husband's ability to pay.<sup>206</sup> Under a similar provision in England the courts have interpreted such ability to pay to mean the husband's potential capacity to provide maintenance.<sup>207</sup> Thus although the court cannot adjust property rights under s. 13 of the Matrimonial Causes Act, in considering the husband's ability to provide a gross or annual sum a rigid distinction should not be drawn between income and capital. The husband's property, like immovable assets, and other valuable movable property, for example, a large herd of cattle, should be taken into account in deciding the secured gross or annual sum to be ordered under s. 25(2)(a). Such a consideration will enable the court to use the husband's property to secure the gross or an annual sum ordered. Furthermore, the ordering of maintenance for the wife

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<sup>206</sup> The wording of the sub-section is unclear. It only states "*to the ability of her husband...*"

<sup>207</sup> See *N. v. N.* (1928) 44 T.L.R. 324.

may, in terms of s. 25(2)(b), be either in addition to or instead of a gross or annual sum ordered under subsection (1). The wording of the subsection suggests that the orders therein are cumulative rather than alternatives, thus establishing a possible link between property rights under s. 13 and maintenance as a gross or annual sum or periodical payments under s. 25(2). A wife who is fortunate to be awarded a substantial gross or an annual sum may not be given periodical payments as well or if she gets a periodical payment, this will be nominal in nature.<sup>208</sup>

In practice though, it is conceded that the court can only properly make an order for a lump sum payment against a husband possessed of sufficient capital assets to justify it.<sup>209</sup> The case law reveals that the normal capital asset available on divorce is the matrimonial home or cattle but the courts have not seen fit to award a wife a lump sum. In fact there has been no reported case since the inception of the Matrimonial Causes Act in which a lump sum has been awarded. Thus

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<sup>208</sup> See, for example, the views of Lord Denning in the English case of *Button v. Button* [1968] 1 W.L.R. 457 at p. 462.

<sup>209</sup> See the English case of *Davis v. Davis* [1967] P. 185 at p. 192 in which Willmer L.J. expressed a similar view on the English provision.

the award of a lump sum may be an exception rather than the rule. In a similar vein it is rare for a court to make a maintenance order in favour of a wife. This may perhaps be due to the influence of customary law in terms of which wives, upon divorce, are assumed to rely on their family group for maintenance. Maintenance for children of the marriage is the usual order made.<sup>210</sup>

The courts have so far exercised their power to determine the mutual property rights of spouses in isolation from their power to order maintenance for a wife. This situation aside, it is submitted that the two powers must, in appropriate circumstance, be used to complement each other. This is because a secured gross sum attached to the property of the husband, for instance, will be the best way of ensuring the payment of any sum awarded. Although the wife in such a case will have a limited interest in the property, the husband is not deprived of it but is merely made to secure his payment. The persistent failure by husbands

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<sup>210</sup> See, for example, *Segosebe v. Segosebe* Misc 243/1992 unreported (26<sup>th</sup> July 1995) High Court, Lobatse; *Ludick v. Ludick* MC No. F35/1993 unreported (15<sup>th</sup> July 1995) High Court, Francistown; *Children, Women and Development in Botswana: A situation report op. cit.*, at p. 211 and A. Molokomme "The mosaic of Botswana maintenance law" (1987) 19 *Botswana Notes & Records* 129.

to pay maintenance when ordered to do so has become chronic<sup>211</sup> despite the existence of legislation for its enforcement.<sup>212</sup> If the courts show a willingness to award lump sum payment, secured in appropriate cases, this will go some way to alleviate this persistent failure on the part of husbands to pay maintenance.

## 7. CONCLUSION

The following inferences can be drawn from the above discussion:

- (a) The court has very little discretion in determining who owns the matrimonial property or in adjusting the proprietary rights of the spouses. What little discretion there is, is exercised merely in determining the quantum of property to be allocated to each spouse.
- (b) The factors that influence the court in determining the quantum of property for each spouse are not clearly discernible.

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<sup>211</sup> See *Children, Women and Development in Botswana: A situation report op. cit.*, at p. 214.

<sup>212</sup> See Maintenance Orders Enforcement Act 1970.

- (c) A contradiction exists in the distribution of matrimonial property owned by persons who are subject to customary law who marry under the Marriage Act. Fault by a spouse play a part in such distribution while it is ignored in the granting of the divorce decree. Where the spouses are not subject to customary law, fault is not a factor in the distribution of the matrimonial property.
- (d) There is an interaction between the common law regimes of community of property/out of community of property on the one hand and customary law principles of distribution on the other.
- (e) The courts have rarely used the financial orders provided by the Matrimonial Causes Act for the enhancement of a wife's financial position.

These inferences will be elaborated upon in the next chapter.

## CHAPTER THREE

## EFFICACY OF THE MATRIMONIAL PROPERTY REGIMES

## 1. INTRODUCTION

*“Irrespective of the precise allocation of economic roles within a marriage, husband and wife are seen as equal partners in co-operative labour, both making, in the normal case, an essential contribution towards the economic viability of the family unit, and hence, towards the accumulation of matrimonial property. Whatever property is acquired by them during marriage is therefore acquired by reason of partnership effort.”*<sup>213</sup>

This extract from a leading authority on matrimonial property forms the theoretical premise upon which the efficacy of the various matrimonial property regimes will be evaluated. From the discussions in Chapter

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K.J. Gray *Reallocation of property on divorce*, Abingdon, Professional Books, 1977 at p. 24. For similar views, see also the *Report of the Royal Commission on Marriage and Divorce* (1951-1955), Cmd. 9678, para. 644 and the English case of *Midland Bank Trust Co. & Anor. v. Green & Anor.* (No. 3) [1982] Ch. 529 at pp. 538-9 *per* Lord Denning M.R.

Two, it is clear that one of the glaring shortcomings of the matrimonial property regimes is the court's inability to exercise any discretion in determining and readjusting the mutual property rights of the spouses on divorce. Apart from marriages in community of property where equality of distribution is the norm, and where the courts can decide which property goes to which spouse, there is no power to exercise discretion in the other matrimonial regimes. In marriages out of community and under customary law, the philosophy of matrimonial partnership is completely ignored when property is distributed on divorce. To adapt the words of Scarman L.J. in the English case of *Calderbank v. Calderbank*,<sup>214</sup> under these two regimes the spouses do not come to the judgment seat in matters of money and property upon the basis of complete equality. The odds are heavily weighted against the wife. Yet the traditional role of a wife, even in a culturally conservative society like Botswana, is gradually changing and the law should reflect this new reality.<sup>215</sup> The attendant problems and injustice

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<sup>214</sup> [1976] Fam. 93 at p. 101.

<sup>215</sup> A typical example of such conservatism was the speech of the then Attorney-General during the third reading of the Matrimonial Causes Bill in 1972 - see p. 112 *supra*.

this lack of discretion causes will become clear in the discussions that follow.

## 2. MARRIAGE OUT OF COMMUNITY OF PROPERTY

The inability of the court to reorganise the economic relationship of the spouses on divorce is brought into a sharp focus where the matrimonial regime is out of community of property. This is due to the separate-property characteristic of the regime. The concept of separate property was intended to be beneficial to married women<sup>216</sup> but the reality of married life in Botswana is that the husband invariably has the superior economic power and therefore is in a far more advantageous position to acquire capital assets. Even where the wife is working, her income in most cases will be less than that of her husband and she will not be in

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See Hahlo "*Husband and Wife*" *op. cit.*, pp. 287-292 where some of the advantages conferred on women by this matrimonial regime are said to be - that they may freely contract and dispose of their property by acts *inter vivos* or *mortis causa*, if their husbands alienate or encumber their property without their consent they may recover it from the third party with the *rei vindicatio*, i.e. an action brought to assert the rights of ownership. See also S.M. Cretney & J.M. Masson *Principles of Family Law* (6<sup>th</sup> ed.), London, Sweet & Maxwell, 1997 at p. 124 and M.D.A. Freeman "Towards a rationale reconstruction of family property law" (1972) *Current Legal Problems* 84.

the same position as the husband to acquire capital assets.<sup>217</sup> Hence when it comes to claiming a share in the matrimonial property her position is not satisfactory. In order for her to do this, she would have to base her claim on some recognised principle of property law.<sup>218</sup> In this regard where the property had been purchased in the sole name of a husband without the wife making any direct contribution to the purchase price or without the spouses making an agreement or declaration regarding the beneficial interest in the property, there is a *prima facie* inference that the husband is the sole legal and beneficial owner.<sup>219</sup> This inference could only be displaced if the court could

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<sup>217</sup> The latest census figures (1991) indicate that women accounted for just 39% of the workers aged 12 years and above. According to this data base less than 50% of Botswana's female population (that is, excluding school children and the retired) was actually classified as labour force participants whereas 90% of their male counterparts were recognised as workers. See the *1991 Housing and Population Census*, Government Printer, Gaborone and *National Report for the Fourth World Conference on Women: Beijing, China, 1995*, Women's Affairs Division, Ministry of Labour and Home Affairs, Gaborone, 1994 at p. 13. For a global perspective see Jane Roberts "Violation against women as a violation of Human Rights" (1991) 17 *Social Justice* 54 at p. 57.

<sup>218</sup> See for example, the South African case of *Hanel v. Hanel* 1962 (3) S.A. 625 (C) and Hahlo "*Husband and Wife*" *op. cit.* at p. 290.

<sup>219</sup> See *Sebina v. Sebina supra* and the English case of *Gissing v. Gissing* [1971] A.C. 886.

impute, from the conduct of the spouses down to the date of their separation, a common intention that the wife was to have a beneficial interest in the property. This would in turn depend on whether the wife had made a substantial financial contribution towards the purchase of the property in dispute.<sup>220</sup> The court cannot impute a common intention that a wife was to have a beneficial interest in the property merely on account of her domestic contribution towards the well-being of the family. Thus, in the English case of *Button v. Button*<sup>221</sup> Lord Denning said:

*“The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of thing which a wife does for the benefit of the family without altering the title to, or interests in, the property...The wife was economical in spending on the housekeeping, as most wives are.*

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<sup>220</sup> See *Molomo v. Molomo op. cit.*, at p. 252.

<sup>221</sup> [1968] 1 All E.R. 1064 at p. 1067. This case represents the English courts' attitude to a wife's indirect contribution to the matrimonial home before the passing of the Matrimonial Proceedings and Property Act 1970. That Act gave the courts extensive powers to redistribute virtually all the spouses' economically valuable assets. See also *Burns v. Burns op. cit.*, at p. 264.

*She helped with the decorating and improvements to the house, as many wives do. It no doubt improved the value of the property...I have come to the conclusion that the proper inference from the evidence is that it was the ordinary kind of work which a husband or wife may do on the matrimonial home without giving the other a share or interest in it.”<sup>222</sup>*

A similar attitude to the above was adopted by Hallchurch J in *Rabantheng’s* case where, in deciding whether there was a universal partnership between the spouses with regard to the acquisition of the matrimonial home, he said:

*“Thus if the spouses conducted a business together to which each contributed money and/or labour, a partnership may have to be implied, but the mere fact that the wife has worked in her husband’s business or on his farm is not sufficient. It must be shown that she made a substantial financial contribution or regularly rendered services going beyond those ordinarily*

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For a similar view expressed on South African law, see Hahlo “*Husband and Wife*” *op. cit.*, at p. 290.

*expected of a wife in her situation: the court will not readily imply a partnership agreement.*<sup>223</sup> (Emphasis added.)

The wife in that case, as would be recalled, was awarded a share in the matrimonial home only because it was adjudged that her contribution of P675 towards the purchase price of P2,813.78 in 1975, was “*a substantial contribution to the purchase of the house...*”<sup>224</sup> Were this not the case, one could reasonably assume that the wife would not have got a share of the matrimonial home even though it was common cause that she had made indirect contributions to the purchase and maintenance of the house by providing food and other household items for her husband and the children.

Would a ruling that the wife’s indirect contribution amounted to a share in the matrimonial home have created injustice in the case? The answer would be no. A golden opportunity was lost when the court shied away from articulating the relevant principles to be applied in resolving disputes between spouses married out of community of property. In the

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<sup>223</sup> At p. 265 relying on Hahlo “*Husband and Wife*” *op. cit.*, at p. 290.

<sup>224</sup> At p. 267.

court's view, "*as this was a marriage out of community of property English law is not of assistance and the resulting and constructive trust principles do not apply and one looks to South African precedents for assistance.*"<sup>225</sup> This stand taken by the court was unfortunate for marriage out of community is the only matrimonial regime known to English law and legal principles formulated by the courts in that country to resolve matrimonial disputes should be germane to disputes concerning this type of regime in Botswana. However, despite the rejection of English legal principles by the court, it seems clear that the criterion used to determine the wife's share in the matrimonial home was based on English law. The relevant authority relied upon by the court was *Horne v. Hine*<sup>226</sup> in which the High Court in the then Southern Rhodesia (now Zimbabwe) held that where both spouses have contributed towards the purchase of a matrimonial home on the understanding that it should belong to them jointly, but it was conveyed into the name of one spouse only, that spouse will be the legal owner but as between the spouses joint ownership principles will apply. The plaintiff in that case was a former wife of the defendant. They were

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<sup>225</sup> See p. 264.

<sup>226</sup> 1947 (4) S.A. 760 (SR).

married in England and subsequently migrated to Rhodesia via South Africa. It was accepted that their proprietary rights were governed by English law and consequently that law was applied in the resolution of the dispute. The legal proposition stated by the court in that case is not different from that stated in the English case of *Pettit v. Pettit*<sup>227</sup> by Lord Upjohn. He said:

*"...the document may be silent as to the beneficial title. The property may be conveyed into the name of one or other or into the names of both spouses jointly in which case parol evidence is admissible as to the acquisition and if, as very frequently happens as between husband and wife, such evidence is not forthcoming, the court may be able to draw an inference as to their intention from their conduct."*<sup>228</sup>

The court in *Rabantheng* did what was said in the above *dictum* by accepting parol evidence from the wife in the face of the silence of the deed of conveyance as to the beneficial ownership of the matrimonial

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<sup>227</sup> [1970] A.C. 777.

<sup>228</sup> At p. 813.

home. The court held that the wife was entitled to a beneficial ownership despite the deed of conveyance being in the sole name of the husband. It is therefore submitted that English legal principles are relevant in resolving disputes about the proprietary rights of spouses married out of community of property. In the absence of a definitive statutory provision in this regard, the courts are urged to follow English precedents to solve disputes relating to matrimonial property under this regime.

Furthermore, if one takes into account the rudimentary nature of the social security framework within which persons without visible means of financial support may be given financial assistance by the State when they are most vulnerable,<sup>229</sup> the need to provide a wife, who has made an indirect contribution, with a share in the husband's acquired property becomes even more important. The reality of the marriage situation is

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<sup>229</sup> An old age pension scheme was only established in Botswana in October 1996. The objective is to offer some financial security to elderly citizens of 65 years and above who in a majority of cases are no longer working. The current rate (August 2000) is P117 per month. In March 1999 it was estimated that some 80,022 people were in receipt of pension under the scheme. Of these 46,267 were women and 33,755 were men. These figures were revealed at an induction course for officers in the Social Benefit Division of the Ministry of Local Government, Lands and Housing in March 1999.

that it is a partnership of the couple and consequently the law should give effect to their legitimate and reasonable expectations.<sup>230</sup> The present situation in which the court refuses to acknowledge a wife's indirect contribution towards the welfare of the family, it is submitted, is not only unfair but also does not fulfil the expectations of couples. This undoubtedly undermines the presumed partnership of the marriage.

The situation is further compounded by the fact that job-related benefits, such as pensions and gratuities, which are accumulated during the marriage do not feature as part of the assets of the spouses. In fact such interests have not been discussed at all in the case law. Even if such discussion were to arise, there will be some difficulty, in the absence of

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See Judith Freedman et al *Property and Marriage: An integrated approach* Institute for Fiscal Studies Report Series No. 29, London, 1988 at p. 9. The word "partnership" is not being used in this context in a commercial sense, for as explained in an American case *Rey v. Rey* (1973) 279 So. 2d 360 at p. 361f cited by Gray *op. cit.* at p. 23 note 5, "*The marital relationship, although classified as a 'partnership' in terms of demonstrating the equality of the individuals involved, was never intended to be a 'partnership' in the ordinary business sense where each party is required 'to give an accounting' at the termination of the relationship...[I]t is somehow degrading to the marital relationship and to the institution of marriage itself to see a dissolution degenerate into a battle between accountants where the spoils go to the better bookkeeper.*" Similar views about the matrimonial 'partnership' can be found in the following South African cases: *Van Gysen v. Van Gysen* 1986 (1) S.A.56(C), *Kritzinger v. Kritzinger* 1989 (1) S.A. 67(A) and *Katz v. Katz* 1989 (3) S.A. 1(A).

a legislative injunction, in treating these benefits as part of a spouse's estate.<sup>231</sup> It has been asserted that South African common law has no principle by which a spouse's pension interest can be compulsorily divided on divorce<sup>232</sup> and because of the similarity between the common law of Botswana and that of South Africa, the Botswana courts are likely to adopt this position if the issue were to come before them. Moreover, pensions and gratuities are mere expectancies which are to be realised in the future, consequently, they are not regarded as "property" in the proper sense of the word. One reason for this is that only the employee-spouse stands in a particular contractual relation to the pension fund to which his employer usually also contributes during the currency of the employment. There is a need to recognise these interests as property because it is a reasonable expectation of a spouse

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<sup>231</sup> Under s. 8 of the Pensions Act 1966, pensions are generally not assignable or transferable except for the purpose of satisfying a debt due to Government or an order of any competent court for the payment of periodical sums of money towards the maintenance of a wife or ex-wife or minor child of the person to whom the pension or gratuity has been granted.

<sup>232</sup> See p. 191 *infra*.

who is not economically strong to expect to benefit from the pension of the other spouse in the twilight of her years.<sup>233</sup>

The preparedness of the Court of Appeal in *Mbenge's* case<sup>234</sup> to use the concept of the universal partnership to divide the acquired assets of cohabitees augurs well for the future. It is hoped that in a suitable case a High Court will be persuaded to adopt the progressive attitude exhibited by the highest court in that case when it divides the matrimonial property of spouses married out of community of property.

The narrow interpretation given to the provision in s. 13 of the Matrimonial Causes Act<sup>235</sup> will however hamper any willingness on the part of the High Court to equitably readjust the property rights of the spouses. The operation of the doctrine of judicial precedent is well

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<sup>233</sup> The old-age pension introduced in 1996 is unlikely to compensate for the loss of participating in the other spouse's pension interest. See note 229 *supra*.

<sup>234</sup> See p. 106 *supra*.

<sup>235</sup> See pp. 80-81 *supra*.

entrenched in Botswana<sup>236</sup> and unless the Court of Appeal, the ultimate court in the hierarchical system of courts, has an opportunity to revisit the interpretation of the said section, the High Court will continue to employ the narrow interpretation of the section.<sup>237</sup> Otherwise, the tyranny of this narrow interpretation of s. 13 of the Matrimonial Causes Act can only be reversed by legislation.

### 3. MARRIAGE IN COMMUNITY OF PROPERTY

This type of matrimonial regime allows for equal division of the matrimonial property on divorce.<sup>238</sup> However, such a division may be affected by customary law where the spouses are subject to that law. The application of customary law to such a division generally does not satisfy wives although empirical evidence suggests that a division by

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<sup>236</sup> See E.K. Quansah *Introduction to the Botswana Legal System op. cit.*, at pp. 34-45 and I.G. Brewer "Sources of the criminal law of Botswana" *op. cit.*, at p. 31.

<sup>237</sup> Although the High Court is generally not bound by its own previous decisions, it will follow its previous decisions to aid consistency and predictability of the law. See *Morgan Moathode v. Kgabywana Mekgwe* [1968-70] B.L.R. 52 at p. 53 and *State v. Macheng* [1968-70] B.L.R. 189 at p. 197 where the High Court refused to follow its previous decisions.

<sup>238</sup> See the remarks of Hannah J. in *Molomo's case* at p. 88 *supra*.

means of either the common law or customary law produces the same results.<sup>239</sup> The fairness of community of property in the division of matrimonial assets is acknowledged but it is predicated on the scrupulous management of the joint estate by the husband during the currency of the marriage. This fairness of the regime will be illusory if the husband dissipates the joint estate and leaves no assets at the time the community comes to an end or leaves only debts. There is a real danger of this happening under the current law which gives unrestricted administrative powers to the husband over the joint estate by virtue of his marital power.<sup>240</sup> The reluctance of the courts to call the husband to account for his administration except in the most extreme cases is a major criticism of this type of matrimonial regime.<sup>241</sup> This shortcoming of this regime has led the Women's Affairs Unit of the Ministry of Home Affairs to conduct workshops to educate women on the advantages and disadvantages of marrying in or out of property.<sup>242</sup>

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<sup>239</sup> See Griffiths "Legal duality..." *op. cit.*, at p. 158.

<sup>240</sup> See pp. 38-41 *supra*.

<sup>241</sup> See p. 40 *supra*.

<sup>242</sup> As part of the campaign, a booklet titled *His, mine or ours - the property rights of women married under Botswana common law* was published in 1986 setting out the relative advantages and disadvantages of marrying in or

Despite these laudable efforts, the common law's insistence that the husband is the sole administrator of the joint estate militates against any exercise of rights which women may be made aware of from these campaigns. The law as it stands will rarely back their efforts to assert their rights to know how the joint estate is being administered by their husbands. In *Moisakamo v. Moisakamo*<sup>243</sup> it was held that for a wife to obtain an interdict restraining her husband from disposing or otherwise dealing with the joint property, she had to show an actual or well-grounded apprehension that if no interdict was granted she would suffer irreparable loss. Such a loss cannot be presumed but must be established by the applicant as an objective fact.<sup>244</sup> It is not enough for the applicant to allege that she herself *bona fide* feared such loss. In most cases of maladministration by the husband such irreparable loss

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out of property. See also *Women and the Law in Botswana op. cit.*

243 [1979-80] B.L.R. 131. See also pp. 8-9 and 41 *supra*.

244 In vindictory or quasi-vindictory actions, that is actions in which the plaintiff claims delivery of a specific property as owner or lawful possessor, such irreparable loss is presumed until the contrary is proved. See the South African case of *Stern and Ruskin NO v. Appleson* 1952 (3) S.A. 800 (W) at pp. 810-813 *per* Millin J. which was relied upon by the court. In the court's view, there was no clear indication whether the applicant's action for the division of property was vindictory or quasi-vindictory, consequently, she must show irreparable loss as an objective fact before an interdict could be given to her. She could not do so hence the interdict was refused.

may be difficult to prove and so make it impossible to challenge the husband's administration of the joint estate. In order for the acknowledged fairness of this particular matrimonial property regime to be fully appreciated, there must be the abandonment of the concept of sole administration of the joint estate by the husband. A wife must be made to partake in the administration of the joint estate in consonance with the beneficial interest she has in it.

An aspect of this regime which may affect the determination of matrimonial property is the forfeiture of benefit order.<sup>245</sup> As argued earlier on,<sup>246</sup> this order is in a complete antithesis to the professed rationale of the Matrimonial Causes Act and must be taken to be no longer applicable under the Act. However, in order to leave no doubts as to its non-applicability under the present law, there is a need to expressly abolish it by legislation.

Finally, there is also the need to extend the ambit of the joint estate by recognising job-related benefits, such as pensions and gratuities, as

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<sup>245</sup> See pp. 87-89 *supra*.

<sup>246</sup> *Ibid*.

property and as such forming part of the joint estate.<sup>247</sup> At present no such recognition exists and consequently, these benefits which are built up during the marriage but may only fall due after its dissolution do not form part of the joint estate and therefore are not susceptible to division when the community comes to an end.

#### 4. MARRIAGE UNDER CUSTOMARY LAW

The customary law matrimonial property regime discriminates against women by placing them in a position of relative inequality with men in respect of the ownership and allocation of matrimonial property upon divorce.<sup>248</sup> The Customary Courts generally consider the husband to be the owner of almost all property acquired during the marriage even where a contribution towards their acquisition has been made by the wife. This bias towards the husband, as was stated in Chapter Two,<sup>249</sup> has led to wives bringing action in the High Court to rectify what they

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<sup>247</sup> See pp. 128-130 *supra*.

<sup>248</sup> See p. 72 *supra* and A. Armstrong *et al Uncovering reality - excavating women's rights in African family law*, Women and Law in Southern Africa Working Paper No. 7, 1992, at p. 35.

<sup>249</sup> See p. 72 *supra*.

perceive to be unfair distribution of matrimonial property. The High Court has distributed such property in accordance with the relevant customary law. However, it has acknowledged the contemporary societal changes that have taken, and are taking place and has taken these into account in such distribution.<sup>250</sup> There is also evidence that when the Customary Courts are distributing matrimonial property on dissolving a customary marriage, they take into account principles which the High Court would have used in distributing the property of spouses married under the common law.<sup>251</sup>

All these point to the dissatisfaction of the application of the customary law by the Customary Courts and the need to rectify the situation. The desire to do this would seem to underlie one of the reasons given by the High Court in *Moisakamo(2)*'s case in rejecting counsel's submission that the court had no jurisdiction to hear a case involving the distribution of the property of spouses subject to customary law.<sup>252</sup> S. 31 of the Customary Courts Act prohibits advocates and attorneys from

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<sup>250</sup> See pp. 75-76 *supra*.

<sup>251</sup> See p. 71 *supra*.

<sup>252</sup> See [1981] B.L.R. 126 at p. 138.

appearing in these courts. The court in *Moisakamo*(2) alluded to the contemporary reality of Batswana men marrying women from tribes other than their own and from other African countries, especially neighbouring countries. Many of these wives are ignorant of local customs as non-Batswana married to Batswana men and in the court's opinion, "*any practice which would deny these persons of the right to be represented by lawyers versed in local customary law when a dispute arises as to the disposition of their property must be discouraged.*"<sup>253</sup> This judicial recognition of the unfairness of the proceedings in these courts is a significant step towards addressing a customary wife's right to be protected by the law.

The customary law property regime also governs the distribution of the matrimonial property of spouses married under the Marriage Act but

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<sup>253</sup> *Ibid.* The situation is made more difficult because, although s. 2 of the Customary Courts Act permits members of a tribe of any other African country prescribed by the designated Minister to be included in the definition of persons subject to customary law, there is yet no such prescription - see p. 64 *supra*. It is interesting to note that the Presidential Commission on the Judiciary, set up on the 19<sup>th</sup> of January 1996, did not find any justifiable reason for any complaint against the prevailing prohibition of legal representation in the Customary Courts. See para. 6.8.6 of its Report (9<sup>th</sup> July 1997), Gaborone, Government Printer.

who are subject to customary law.<sup>254</sup> The general tendency of the High Court in such cases is to refer the distribution to a local chief or Customary Court<sup>255</sup> but invariably the case comes back to the High Court because of dissatisfaction with the distribution. This situation reinforces the need to reform the customary law especially in its application to the distribution of matrimonial property on divorce. A statutory yardstick for recognising customary law is that such a law should not be “*incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.*”<sup>256</sup> Although the phrase “*contrary to morality, humanity or natural justice*” has not been defined, it is submitted that a customary law which blatantly

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<sup>254</sup> See s. 7(1) of the Married Persons Property Act 1971.

<sup>255</sup> The existence of this practice was acknowledged in *Moisakamo v. Moisakamo (2)* [1981] B.L.R. 126 at p. 135. See also *Mfa v. Mfa* MC F112/93, unreported (11<sup>th</sup> November 1996) High Court Francistown, *Gabanakgosi v. Gabanakgosi* MC F116/94, unreported (22<sup>nd</sup> November 1996) High Court Francistown and *Ruwona v. Ruwona* MC F35/95, unreported (30<sup>th</sup> June 1997) High Court Francistown. *Dicta* in *Lesotho v. Lesotho op. cit.* suggest that if the properties consist of the kind unknown to customary law, such a reference will not be countenanced. In that case the properties included mortgage bonds which according to the court was unknown to customary law. Accordingly, the court abandoned the idea of referring the division of the property to the Customary Court.

<sup>256</sup> See s. 2 of the Customary Courts Act Cap. 04:05.

discriminates against women in the division of matrimonial property, is at least contrary to natural justice in the sense of fairness. Consequently, such customary law, in the light of contemporary socio-economic conditions, should not be upheld. This was implicitly recognised in *Moisakamo (2)*<sup>257</sup> where the court expressed the view that “*a rule that may have been just and suitable in a subsistence farming community may work grave hardship and injustice in a commercial farming economy.*” This statement hints at the flexibility and adaptability of customary law, characteristics which are already acknowledged in other African jurisdictions. A typical example of such recognition is the *dictum* of Osborne C.J. in the Nigerian case of *Lewis v. Bankole*.<sup>258</sup> In that case the learned Chief Justice said:

“*One of the most striking features of West African native custom is its flexibility; it appears to have been subject to motives of expediency; and it shows an unquestionable adaptability to altered circumstances without entirely losing its character.*”

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<sup>257</sup> See p. 76 *supra*.

<sup>258</sup> [1908] 1 N.L.R. 81 at pp. 100-101. See also the *dictum* of Amissah J.A. (as he then was) in *Attah v. Esson* [1976] 1 G.L.R. 128 at p. 132.

It is submitted that Botswana customary law has these characteristics. It is only unfortunate that the superior courts have not taken advantage of the existing facility to shape and mould the customary law to suit the contemporary socio-economic circumstances of Botswana.

## 5. CONCLUSION

The efficacy of the three matrimonial regimes is far from satisfactory. With regard to marriages out of community of property, there is a need to give statutory discretion to the courts to adjust the matrimonial property rights of the spouses in the light of the post-divorce circumstances of the spouses. The exercise of sole control of the joint estate by husbands of marriages in community of property needs to be abolished and the wife given joint control of such estate. The practice of referring the determination and distribution of matrimonial property of persons subject to customary law, who marry under the Marriage Act, to a Customary Court must be stopped. Such practice, though based on convenience, has no legal foundation. Besides, there are statutory provisions for the ascertainment of customary law in the High Court and these can and are used occasionally to resolve matters governed by

customary law.<sup>259</sup> Customary law rules for distribution of matrimonial property on divorce must be reformed to place spouses on an equal footing before the Customary Courts. This reform may not be forthcoming in the immediate future because of the inherent conservatism of the House of Chiefs, a body which Parliament is obliged to consult on such matters. An alternative reform will be to make the provisions of the Matrimonial Causes Act, as it is being suggested to be amended, to apply specifically to customary marriages. This will enable the relatively fairer provisions of that Act to be applied to customary marriages and to overturn the view expressed in *Mafokate's* case that the provisions of the Act do not apply to customary marriages.

The detailed proposals for reforming these shortcomings will be discussed in chapter eight but before that is done an overview will be given of how matrimonial property disputes are resolved in South Africa, England and Ghana in order to draw lessons from these countries to help propose a solution to the shortcomings revealed above. The choice of South Africa and England for study is because of their

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See s. 7 of Common Law and Customary Law Act Cap. 16:01 and *Moisakamo v. Moisakamo (2) supra*.

long historical and political association with Botswana. The bulk of the present matrimonial regimes was introduced by the British with a significant contribution from South Africa.<sup>260</sup> Therefore, changes in the legal systems in these countries have a habit of influencing legal thought in Botswana. The choice of Ghana is because, being an ex-British colonial country, it shares similar problems in this area with Botswana. The spirited attempts by the courts in Ghana to adapt the existing laws to social change should serve as an impetus to the Botswana courts in the face of legislative lethargy to reform.

## CHAPTER FOUR

AN OVERVIEW OF THE MATRIMONIAL PROPERTY  
REGIMES IN SOUTH AFRICA<sup>261</sup>

## 1. INTRODUCTION

Before 1994, the official policy of separate development created for Blacks in the “so-called self-governing territories” and “independent” TBVC<sup>262</sup> states gave rise to pluralism of matrimonial regimes in these territories/states and the Republic of South Africa as it existed before 1994.<sup>263</sup> On the 27<sup>th</sup> of April 1994 the Constitution of the Republic of South Africa Act 200 of 1993 came into effect. This Constitution by s.

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<sup>261</sup> For a detailed exposition of the matrimonial regimes, the reader is referred to June Sinclair *An Introduction to the Matrimonial Property Act 1984*, Cape Town, Juta & Co., 1984, Hahlo “*Husband and Wife*” *op. cit.*, pp. 153-314, Cronje & Heaton *op. cit.*, pp. 83-113, Van Heerden *et al op. cit.*, 182-206 and P.J. Visser & J.M. Potgieter *Introduction to Family Law* (2<sup>nd</sup> ed.), Kenwyn, Juta & Co., 1998 at pp. 84-154.

<sup>262</sup> This acronym refers to the former “independent” Republics of Transkei, Bophuthatswana, Venda and Ciskei. The self-governing territories were Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and Qwaqwa.

<sup>263</sup> On the pluralism of South African marriage laws, see Sinclair assisted by Heaton, *op. cit.*, at Chap. 3.

1 Part I of the first schedule redefined the national territory of South Africa by creating nine provinces which absorbed the then existing self-governing and “independent” states thus creating one sovereign democratic state within which national laws apply. The 1993 Constitution was repealed by schedule 7 of the Constitution of South Africa Act 108 of 1996 which came into effect on the 4<sup>th</sup> of February 1997. S. 1 of the 1996 Constitution reaffirmed and retained the reunified South African Republic and provided for the continuance of existing laws until modified or repealed.<sup>264</sup> The Justice Laws Rationalisation Act 18 of 1996 has however, repealed and amended most of the laws in the former self-governing and “independent” states to bring them into line with the law in the rest of the country. This chapter will therefore discuss mainly the matrimonial property regimes existing in what has been called the old Republic,<sup>265</sup> that is, the Republic of South Africa as it existed before 1994 with passing references, where appropriate, to the regimes in the self-governing and “independent” states. The discussion will begin with an exposition of

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<sup>264</sup> See Sched. Six Item 2(1) of the Constitution. Unless otherwise stated further references to the Constitution are to the 1996 version.

<sup>265</sup> See Sinclair assisted by Heaton *op. cit.*, at p. 207.

the matrimonial property systems in civil marriages followed by those in marriages under customary law.

## 2. MATRIMONIAL PROPERTY REGIMES IN CIVIL MARRIAGES

### (a) Historical background.

Prior to the commencement of the Matrimonial Property Act 88 of 1984,<sup>266</sup> there were, for white, coloured and Asian people, two main matrimonial property regimes from which parties proposing to enter into marriage could choose. Once the choice has been made the immutability doctrine applied, that is, the matrimonial property regime chosen at the time of the marriage could not be changed during the subsistence of the marriage by an act *inter vivos*, either by excluding or varying community of property, or by cancelling or modifying an antenuptial contract.<sup>267</sup>

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<sup>266</sup> The Act came into force on the 1<sup>st</sup>. of November 1984 - see Proclamation R158 GG 9413 of 7<sup>th</sup>. September 1984 Reg. Gaz. 3322. This Act has now been extended to the whole of the national territory of South Africa by s. 2(1) of Act 18 of 1996.

<sup>267</sup> See *Union Government (Minister of Finance) v. Larkan op. cit.*, at p. 224 *per Innes C.J.*, *Edelstein v. Edelstein op. cit.*, at p. 15 *per Van den Heever J.A.* and *Honey v. Honey op. cit.*, at p. 611 *per Du Plessis J.* Until 1956 it

The two matrimonial property regimes were:

- (1) Marriage in community of property which conferred on the husband the marital power over his wife and
- (2) Marriage with an antenuptial contract (marriage out of community of property) which excluded all forms of sharing and the marital power. This regime created complete separation of property.

There were other possible matrimonial regimes but these were seldom used.<sup>268</sup> Of the above two regimes, the community of property regime

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was possible in Natal to enter into a postnuptial contract excluding community of property and profit and loss but not the marital power. This was by virtue of s. 7 of Law 22 of 1863 (N) and s. 2 of Law 14 of 1882 (N). These two laws were repealed by s. 32 of the General Law Amendment Act 50 of 1956. See *Lee & Honore op. cit.*, at para. 78. Ss. 1, 3, 4, 5 and 6 of Act 50 of 1956 were repealed by s. 3 of Act 18 of 1996.

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For example, spouses could agree in their antenuptial contract that there would be only a community of profit and loss between them. In such a case each spouse retained as his private estate all property owned by him at the marriage and all property acquired during the marriage which was not regarded as profit. The spouses became co-owners of a joint estate consisting of all acquisitions considered as profit, as diminished from time to time by outgoings regarded as loss. All three estates were administered by the husband by virtue of his marital power. Hahlo "*Husband and Wife*" *op. cit.*, commented in his 4<sup>th</sup> edition that this type of matrimonial regime is not

was considered as the primary regime. In other words, if the parties did not expressly enter into an antenuptial contract excluding the community of property regime, the community of property regime automatically applied to their marriage.<sup>269</sup> Marriage out of community therefore was a secondary regime.

The Matrimonial Property Act 88 of 1984 introduced a third regime for marriages celebrated after the commencement of the Act by persons from the racial groups mentioned above. This regime, called the accrual system, applies automatically if community was excluded in an antenuptial contract, unless the contract also excluded the accrual system.<sup>270</sup> The fundamental principle underlying the accrual system is that:

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a living institution in South Africa.

<sup>269</sup> See *Mograbi v. Mograbi* 1921 A.D. 274 at p. 275 *per* Innes C.J., *Njobe v. Njobe & Dube* 1950 (4) S.A. 545 (C) at p. 500 *per* Van Winsen A.J., *Edelstein v. Edelstein op. cit.*, at p. 10 *per* Van den Heever J.A., *Brummund v. Brummund's Estate* 1993 (2) S.A. 494 (Nm) at pp. 498-499 *per* Levy, J. and Hahlo *op. cit.*, at p. 157 especially note 1.

<sup>270</sup> See s. 2 of the 1984 Act.

*“one spouse contributes financially and otherwise to the growth of the other spouse’s estate and should therefore be entitled to share in that spouse’s estate on the dissolution of the marriage”.*<sup>271</sup>

However, the 1984 Act did not change the primacy of the community of property regime and therefore it will be discussed first followed by the out of community regime.

### **(i) The nature of the community of property regime**

Community of property brings together, subject to certain exceptions,<sup>272</sup> the property of the spouses into a joint estate without the necessity for

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<sup>271</sup> See the South African Law Commission’s Report RP26/1982 titled *Report pertaining to the matrimonial property law with special reference to the Matrimonial Affairs Act, 1953, the status of the married woman, and the law of succession in so far as it affects the spouses* at para. 17.1.

<sup>272</sup> For example, an asset which a third party gives or bequeaths to one of the spouses with a proviso that it shall be excluded from the community does not fall into the joint estate. See *Erasmus v. Erasmus* 1942 A.D. 265 and *Cuming v. Cuming* 1945 A.D. 201. For a full list of assets excluded from the joint estate, see Hahlo *“Husband and Wife” op. cit.* at pp. 164-169, Cronje & Heaton *op. cit.* at pp. 86-89, Lee & Honore *op. cit.*, at para. 81, Visser & Potgieter *op. cit.*, at pp. 97-100 and *The Law of South Africa* vol. 16 (1992), T.J. Scott (ed.) at para. 78.

delivery of movables or transfer of immovables. This occurs by operation of law.<sup>273</sup>

The exact legal nature of the regime has been a matter for debate. A leading authority has described the position thus:

*“As many as ten theories concerning the legal nature of the matrimonial community of property have been distinguished ...but there are four main ones: see generally Van Wyk Power to Dispose<sup>274</sup> at 27, 54. Firstly there is the view, popular particularly with nineteenth century French authors, that there is indeed no ‘community’ and that the husband is the sole owner of the ‘joint’ estate while the wife has only a spes to receive half the estate at dissolution. The theory, which has a very weak historical foundation and which is also based on a confusion*

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<sup>273</sup> See pp. 37-38 *supra*. See also *Rosenburg v. Dry’s Executors & Ors.* 1911 A.D. 679 at pp. 688-689, *Ex parte Menzies et Uxor* 1993 (3) S.A. 799 (C) at p. 807, Hahlo “*Husband and Wife*” *op. cit.*, at pp. 162-163, Joubert (ed.) *The Law of South Africa* vol. 16 para.76 and *Lee & Honore op. cit.* at para. 80.

<sup>274</sup> This refers to the LL.D. thesis of Prof. Van Wyk, titled *The Power to Dispose of the Assets of the Universal Matrimonial Community of Property*, Leiden, 1976.

between the joint estate itself and the administration thereof, has been consciously propounded in four South African decisions, viz. *ex parte Hoekstra* 1923 O.P.D. 92 at 100; *Oberholzer v. Oberholzer* 1947 (3) S.A. 294 (O); *Wolfaardt v. Symington & De Kok* 1968 (3) S.A. 332 (O); *Van Schalkwyk v. Folscher* 1974 (4) S.A. 967 (NC). There are also signs that many of the decisions dealing with the basis of the wife's capacity as a public mercatrix and in *rebus domesticis* were unconsciously influenced by this discredited approach...The Appellate Division expressly rejected this "sole ownership" theory in *De Wet NO v. Jurgens* 1970 (3) S.A. 38 (A), but it proved its surprising resilience by reappearing in *Van Schalkwyk v. Folscher* 1974 (4) S.A. 967 (NC)...(Secondly:) Popular with many Romanising Dutch authors was the view that the matrimonial community is but an example of a *societas* (partnership)...Apart from the fact that the matrimonial community is far more encompassing than any partnership, the modern partnership (unlike the Roman *societas*) is a commercial undertaking with which the matrimonial community has little in common...The third theory sees the community between spouses as a legal persona, even if only in a

*rudimentary form. It has found no support in South Africa...but was propagated in the eighteenth and nineteenth centuries by various French and German writers. This approach cannot be reconciled with our positive law: our universal community does not display the degree of independence to be expected from a separate entity, particularly not in respect of the spouses' joint debts. The final (and, it is submitted, correct) view, which is also supported by the vast majority of our decisions, is that the matrimonial community is but an example of co-ownership: see, e.g. Rosenberg v. Dry's Executors 1911 A.D. 679, Union Government v. Leask's Executors 1918 A.D. 447, 457-458; Estate Sayle v. CIR 1945 A.D. 388, 395...However, this co-ownership is not the normal Roman "free" co-ownership (communio pro partibus indivisis) with freely disposable shares and the possibility to demand a division at any time, but can be described as "tied up" co-ownership..."<sup>275</sup>*

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See *Lee & Honore op. cit.*, at para. 80. See also Hahlo "Husband and Wife" *op. cit.*, at pp. 158-159, *Annual Survey of South African Law* (1974) at pp. 72-73 and Van Heerden *et al op. cit.*, at pp. 185-194.

## (ii) The joint estate

Despite the debate about its exact nature, it is generally accepted that this type of matrimonial regime entails that husband and wife become co-owners in undivided half-shares of all the assets they both possess at the moment of their marriage, as well as of all the assets acquired by them *stante matrimonio*.<sup>276</sup> Upon the conclusion of the marriage, the separate estates of the husband and wife are combined into one joint estate.<sup>277</sup> All antenuptial debts and assets of the parties fall into the joint estate, as do all debts and assets acquired or negotiated by any one of the spouses after the conclusion of the marriage.<sup>278</sup> However, it has

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<sup>276</sup> See *Estate Sayle v. Commissioner for Inland Revenue* 1945 A.D. 388 at pp. 395-396 per Watermeyer C.J., *Lee & Honore op. cit.*, at para. 80 and the authorities cited therein, Cronje & Heaton *op. cit.*, at pp. 85-86 and Hahlo "*Husband and Wife*" *op. cit.*, at pp. 157-161.

<sup>277</sup> Certain assets are excluded from the joint estate. See note 272 *supra*.

<sup>278</sup> See *Estate Sayle v. Commissioner for Inland Revenue* 1945 A.D. 388 at pp. 395-396, Cronje & Heaton *op. cit.*, at p. 85, Hahlo "*Husband and Wife*" *op. cit.*, at pp. 157-158. However, certain assets may be excluded from the joint estate. These include those excluded by will or deed of donation or those subject to a *fideicommissum* or usufruct. See note 272 *supra*.

been argued<sup>279</sup> and judicially accepted,<sup>280</sup> that it is incorrect to say that the spouses are co-owners in undivided half-shares.<sup>281</sup> The ownership should rather be considered as one in which the spouses have tied-up shares, which shares are not only undivided but also indivisible, unless a division is ordered by the court. At the termination of the marriage, all liabilities are settled from the joint estate and the balance of the joint estate is then distributed equally between the spouses.

### (iii) The administration of the joint estate

Before 1984 the administration of the joint estate was the exclusive preserve of the husband by virtue of his having the marital power.<sup>282</sup> He

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<sup>279</sup> A.H. van Wyk *Power to Dispose...op. cit.*, at p. 44.

<sup>280</sup> See *Ex parte Menzies et Uxor op. cit.*, at p. 811 *per* King J.

<sup>281</sup> Roman-Dutch law distinguishes between "free" co-ownership and "tied" co-ownership. In the former, the parties have undivided shares which are freely divisible at their insistence during the subsistence of the co-ownership, whilst in the latter case the undivided shares are indivisible during the course of the co-ownership. Co-ownership arising out of community of property falls under the "tied" ownership category. See p. 151 *supra*.

<sup>282</sup> See pp. 39-41 *supra* and Hahlo "*Husband and Wife*" *op. cit.*, Chap. 12. The marital power has now been abolished. This was done in phases. The initial abolition on the 1<sup>st</sup> of November 1984 by s. 11 of the Matrimonial Property

could buy and sell assets, pledge assets or burden them with a mortgage, collect moneys on the behalf of the estate, pay debts out of the estate and, in general, conclude any contract which would bind the joint estate without his wife's consent or knowledge.<sup>283</sup> The wife's position, on the other hand, was equated to that of a minor. She had only limited capacity to act in respect of the joint estate. For example, with the consent of her husband, she could conclude a contract which would

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Act 88 of 1984 applied to the old Republic of South Africa, that is, the country as it was before the re-integration of the TBVC states and the self-governing territories into South Africa by the 1993 Constitution. It was followed by its abolition in marriages by Blacks, celebrated after the 2<sup>nd</sup> December 1988: s. 1(e) of Marriage and Matrimonial Property Law Amendment Act 3 of 1988 repealed s. 22(6) of the Black Administration Act 38 of 1927, which rendered marriages of Africans automatically out of community of property with the marital power. The General Law Fourth Amendment Act 132 of 1993 abolished, as from 1<sup>st</sup> December 1993, the marital power in all existing marriages within the old Republic regardless of the date on which they were celebrated. Finally, when the Justice Laws Rationalisation Act 18 of 1996 extended, on 1<sup>st</sup> of April 1997, the operation of the Matrimonial Property Act 88 of 1984 to the whole of the re-unified Republic of South Africa, the marital power ceased to exist in South African matrimonial law. See J. Heaton "Family Law and the Bill of Rights" in *Bill of Rights Compendium*, Durban, Butterworths, 1988 at para. 3C21 esp. note 1.

See Cronje & Heaton *op. cit.*, at p. 95. See also *Estate Sayle v. Commissioner for Inland Revenue* 1945 A.D. 388 at p. 396 *per* Watermeyer C.J.

bind the joint estate.<sup>284</sup> Without her husband's consent, she could conclude a contract which brought only rights and no liabilities to the joint estate<sup>285</sup> or one for the purchase of household necessities.<sup>286</sup> Also, where the wife was engaged as a public trader (*publica mercatrix*)<sup>287</sup> with the consent, expressed or implied, of her husband, she could validly enter into contracts connected with such trade which would be binding on the joint estate.<sup>288</sup> However, if she entered into a contract unconnected with her business, the joint estate would not be bound.<sup>289</sup>

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284 See *Pretorius v. Hack* 1925 T.P.D. 643 at p. 647 per Curlewis J.P. and Hahlo "*Husband and Wife*" *op. cit.*, at pp. 199-201.

285 See *Rautenbach v. Groenewald* 1911 T.P.D. 1148 at p. 1150 per Wessels J.

286 This capacity to contract for household necessities applied to married women in general irrespective of the matrimonial regime applicable to their marriage.

287 This referred to a woman married in or out of community of property who was subject to her husband's marital power and who publicly conducted a business undertaking or a profession in her own name and with her husband's consent. See *Grobler v. Schmilg and Freeman* 1923 A.D. 496 at p. 501.

288 See *Holton v. Cato* (1901) 22 N.L.R. 152.

289 *Ibid.* See also *Grobler v. Schmilg and Freeman supra*.

She generally had no *locus standi in judicio* that is to say, she could not conduct a civil action unassisted by her husband.<sup>290</sup> She could also not be appointed to certain offices without her husband's consent. For example, it used to be law that she could not be appointed as a director of a company without her husband's consent but this has since been changed by statute.<sup>291</sup>

The position of a wife married in community of property was clearly an untenable one. It was ameliorated somewhat by the protection afforded her by the common law against her husband's abuse of the marital power. The common law, for example, gave her (or her estate) a right of recourse against him (or his estate) on the dissolution of the marriage where he had made donations out of the joint estate in deliberate fraud

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<sup>290</sup> See *Pretorius v. Hack op. cit.*, at p. 647 and *South African Mutual & General Co. Ltd. v. Bali N.O.* 1970 (2) S.A. 696 (A) at p. 705. In certain exceptional cases however, such as those relating to her separate property, she could litigate without her husband's assistance. See *Erasmus v. Erasmus* 1942 A.D. 157 at pp. 161-162. The rule did not apply to criminal proceedings. See *Voet Commentarius ad Pandectas* (The Hague 1698-1704) 5.1.17.

<sup>291</sup> S. 218 (1) (b) of the Companies Act 61 of 1973, under which such consent was required, has now been amended to delete this requirement. See s. 24 General Law Fourth Amendment Act 132 of 1993.

of his wife or her heirs.<sup>292</sup> It was also possible to bring an *actio Pauliana utilis* (an action to revoke a donation made to defraud the wife) against the third party to whom the donation had been made. In appropriate circumstances the wife could obtain an interdict restraining the husband from dealing with or alienating joint assets.<sup>293</sup>

The common-law protection, however, proved ineffective.<sup>294</sup> For example, it was held in *Nel v. Cockcroft and Anor.*,<sup>295</sup> on the authority of Voet and Van der Keessel,<sup>296</sup> that the *actio Pauliana utilis* was not

<sup>292</sup> See *Govender v. Chetty op. cit.*, at p. 1080 per Berman J. On what will constitute fraud in this context, see *Pretorius v. Pretorius' Estate & Anor.* 1948 (1) S.A. 250 (A.D.) at pp. 255-256 per Schreiner J.A. For the prerequisites which a wife must prove to succeed, see *Laws v. Laws & Ors.* 1972 (1) S.A. 321 (W) at pp. 324-325 per Margo J.

<sup>293</sup> See *Cullamah v. Munean* 1941 N.P.D. 163.

<sup>294</sup> See *Reyneke v. Reyneke* 1990 (3) S.A. 927 (E) at p. 930.

<sup>295</sup> 1972 (3) S.A. 592 (T) at p. 595 per De Wet A.J. In *Ex parte Van Kraayenberg; Ex parte Ahlers NO* 1946 T.P.D. 686 at p. 689, Malan J. expressed the view that there exists a "considerable body of authority pointing in the opposite direction" to the view expressed by Voet, although he did not specify what it is because he considered that this was unnecessary for the purposes of the proceedings before him.

<sup>296</sup> Johannes Voet (1647-1713) and Dionysius Godefridus van der Keessel (1738-1816) were Dutch jurists whose works on Roman-Dutch Law are frequently cited in South African courts.

available to a wife while the marriage subsisted, or at any rate, while the joint estate remained undivided.<sup>297</sup> Consequently, the legislature intervened by restricting the husband's power to alienate or deal with certain categories of immovable and movable property.<sup>298</sup> In 1984 a process was initiated which culminated in the marital power being abolished for all marriages in 1997.<sup>299</sup>

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<sup>297</sup> In *Reyneke v. Reyneke supra* at pp. 930-931, Jones J. criticized this rule as unlikely to afford any relief of substance to the wife. He expressed the view that it seems illogical to give a wife the right to recover community assets from a transferee who takes in bad faith, with full knowledge of the fraud, but to delay her ability to enforce that right until dissolution of the joint estate. This may take place many years later by which time the right may be useless. See C.P. Joubert (1972) *Annual Survey of South African Law* 122 where a call is made for legislative intervention to allow such actions during the marriage.

<sup>298</sup> See ss. 1 and 2 of the Matrimonial Affairs Act 37 of 1953. This Act has now been extended to the former areas of the Republic covered by the "independent" and self-governing states by s. 2 (1) of Act 18 of 1996. See also p. 170 *infra*.

<sup>299</sup> See note 282 *supra* and pp. 173-177 *infra*.

#### (iv) The nature of the out of community of property regime

As indicated above,<sup>300</sup> community of property automatically followed the conclusion of a civil marriage. To exclude the automatic application of the community of property regime, parties to a civil marriage needed to enter into an antenuptial contract specifically excluding community of property and profit and loss and the marital power of the husband.<sup>301</sup>

#### (v) The nature of an antenuptial contract

There are no formalities for the validity of the contract between the parties *inter partes*.<sup>302</sup> However, because third parties may also have an interest to know what the patrimonial position of the married couple is, the law requires that the contract should comply with certain prescribed

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<sup>300</sup> See p. 147.

<sup>301</sup> In Roman-Dutch common law there were a variety of forms of antenuptial contracts but these subsequently became crystallized into a standard form document excluding the three elements stated in the text. See H.R. Hahlo "A hundred years of marriage law in South Africa" (1959) *Acta Juridica* 47 at p. 54. The standard form antenuptial contract is the one invariably used in practice.

<sup>302</sup> See *Ex parte Spinazze* 1985 (3) S.A. 650 (A) at p. 658 and Hahlo "Husband and Wife" *op. cit.*, pp. 261-262.

formalities for it to be valid against third parties.<sup>303</sup> Failure to comply with the formal requirements renders the contract not binding on third parties, that this, parties other than the spouses and their estate.<sup>304</sup> Other persons may also be parties to the contract, for example, if a succession clause is included in the antenuptial contract, the beneficiaries may be parties to the contract.<sup>305</sup>

The antenuptial contract is not a contract in the commercial sense. Its primary purpose is not to create obligations but rather to determine the matrimonial property system between the spouses by excluding either partially or wholly, the normal consequences of marriage.<sup>306</sup>

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<sup>303</sup> These formalities are set out in s. 87 of the Deeds Registries Act 47 of 1937.

<sup>304</sup> See generally, *Ex parte Kloosman* 1947 (1) S.A. 342 (T) and *Ex parte Spinazze* 1983 (4) S.A. 751 (T).

<sup>305</sup> See *Ex parte Executors Estate Everard* 1938 T.P.D 190 at pp. 195-197. For the different forms succession clauses may take, see *The Law of South Africa* vol. 16, (1992) T.J. Scott (ed.) at para. 151.

<sup>306</sup> See Cronje & Heaton *op. cit.*, pp. 107-108 and note 91 *supra*. Cf. the *dicta* of Stegmann J. in *Mathabathe v. Mathabathe* 1987 (3) S.A. 45 at pp. 51J and 52I where the learned judge held that the term antenuptial contract has both narrow and broad meanings. In its broad meaning it could be applied to a pre-marital agreement relating to the intended marriage which does not deal with proprietary rights expressly or tacitly and which leaves them to be dealt with by implication of law. This view of an antenuptial contract was

Anything that is legal, not contrary to public policy or good morals may be included in an antenuptial contract.<sup>307</sup> Thus, a spouse may make a donation to the other spouse in an antenuptial contract.<sup>308</sup> Such a donation may be made conditional; for example, it may revert to the donor on the occurrence of a certain event. This type of condition may be embodied in a reversion clause and may affect the distribution of property between the spouses on divorce.<sup>309</sup> In *Cumming v. Cumming*<sup>310</sup> the spouses' antenuptial contract included a clause which provided that the marriage settlement made in favour of the wife would revert to the husband in the event of the spouses' separation, judicial or otherwise,

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rejected by Coetzee Dep. J.P. in *Milbourn v. Milbourn* 1987 (3) S.A. 62 (W) at p. 65B.

<sup>307</sup> See Hahlo "*Husband and Wife*" *op. cit.*, at p. 259 and Cronje & Heaton *op. cit.*, at p. 113.

<sup>308</sup> Prior to the enactment of the Matrimonial Property Act 88 of 1984, the law prohibited any donation between husband and wife married out of community of property but this prohibition did not apply to donations contained in a properly registered antenuptial contract. S. 22 of the 1984 Act abrogated the prohibition of donations. See note 342 *infra*.

<sup>309</sup> However, s. 7(3) of the Divorce Act 70 of 1979 now gives the court a discretion to redistribute the assets of certain spouses on divorce. See pp. 207-226 *infra*.

<sup>310</sup> 1984 (4) S.A. 585 (T)

irrespective of who was responsible for the separation. The spouses were later divorced and the court held that the reversion clause was valid and not contrary to public policy.

#### **(vi) The estates of the spouses**

If the spouses validly execute an antenuptial contract, the effect is that two separate estates are created, namely:

(i) the separate estate of the husband comprising all assets and liabilities which he had before conclusion of the marriage, as well as all assets and liabilities which he acquires or incurs thereafter and

(ii) the separate estate of the wife comprising all assets and liabilities which she had before conclusion of the marriage, as well as all assets and liabilities which she acquires or incurs thereafter.<sup>311</sup>

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Under s. 21(2)(a) of the Matrimonial Property Act 88 of 1984, spouses married “*in terms of an antenuptial contract*” before the commencement of the Act could, by a notarial contract, for an initial period of two years which was subsequently extended for another two years for whites, coloureds and Asians, introduce the accrual system by an application to the court.

The result of this is that the spouses are in the same position as they were before they got married,<sup>312</sup> except that if they are minors in age they became majors in law.<sup>313</sup>

**(vii) The administration of the separate estates**

The separate estates are managed separately by each spouse without reference to one another except in cases where the husband's marital power was not excluded. Under this exception, the husband administered his own estate as well as that of the wife.<sup>314</sup>

**(viii) The termination of the antenuptial contract**

The antenuptial contract comes to an end when all the obligations arising under it have been carried out or have been terminated by a court

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<sup>312</sup> See Cronje & Heaton *op. cit.*, at p. 117.

<sup>313</sup> See Hahlo "*Husband and Wife*" *op. cit.*, at p. 128.

<sup>314</sup> See *Erasmus v. Erasmus op. cit.*, at p. 271 *per* Tindall J.A., *Estate Watkins-Pitchford v. Commissioner of Inland Revenue* 1955 (2) S.A. 437 (A) at p. 460 *per* Van den Heever J.A. and Hahlo "*Husband and Wife*" *op. cit.*, at p. 293. The marital power has since been abolished. See note 282 *supra*.

ordering a party to forfeit benefits under it.<sup>315</sup> Thus, the dissolution of the marriage will not terminate the contract if there is some outstanding obligation, such as a marriage settlement which is yet to be implemented.

On divorce however, each spouse takes his or her separate estate, including whatever was settled on him or her under the antenuptial contract.<sup>316</sup> But under s. 7(1) of Act 70 of 1979, the spouses may agree on their proprietary rights and such an agreement may be incorporated in the order granting the divorce. Except for debts incurred for household necessities, the spouses are not liable for each other's debts.<sup>317</sup>

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<sup>315</sup> For example, under s. 9 of Divorce Act 70 of 1979. See further pp. 194-200 *infra*.

<sup>316</sup> Marriage settlements can be included in antenuptial contracts. They are gifts given by a spouse to the other in consideration of the marriage. They take a variety of forms, such as one of the spouses undertaking to settle a specific asset like a house or an insurance policy on the other or creating a trust in favour of the other. See *Estate McDonald's Trustee* 1915 A.D. 491 at pp. 499 and 507 respectively, *Ex parte Orchison* 1952 (3) S.A. 66 (T), *Sinclair v. Sinclair* 1935 E.D.L. 359 and *Dann v. Dann* 1961 (4) S.A. 437 (D).

<sup>317</sup> See *Rosengarten v. O'Brien* 1912 T.P.D. 834, *Williamson v. Wagenaar* 1940 E.D.L. 244 and s. 23(5) of the Matrimonial Property Act 88 of 1984.

**(ix) Readjusting the property rights of the spouses on divorce**

The courts had very limited discretion in readjusting the proprietary rights of the spouses on divorce. Such limited discretion was exercised in the area of forfeiture of benefits.<sup>318</sup> In *Watt v. Watt*<sup>319</sup> such benefits were held to be fixed at marriage by the terms of the spouses' antenuptial contract. In that case the parties were married out of community of property. The plaintiff (husband) had donated a house to his wife during the course of the marriage. The parties were in agreement that the plaintiff alone had contributed to the purchase price of the property as well as to the moneys expended on improvements. They wanted the court to resolve the question whether the house was a patrimonial benefit of the marriage as envisaged by s. 9(1) of the Divorce Act 70 of 1979. The court held that the house, its improvements as well as the escalation in its value, were not patrimonial benefits of the marriage. In *Koza v. Koza*<sup>320</sup> the court accepted, without deciding the issue, that the

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<sup>318</sup> See *Opperman v. Opperman* 1962 (1) S.A. 456 (SWA) and Sinclair (1981) 98 *South African Law Journal* 469 at pp. 472-473.

<sup>319</sup> 1984 (2) S.A. 455 (W) at p. 460 approving the *dictum* of Van den Heever J. in *Rousalis v. Rousalis* 1980 (3) S.A. 446 (C) at p. 450E.

<sup>320</sup> 1982 (3) S.A. 462 (T) at p. 465 *per* McCreath J.

patrimonial benefits of a marriage out of community of property are not restricted to those conferred in the antenuptial contract. There is therefore uncertainty as to the point in time when the patrimonial benefits of a marriage out of community of property should be determined.<sup>321</sup> The view has however, been expressed that the weight of Roman-Dutch authority support the view that the patrimonial benefits of a marriage out of community of property are fixed at marriage by the terms of the parties' antenuptial contract.<sup>322</sup>

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<sup>321</sup> Cf. *Persad v. Persad* 1989 (4) S.A. 685 (D) where in a marriage in community of property it was held, *per* Didcott J. at p. 687, that a postnuptial property (a lease) qualified as a patrimonial benefit. One of the reasons which influenced this conclusion was that under the policy of the Local Authority which granted the lease in question, leases were granted only to family units and consequently, it would not have granted the lease but for the parties being married. The lease was therefore a benefit derived from the marriage and accordingly a benefit of the marriage capable of being the subject of a forfeiture order.

<sup>322</sup> See Cronje & Heaton *op. cit.*, at p. 151 note 70. See also *Dawson v. Dawson* (1892) 9 S.C. 446, *Celliers v. Celliers* 1904 T.S. 926, *Ferguson v. Ferguson* 1906 E.D.C. 218, *Kilroe v. Kilroe* 1928 W.L.D. 112 and *Swil v. Swil* 1978 (1) S.A. 790 (W). Support for a wide interpretation of "benefits of the marriage" in the context of forfeiture of benefits has been expressed by Hahlo. See "When is a benefit not a benefit?" (1984) *South African Law Journal* 456. See also Sinclair & Kaganas (1984) *Annual Survey of South African Law* at p. 110 *et seq.*

The absence of a discretion to readjust the proprietary rights of the spouses created problems for the spouse, usually the wife, who was in a weaker financial position on a dissolution of the marriage by death or divorce. In the event of a divorce, a wife who had not accumulated an estate of her own could not partake in the estate of her husband as she had no right to share in the growth of such estate.<sup>323</sup> The court did not have a discretion to give her any share of the husband's estate. Consequently, she was left with only a possible claim for maintenance from her ex-husband or to prove that a universal partnership<sup>324</sup> existed

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<sup>323</sup> See *Beira v. Beira* 1990 (3) S.A. 802 (W) at pp. 804-805 *per* Leveson J. explaining the mischief against which the redistribution of assets provisions introduced by s. 36 of the Matrimonial Property Act 1984 into the Divorce Act 1979 were aimed.

<sup>324</sup> This is a partnership in which the partners jointly agree to contribute to the common fund of the partnership the whole of their property both present and future. The requirements for the establishment of this partnership are: (1) each partner should bring something into the partnership, be it money or skill, (2) the business of the partnership should be carried on for the benefit of both parties, (3) the object should be to make profit and (4) the partnership contract should be legal. See *Isaacs v. Isaacs* 1949 (1) S.A. 952 (C) at pp. 955-956, *Rhodesia Railways & Ors. v. Commissioner of Taxes* 1925 A.D. 438 at p. 465, *Joubert v. Tarry & Co.* 1915 T.P.D. 277 at p. 279, *Muhlmann v. Muhlmann* 1981 (4) S.A. 632 (W) confirmed on appeal in 1984 (3) S.A. 102 (A) and *Pezzutto v. Dreyer op. cit.*

between herself and the husband. Such claims of universal partnership hardly succeeded.<sup>325</sup>

#### (x) Civil marriages of Blacks

The Black Administration Act 38 of 1927 regulated the civil marriages of Blacks. S. 22(6) of this Act, as interpreted by the then Appellate Division in 1946,<sup>326</sup> made such marriages automatically out of community of property and of profit and loss but with the retention of the marital power. To exclude the automatic application of the regime of out of community, parties could make a declaration to that effect within one month prior to the marriage, provided that the intended husband was not a partner in a customary marriage with another woman at the time of the marriage. The reason for this arrangement was that the Black community was allegedly accustomed to a matrimonial property dispensation other

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<sup>325</sup> See *dicta* in *Beira v. Beira supra*.

<sup>326</sup> See *Ex parte Minister of Native Affairs: In re Molefe v. Molefe* 1946 A.D. 315. See also *Ngwenya v. Smits* NO 1942 W.L.D. 234, *Mpushu v. Mjolo* 1976 (3) S.A. 606 (E) and *R. v. Silas* 1958 (3) S.A. 253 (E). The said s. 22(6) has since been abolished, see note 282 *supra*. See also pp. 250-253 *infra*.

than community of property and that this type of matrimonial regime was alien to it.<sup>327</sup>

S. 22(6) of the 1927 Act was also aimed at protecting customary wives and their children against the claims of a second woman with whom the man contracted a civil marriage.<sup>328</sup> This had to be done because a civil marriage by a husband of a customary "union" to another woman automatically dissolved the customary "union" existing between him and his customary wife. Consequently, she and her children became "discarded"<sup>329</sup> as a result of the civil marriage and in order to protect them, s. 22(7) of the Black Administration Act provided that the civil marriage in no way affected the material rights of the partner of the customary union or any issue thereof.

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<sup>327</sup> See Sinclair assisted by Heaton *op. cit.*, at pp. 227 n. 55 and 228. The learned authors also argue that s. 22(6) of the 1927 Act applies to couples of which only the husband is Black. See also N.S. Peart "Civil or Christian marriage and customary unions: the legal position of the 'discarded' spouse and children" (1983) XVI *Comparative and International Law Journal of Southern Africa* 39 at p. 55.

<sup>328</sup> See Cronje & Heaton *op. cit.*, at p. 85 n. 10 and *Seymour's Customary law in Southern Africa* (5<sup>th</sup>. ed.) by J.C. Bekker, Cape Town, Juta & Co., 1989 at p. 250.

<sup>329</sup> See Sinclair assisted by Heaton *op. cit.*, at p. 227 n. 55 and Peart *op. cit.*

**(xi) Shortcomings of the matrimonial property regimes**

The Matrimonial Affairs Act 37 of 1953 attempted to address perceived shortcomings in the community of property regime but although the attempt proved significant, it did not go far enough to ameliorate the position of women who were subject to the marital power. The Act retained community of property and profit and loss and the marital power but conferred upon the wife a modicum of independent legal capacity, with a corresponding diminution in the marital power of the husband. Subsequent amendments made to the Act by the General Law Further Amendment Act 93 of 1962 and the Matrimonial Affairs Amendment Act 13 of 1966, enabled the wife, *inter alia*, to protect immovable property which she had brought into the marriage or acquired out of her own earnings or by gift or inheritance against alienation and hypothecation by the husband and gave her control of her own earnings and savings.

Despite these reforms, the matrimonial property regimes remained in an unsatisfactory state and this prompted a commentator to suggest that the legislature should critically consider reforms from abroad, necessitated by altered social values, especially as to the place and function of the

wife, in order to help produce a system suitable for modern South African conditions.<sup>330</sup>

In 1982, the South African Law Commission identified the following shortcomings in the matrimonial property regimes:<sup>331</sup>

(a) The regime of complete separation of property did not allow the spouses to share the assets which they acquired during the subsistence of the marriage by their joint efforts.<sup>332</sup> It was particularly objectionable that a wife could not claim, as of right, a share of property acquired by her husband with her assistance.

(b) The position of a wife married out of community of property was further complicated by the fact that, unlike her children, she had no claim

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<sup>330</sup> D.L.C. Miller, "Pointers for possible reform of South African matrimonial property law" (1974) 91 *South African Law Journal* 390 at p. 395.

<sup>331</sup> See its Report RP26/1982 *op. cit.*

<sup>332</sup> *Ibid.* at para. 12.1.4. It cited the following sources, *inter alia*, to back up this shortcoming: The *dictum* of De Wet J. in *Ex parte Podlas* 1935 W.L.D. 14 at p. 16, *Report of The Women's Legal Disabilities Commission* (UG 18/1949), paras. 119 and 121, Hahlo, "*Husband and Wife*" *op. cit.*, (4th ed.) at p. 17 and Miller *op. cit.*

to support from her husband's estate where the marriage was dissolved by death.<sup>333</sup>

(c) The prohibition of donations between spouses married out of community *stante matrimonio* was an anachronism in the contemporary setting.<sup>334</sup> In the Commission's view:

*“It is clear not only that the ratio for the prohibition of donations between spouses has fallen away in modern times, but even more that the retention of the prohibition can in certain circumstances give rise to extremely unjust consequences, particularly as regards the economically weaker spouse. For instance, a husband could reclaim any ‘pocket money’ he had given his wife, or any amount saved by her out of her household allowance on the ground that it constituted an unlawful donation.”*<sup>335</sup>

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<sup>333</sup> Para. 12.1.5. See now the Maintenance of Surviving Spouses Act 27 of 1990 which conferred such a right on the surviving spouse.

<sup>334</sup> Para. 12.4.1.

<sup>335</sup> Para. 12.4.4.

(d) The exercise of the marital power by a husband subjected the wife to several disabilities. For instance, there was no general rule that the husband should exercise his marital power in the interest of his wife. Thus he was, in principle, entitled to exercise the marital power to his own advantage. Furthermore, if the husband were to deliberately damage or destroy assets of the joint estate, his wife would have no claim against him for damages, and he would not be committing the crime of malicious injury to her property.<sup>336</sup>

The Law Commission made a number of recommendations for the reform of the matrimonial property law.<sup>337</sup> These recommendations were embodied in the Matrimonial Property Act 88 of 1984.

### **(xii) The 1984 reforms of the matrimonial property regimes**

The reforms initiated by the Matrimonial Property Act 1984 retained the universal community of property as the primary matrimonial property regime in South Africa whilst introducing a statutory variation of

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<sup>336</sup> Paras. 13.1 and 13.1.3. See *R. v. Van Vliet* (1892) 9 S.C. 273, *R. v. Silas* 1958 (3) S.A. 253 (E) and *S. v. Seobi* 1974(1) S.A. 494 (O).

<sup>337</sup> See Chap. 13 of the Report.

marriage out of community of property. For such marriages out of community of property, the accrual system was introduced unless the parties expressly excluded it in their antenuptial contract.<sup>338</sup> The marital power was abolished in respect of all marriages concluded by whites, coloureds or Asians on or after the commencement of the Act.<sup>339</sup> Equal, concurrent administration of the joint estate was introduced into marriages in community of property.<sup>340</sup> The principle of immutability of the matrimonial property regime was relaxed so that it is now possible to change the matrimonial property system that applies to a marriage.<sup>341</sup> The Roman relic that rendered donations between spouses married out

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<sup>338</sup> See s. 2 of the 1984 Act.

<sup>339</sup> See s. 11 of the 1984 Act and note 282 *supra*.

<sup>340</sup> See s. 4 of the 1984 Act.

<sup>341</sup> See s. 21(1) of the Act. Prior to the enactment of this subsection, the principle of immutability prevented a change in the matrimonial property system chosen by the spouses on their marriage. The chosen system remained fixed and could not be changed during the subsistence of the marriage. See *Union Government (Minister of Finance) v. Larkan op. cit.*, at p. 224 *per* Innes C.J. applied in *Honey v. Honey op. cit.*, at p. 611 *per* Du Plessis J. See also note 267 *supra*. On the reasons for the relaxation of the principle of immutability see the South African Law Commission's Report *op. cit.*, at paras. 14 and 20.

spouses married out of community revocable was abolished.<sup>342</sup> Some of the reforms are prospective whilst others are retrospective in nature.<sup>343</sup>

S. 36 of the 1984 Act amended s. 7 of the Divorce Act 70 of 1979 by adding subsections 7(3) to 7(6). Under these subsections, a court is empowered, in specified circumstances, to make an order that the assets or part of the assets belonging to one of the spouses, be transferred to the other spouse if the court considers it to be just. The overall effect of these amendments to the 1979 Act is to give the court a very wide discretion to enable it to redistribute the assets of the spouses on divorce.<sup>344</sup> This judicial discretion applies only to marriages out of

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<sup>342</sup> See s. 22 of Act 88 of 1984.

<sup>343</sup> See Sinclair *An Introduction to the Matrimonial Property Act 1984 op. cit.* note 263 at p. v. For example, the abolition of the marital power in a marriage in community was initially applicable to marriages entered into after the commencement of the Act (s.11) whilst the abolition of the rule prohibiting donations between spouses applied to both marriages entered into before and after the commencement of the Act (s. 22).

<sup>344</sup> See J. Sinclair "Divorce and the judicial discretion - In search of the middle ground" (1989) 106 *South African Law Journal* 249, B. Clark & B.J. Van Heerden "Asset redistribution on divorce - the exercise of judicial discretion" (1989) 106 *South African Law Journal* 243 and N.D.C. Dillion "The financial consequences of divorce: S. 7 (3) of the Divorce Act 1979 - a comparative study" (1986) XIX *Comparative and International Law Journal of Southern Africa* 271.

community of property, entered into either before the commencement of the 1984 Act, in terms of an antenuptial contract, or before the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, in terms of s. 22(6) of the Black Administration Act 38 of 1927.<sup>345</sup>

The 1988 Act also repealed s. 22(6) of the 1927 Act which subsection rendered the consequences of civil marriages of Blacks different from those arising out of marriages of persons of other races<sup>346</sup> and extended the abolition of the marital power to such marriages entered into on or after the commencement of the Act.<sup>347</sup> Consequently, all civil marriages entered into after the commencement of the 1988 Act have the same consequences irrespective of the race of the parties. They are in

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<sup>345</sup> The 1988 Act came into effect on 2<sup>nd</sup> December 1988. S. 1(e) of the Act repealed s. 22(6) of the 1927 Act and s. 2 amended s. 7 of the Divorce Act 70 of 1979 by extending the judicial discretion to marriages entered into before the commencement of the 1988 Act in terms of s. 22(6) of the 1927 Act as it existed before its repeal. See s. 7(3)(b) of the 1979 Act.

<sup>346</sup> See p. 167 and note 326 *supra*.

<sup>347</sup> See s. 4(a) of the 1988 Act, which deleted s. 25(1) of the 1984 Act. The latter subsection excluded marriages between Black people from the provisions of Chapters II and III of that Act, which provisions abolished the marital power and replaced it with a system of equal and concurrent administration of the joint estate in marriages in community of property.

community of property in the absence of an antenuptial contract. The General Law Fourth Amendment Act 132 of 1993<sup>348</sup> repealed the common-law rule that gave the husband the marital power “*over the person of his wife*”<sup>349</sup> and abolished any marital power that any husband may have been exercising immediately before the commencement of the Act.<sup>350</sup>

Finally, the Justice Laws Rationalisation Act 18 of 1996 applied the above reforms, and other relevant legislation, to the whole of South Africa from 1<sup>st</sup> April 1997.<sup>351</sup> Thus, most of the differences that existed between the matrimonial property laws of the old South Africa, the TBVC states and the self-governing states have been eliminated.

### 3. THE CURRENT LAW

There are now three matrimonial property regimes coexisting, namely:

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<sup>348</sup> The Act came into effect on 1<sup>st</sup> December 1993.

<sup>349</sup> See pp. 39-41 *supra*.

<sup>350</sup> See note 282 *supra*.

<sup>351</sup> See s. 2(1) and sched. 1 of the Act.

- (1) Marriage in community of property and profit and loss,
- (2) Marriage out of community of property without the accrual system (complete separation of property) and
- (3) Marriage out of community of property with the accrual system.<sup>352</sup>

These regimes will now be discussed *seriatim*.

**(a) Marriage in community of property and profit and loss**

As indicated above,<sup>353</sup> marriage in community of property is the primary matrimonial property system in South Africa. Every civil marriage is presumed to be governed by this matrimonial property system unless the

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<sup>352</sup> See Cronje & Heaton *op. cit.*, at pp. 126-128 and Visser & Potgieter *Introduction to Family Law op. cit.*, at pp. 86-88.

<sup>353</sup> See pp. 146-147. On the legal nature of the community of property, see pp. 148-151 *supra*.

contrary is proved.<sup>354</sup> This presumption may be rebutted by proof of one of the following circumstances:<sup>355</sup>

(i) that the parties have entered into a valid antenuptial contract in terms of which community is wholly or partially excluded;<sup>356</sup>

(ii) that the parties have, with the authority of a court, entered into a notarial contract *stante matrimonio*, in terms of which contract community is partly or wholly excluded;<sup>357</sup>

(iii) that the husband was, at the time of the marriage, domiciled in a country where the legal matrimonial property system is not community of property;<sup>358</sup>

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<sup>354</sup> See pp. 146-147 *supra*.

<sup>355</sup> See Cronje & Heaton *op. cit.*, at pp. 84-85 and Visser & Potgieter *op. cit.*, at pp. 94-95.

<sup>356</sup> On the formal requirements for a valid antenuptial contract, see s. 87 of the Deeds Registries Act 47 of 1937.

<sup>357</sup> See s. 21(1) of the Matrimonial Property Act 88 of 1984.

<sup>358</sup> See *Brown v. Brown op. cit.*, *Frankel's Estate v. The Master op. cit.* and *Sperling v. Sperling op. cit.*

(iv) that the spouses are Black who married each other after 1<sup>st</sup> January 1929<sup>359</sup> and before the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 on 2<sup>nd</sup> of December 1988, without making a joint declaration in the prescribed form that they elect to be married in community of property.<sup>360</sup>

### (i) The joint estate

On the conclusion of a marriage in community of property, all the assets and liabilities, whether subsisting at the time of the marriage or acquired or incurred during the marriage, are pooled to form a single joint estate.<sup>361</sup> This joint estate is held by the spouses in co-ownership, in equal undivided shares.<sup>362</sup>

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<sup>359</sup> Date of commencement of s. 22 of the Black Administration Act 1927. See pp. 168-169 *supra*.

<sup>360</sup> See s. 22(6) of the Black Administration Act 1927. See also pp. 168-169 *supra*.

<sup>361</sup> See pp. 152-153 *supra*. On the assets excluded from the joint estate, see note 272 *supra*.

<sup>362</sup> See pp. 152-153 *supra*.

## (ii) The administration of the joint estate

The joint estate is administered by both spouses concurrently, that is, both husband and wife have equal capacity to perform juristic acts and equal powers to manage the joint estate, which powers can in most cases be exercised without the consent of the other spouse.<sup>363</sup> This is the result of the abolition of the husband's marital power.<sup>364</sup> There is however, a list of transactions into which one spouse shall not enter without the consent of the other.<sup>365</sup> The lack of the requisite consent in the specified transactions may have the following consequences. In relation to the spouses, it is provided that when a spouse enters into a transaction with a person without the required consent of the other spouse or after his power to act has been suspended by order of court under s. 16(2),<sup>366</sup> and that spouse knows or ought reasonably to know that he will probably not

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<sup>363</sup> See ss. 14 and 15 of the Matrimonial Property Act 1984.

<sup>364</sup> See pp. 152-158 and note 282 *supra*. See also *Godfrey v. Campbell* 1997 (1) S.A. 570 (C) at p. 574 *per* Pincus A.J.

<sup>365</sup> See ss. 15 and 17 of the 1984 Act.

<sup>366</sup> This subsection provides that if a court is satisfied that it is essential for the protection of the interest of a spouse in the joint estate, it may on an application of that spouse suspend for a definite or an indefinite period any power which the other spouse may exercise in relation to the joint estate.

obtain the consent of the other spouse or that the power concerned has been suspended, and as a result of that transaction the joint estate suffers a loss an adjustment is to be effected in favour of the other spouse upon the division of the joint estate.<sup>367</sup> In relation to a third party, it is provided that if that party did not know and could not reasonably have known that the transaction was entered into contrary to the provisions of the Act, the transaction is to be deemed to have been entered into in compliance with those provisions, in other words, as if the requisite consent had been given by the spouse concerned.<sup>368</sup> However, no provision is made for the situation where the third party knew or should reasonably have known that the transaction contravenes the provisions of the Act. Views have been expressed, and it is submitted they are correct, that in such a situation the transaction should be void.<sup>369</sup>

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<sup>367</sup> S. 15(9)(b) of the 1984 Act.

<sup>368</sup> S. 15(9)(a) of the 1984 Act.

<sup>369</sup> See Cronje & Heaton *op. cit.*, at p. 101 and Van Aswegen *op. cit.*, at p. 146. In *Amalgamated Banks of South Africa Bpk v. Lydenburg Passasiersdienste Bk en Andere* 1995 (3) S.A. 314 (T) it was held that a deed of suretyship signed without the other spouse's consent was null and void. On appeal, the Supreme Court of Appeal reversed the decision of the court *a quo* on the ground that the suretyship fell within s. 15(6) of the 1984 Act by which, if such suretyship was given by the spouse in the ordinary course of his profession, trade or business the consent of the other spouse was not required. The appellate court did not rule on the consequence of signing

These sanctions for the non-compliance of the consent provisions of the Act have been criticised as weak and overprotective of third parties to the detriment of the innocent spouse.<sup>370</sup>

### (iii) Protection of the spouses inter se

The 1984 Act provides certain measures for the protection of the assets of the joint estate.<sup>371</sup> For example, the High Court can suspend any power which a spouse may have over the joint estate in terms of the Act, for a definite or indefinite period.<sup>372</sup> The court will only do this if the other spouse applies for the suspension and it is satisfied that it is

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such suretyship outside the scope of a spouse's profession, trade or business. Consequently, it is submitted that the court *a quo's* ruling on that point reflects the law. See *Amalgamated Banks of South Africa Bpk v. De Goede* 1997 (4) S.A. 66 (SCA)

<sup>370</sup> See Sinclair *An Introduction to the Matrimonial Property Act 1984 op. cit.*, at pp. 21-23. See also N. Zaal "Marital milestone or gravestone? The Matrimonial Property Act 88 of 1984 as a reformative half-way mark for the eighties" (1986) 1 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 57 at p. 65.

<sup>371</sup> These statutory measures supplement the common-law remedies discussed above at pp. 156-158. The common-law remedies can still be utilized in appropriate circumstances.

<sup>372</sup> See s. 16(2) of the 1984 Act.

essential for the protection of that other spouse's interest in the joint estate. If the spouse whose powers in relation to the joint estate have been suspended acts contrary to such a suspension, the consequences are the same as in the case of a juristic act performed without the requisite consent.<sup>373</sup> Furthermore, where a spouse's conduct seriously prejudices the interests of the other spouse in the joint estate, the prejudiced spouse can apply to the court for a division of the joint estate.<sup>374</sup> The court granting the order may order that the joint estate be divided in equal shares or such other basis as it deems just.<sup>375</sup> This remedy has great potential but the view has been expressed that spouses will seldom make use of it because if they have so much conflict over the administration of their estate, they would probably rather divorce.<sup>376</sup> Besides, it may prove too little too late, for by the time the application for division is made the prejudice may already have been suffered. There may well not be enough

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<sup>373</sup> See Cronje & Heaton *op. cit.*, at p. 101.

<sup>374</sup> See s. 20(1) of the Act.

<sup>375</sup> *Ibid.* For factors which the court will take into account in dividing the joint estate, see *Leeb v. Leeb* 1999 (2) All S.A. 588 (N) at p. 597.

<sup>376</sup> Cronje & Heaton *op. cit.*, at p. 102 note 43.

assets left in the joint estate for the court to rectify the prejudice by an order for the division of the joint assets other than by equal sharing.<sup>377</sup>

**(iv) Dissolution of the joint estate**

The joint estate may be dissolved:

(a) by the death of one or both of the spouses,

(b) by divorce,

(c) by an order of division<sup>378</sup> and

(d) by a change in the matrimonial property regime in terms of s. 21 of the Matrimonial Property Act 88 of 1984.

The effect of the dissolution of the joint estate by divorce is the aspect that is germane to this study and consequently only that will be

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<sup>377</sup> See Zaal *op. cit.*, at p. 66.

<sup>378</sup> Boedelscheiding (*separatio bonorum*, separation of goods) or its statutory successor, s. 20 of the Matrimonial Property Act 88 of 1984.

discussed. The effect of such a dissolution can be summarised as follows:

*“When a court grants an order of divorce, the community of property between the spouses comes to an end. No provision is made for an executor to divide the estate and the matter is left in the hands of the spouses. They can divide the estate by agreement or they can appoint a liquidator to do so. If they cannot agree on a liquidator, the court can appoint one to this task.”*<sup>379</sup>

According to Hahlo<sup>380</sup> *“each spouse retains, subject to an order of forfeiture of benefits, his or her half share until division is effected.”*

This statement, though in accordance with the logical principles of the common law, was said to be open to doubt by King J. in *Ex parte Menzies*.<sup>381</sup> The implication of Hahlo’s statement, according to the learned judge, is that upon divorce the ex-spouses become in effect free

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<sup>379</sup> See Joubert (ed.) *op. cit.*, vol. 16 para. 119 at p. 138. See also *Gillingham v. Gillingham* 1904 T.S. 609 at p. 613 *per* Innes C.J.

<sup>380</sup> *Op. cit.*, at p. 175 n. 108.

<sup>381</sup> *Supra* at p. 815.

co-owners entitled to a division of the estate. In other words, their respective shares become determinate and divisible. However, the learned judge pointed out that what comes to an end is the “tied”<sup>382</sup> nature of the co-ownership and not the co-ownership itself. The undivided and indivisible shares which the spouses hitherto had become “free” and divisible at the instance of either spouse. The spouses may continue with the co-ownership in this “free” form. But given the circumstances of divorce, this is highly unlikely. Hence, the growth of the rule that a decree of divorce carried with it an automatic order for division of the joint estate. But this should not necessarily be the case, for the spouses may decide to continue, by agreement, with co-ownership of particular property.<sup>383</sup>

It seems from the views expressed in the case that the termination of the “tied” co-ownership does not necessarily mean the termination of the “free” co-ownership that has come into existence. Neither does the court have to decree the continuance of the “free” co-ownership nor decree its

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<sup>382</sup> On the distinction between “tied” and “free” co-ownership, see note 281 *supra*.

<sup>383</sup> Under s. 7(1) of the Divorce Act 70 of 1979, a court granting a divorce decree may incorporate a written agreement of the parties with regard to the division of their assets as part of the court order. See pp. 188-190 *infra*.

termination. This must be left to the spouses to decide, failing which the court may then step in. Since it is estimated that a majority of financial issues arising out of divorce are settled by agreement,<sup>384</sup> and one will assume these will include division of property, the issue whether the community automatically terminates on divorce or endures in a “free” form until terminated by the spouses, may be devoid of much practical importance.

#### **(v) Private agreement relating to financial matters**

As evident from the passage quoted above,<sup>385</sup> divorcing spouses may, and usually do settle the division of their property by entering into an agreement with each other to that effect.<sup>386</sup> In this regard s. 7(1) of the Divorce Act 70 of 1979 enables the court to incorporate, as part of its order, any written agreement between the parties as to the manner in

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<sup>384</sup> See J. Sinclair “Financial consequences of divorce in South Africa: Judicial determination or private ordering?” (1983) 32 *International and Comparative Law Quarterly* 781 at p. 791.

<sup>385</sup> See p. 186 and Sinclair “Financial consequences of divorce in South Africa...” *op. cit.*, at p. 791.

<sup>386</sup> See for example, *Van Schalkwyk v. Schalkwyk* 1947 (4) S.A. 86 (O) and *Keyser v. Keyser* 1979 (4) S.A. 12 (T).

which their matrimonial assets are to be divided.<sup>387</sup> Both parties to the agreement may subsequently, by mutual consent, modify their agreement.<sup>388</sup> However, where there is no such mutual agreement, the court is powerless to superimpose or add a term to the other terms of the settlement.<sup>389</sup> In this connection, there is no power under the Divorce Act 70 of 1979 for the court to rescind or vary an order made under subsection 7(1) relating to division of assets. This is because s. 8(1) of the Act, which empowers the court to rescind, vary, or suspend an order made under ss. 7(1) or (2) in regard to maintenance, does not provide for the rescission or variation of an order made under s. 7(1) in terms of an agreement with regard to the division of assets.<sup>390</sup> Nevertheless, the common-law grounds for setting aside an agreement, namely, error, fraud

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<sup>387</sup> This agreement may be entered into by all divorcing couples irrespective of the matrimonial property system governing their marriage. The court's attitude to such agreements is that it will usually give effect to them if the parties so desire. It was held in *Van Schalkwyk v. Van Schalkwyk op. cit.*, at p. 96 *per* Van den Heever J. that "*Where litigants come to some arrangement in regard to their proprietary rights which is not illegal, contrary to good morals or against public policy, the court should make that settlement an order of court.*" For the English position on this, see *infra* pp. 412-418.

<sup>388</sup> See for example, *Ex parte Boshi* 1979 (1) S.A. 249 (R).

<sup>389</sup> See *Horne v. Horne* 1928 W.L.D. 350.

<sup>390</sup> See Hahlo "*Husband and Wife*" *op. cit.*, at p. 386.

or duress are not affected by the provision in s. 8(1) of Act 70 of 1979. Consequently, a settlement agreement may be rescinded if any of the common-law grounds are established by an aggrieved spouse.<sup>391</sup>

In the absence of an agreement as to how the joint estate is to be divided, the parties or the court may appoint a liquidator to wind up the joint estate.<sup>392</sup> Such a liquidator will sell the assets of the estate, pay the debts of the estate and divide what remains equally between the former spouses.<sup>393</sup> In making such a division, it has been held that the basic principles used in the case of the dissolution of a partnership may be applied but this does not mean that they should be applied without flexibility.<sup>394</sup>

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<sup>391</sup> *Ibid.* note 173. In *Cloete v. Cloete* 1953 (2) S.A. 176 (O) at p. 178 it was held that without *prima facie* proof that there was fraud or error, a settlement agreement which had been embodied in the court's order could not be varied.

<sup>392</sup> See *Gates v. Gates* 1940 N.P.D. 361, *Singh v. Singh* 1981 (1) S.A. 787 (C) and *Soupionas v. Soupionas* 1983 (3) S.A. 757 (T).

<sup>393</sup> See *Ex parte De Wet* 1952 (4) S.A. 122 (O).

<sup>394</sup> See *Van Onselen NO v. Kgengwenyane* 1997 (2) S.A. 423 (B). On the general principles for division of partnership assets on dissolution, see *Ex parte De Wet NO op. cit.*, *Robson v. Theron* 1978 (1) S.A. 841 (A) and *The Law of South Africa* Vol. 19 Joubert (ed.) (sv "Partnership") at para. 428.

**(vi) Pension and other benefits**

In dividing the assets of the spouses the court takes into account a spouse's pension interest or retirement annuities<sup>395</sup> as part of his estate.<sup>396</sup>

This specie of property was recognised by the Divorce Amendment Act 7 of 1989.<sup>397</sup> Prior to this Act the South African common law did not make any provision for the compulsory division of an ex-spouse's pension interest on divorce.<sup>398</sup> Pension interests were not regarded as an asset of the parties or the common estate in the case of a marriage in community of property because only tangible assets capable of

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<sup>395</sup> Pension interest in respect of a person who is a member of a pension fund, is the benefits to which he would have been entitled if he had terminated his membership on the date of divorce. In the case of a retirement annuity fund it is the total of all contributions the party paid up to the date of divorce, plus interest calculated thereon in the prescribed manner. See s. 1 of Divorce Act 70 of 1979 as amended by Divorce Amendment Act 7 of 1989.

<sup>396</sup> See s. 7(7)(a) of Act 70 of 1979.

<sup>397</sup> The Act came into effect on the 1<sup>st</sup> of August 1989.

<sup>398</sup> See P.J. Visser & J.M. Potgieter *Family Law - Cases and Materials*, Kenwyn, Juta & Co. 1994 at p. 383 citing J.C. Sonnekus (1989) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 352.

immediate evaluation were counted as property.<sup>399</sup> Pension interests by their nature were not “property” properly so called because before fulfilment of the relevant conditions of a particular pension fund, pension interests constitute a mere expectancy.<sup>400</sup> The contemporary changes in the nature of wealth and property have given rise to what has been termed “new property”,<sup>401</sup> one of which is pension interest. The recognition of pension interests as a specie of property by Act 7 of 1989 is in line with current developments in comparable legal systems<sup>402</sup> although it is excluded from marriages out of community of property entered into on or after 1<sup>st</sup> of November 1984 in terms of an antenuptial

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<sup>399</sup> J. Sinclair *An Introduction to the Matrimonial Property Act 1984 op. cit.*, at p. 69.

<sup>400</sup> See Sonnekus (1989) *op. cit.*, *supra*.

<sup>401</sup> See C. Reich “The New Property” (1964) 73 *Yale Law Journal* 733 quoted by Sinclair in *Introduction to the Matrimonial Property Act op. cit.*, at p. 69 and A. Glendon *The New Family and the New Property*, Toronto, Butterworths, 1981. See further Sinclair assisted by Heaton *op. cit.*, at p. 140 note 374.

<sup>402</sup> See Sonnekus (1989) *op. cit. supra*. A recent development in England is the enactment of the Pensions Act 1995, as amended by the Welfare Reform and Pensions Act 1999, which amended the Matrimonial Causes Act 1973 to enable a court to deal with pension rights on divorce so as to enable income to be paid to a divorce spouse at the time of retirement. See *infra* pp. 366-371.

contract by which community of property, profit and loss and the accrual system are excluded.<sup>403</sup>

In the valuation of the pension interest certain contributions may be excluded. For example, if the interest consists of a retirement annuity fund, only the value of the contribution paid by the member personally is considered and the value, for instance, of any contribution by his employer is ignored.<sup>404</sup> The pension interest is also reduced by any amount which was awarded to another party in a previous divorce or was accounted in favour of another party in a settlement under s. 7(1) of Act 70 of 1979.<sup>405</sup>

Notwithstanding the provisions of any law or rules of any pension fund, the court may make an order that part of a spouse's interest in a pension fund shall be paid by that fund to the other spouse when the benefits

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<sup>403</sup> See s. 7(7)(c) of Act 70 of 1979 and p. 213 *infra*.

<sup>404</sup> See J.C. Sonnekus (1994) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* at pp. 227-8 cited by Visser & Potgieter *Family Law - Cases and Materials op. cit.*, at p. 384.

<sup>405</sup> See s. 7(7)(b) of Act 70 of 1979.

accrue.<sup>406</sup> In this regard, it was held in *Schenk v. Schenk*<sup>407</sup> that no interest is payable from the date of the divorce until the benefit is actually paid out. Inflationary trends in the economy will therefore erode the value of the benefit by the time it is paid, thus resulting in what has been called “a meagre *solatium*” (that is, compensation) for the spouse to whom the benefit was awarded.<sup>408</sup>

### **(vii) Forfeiture of benefits**

Although by operation of law spouses are each entitled to a one half share of the joint estate, a spouse is likely to forfeit the patrimonial benefits of the marriage if he or she is adjudged to have been

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<sup>406</sup> See s. 7(8) of Act 70 of 1979.

<sup>407</sup> 1993 (2) S.A. 346 (E).

<sup>408</sup> See Sonnekus (1994) *op. cit.* The South African Law Commission in its report - *Report on the sharing of Pension Benefits Project 112 of 1999* - has recommended, *inter alia*, that the Divorce Act should no longer deal with the division of pension interests. It recommends that a specific statute should be enacted to deal exclusively with these interests. It further recommends that the proposed statute should only apply to marriages which are dissolved by divorce after the coming into operation of the statute and that it should not apply to spouses who choose complete separation of property as their matrimonial property system unless they make the provisions of the statute applicable to their marriage by a written agreement.

instrumental in the breakup of the marriage. The premise upon which such an order is made is that no person should be allowed to benefit financially from a marriage which he or she has caused to fail.<sup>409</sup> Prior to 1979, when the order for forfeiture was asked for by an innocent spouse the court had no discretion but to grant it.<sup>410</sup> However, by s. 9(1) of Act 70 of 1979, the court is given a discretion in granting the order if asked for<sup>411</sup> and in exercising its discretion the court must have regard to the duration of the marriage, the circumstances which led to the

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<sup>409</sup> See *Murison v. Murison op. cit.*, *Harris v. Harris op. cit.*, and *Allen v. Allen* 1951 (3) S.A. 320. These cases were decided at a time when divorce was based on the fault principle in which the court had to decide the “guilt” or “innocence” of a spouse. In the light of the new divorce concept of “irretrievable breakdown” of a marriage in s. 4(1) of the Divorce Act 70 of 1979, the concept of forfeiture of benefits sits uncomfortably with the current basis for divorce. Fault (“substantial misconduct”), is now one of three factors, to be taken into account in deciding whether or not to grant a forfeiture order. See *Engelbrecht v. Engelbrecht* 1989 (1) S.A. 597 (C), *Klerck v. Klerck* 1991 (1) S.A. 265 (W), *Binda v. Binda* 1993 (2) S.A. 123 (W) and *Wijker v. Wijker* 1993 (4) S.A. 720 (A).

<sup>410</sup> *Murison v. Murison supra*, at p. 161.

<sup>411</sup> See pp. 87-89 *supra*. For a criticism of s. 9(1) of Act 70 of 1979, see H.R. Hahlo & J.D. Sinclair *The Reform of South African Law of Divorce* Cape Town, Juta & Co., 1980 at pp. 51-52.

breakdown of the marriage and any substantial misconduct on the part of either of the parties.<sup>412</sup>

The following principles emerged from the Supreme Court of Appeal's interpretation of s. 9(1) in *Wijker v. Wijker*.<sup>413</sup>

(1) Before making a forfeiture order, a court must establish whether the party against whom an order is sought, will in fact be benefited if the order is not made. Then the court must make a value judgement whether such benefit will be an undue one.<sup>414</sup>

(2) The three factors specified in s. 9(1) of the 1979 Act need not be considered cumulatively. The real test is whether the person against whom the order is sought will unduly benefit if an order is not made. In

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<sup>412</sup> See s. 9(1) of Act 70 of 1979 and its interpretation by the Supreme Court of Appeal in *Wijker v. Wijker op. cit.*, at p. 730. However, by s. 9(2) no such order may be made when a divorce is granted on the ground of the mental illness or continuous unconsciousness of the defendant as provided by ss. 3(b) and 5 of the Act.

<sup>413</sup> *Supra.*

<sup>414</sup> At p. 727.

order to establish this the court must have regard to the factors specified in s. 9 of the 1979 Act.<sup>415</sup>

(3) The fact that substantial misconduct has not been proved does not mean that the court cannot make a forfeiture order.<sup>416</sup>

(4) Substantial misconduct which has led to the breakdown of the marriage as well as conduct which has nothing to do with the breakdown, must be considered. However, too much importance should not be attached to misconduct which is not of a serious nature.<sup>417</sup>

(5) The court must not lose sight of what the matrimonial property system governing the marriage entails. In deciding whether a spouse will unduly benefit if an order is not made, the principle of fairness is not to be resorted to in order to deviate from the consequences of the matrimonial property system governing the marriage. Thus, if a spouse married in community of property has made no contribution to the

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<sup>415</sup> At p. 729.

<sup>416</sup> *Ibid.*

<sup>417</sup> At p. 730.

success of a business of the other spouse and still receives a substantial benefit from the business, this will be a consequence of the marriage in community of property and not necessarily an undue benefit.<sup>418</sup>

The effect of an order for forfeiture was succinctly put by Schreiner J. (as he then was) in *Smith v. Smith*<sup>419</sup> as follows:

*“What the defendant forfeits is not his share of the common property but only the pecuniary benefits that he would otherwise have derived from the marriage....It [the order for forfeiture] is really an order for division plus an order that the defendant is not to share in any excess that the plaintiff may have contributed over the contributions of the defendant.”*

The order means that there is an equal division of the joint estate if the guilty defendant had contributed more than half of the estate, but that the

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<sup>418</sup> At p. 731.

<sup>419</sup> 1937 W.L.D. 126 at pp. 127-128. See pp. 87-88 *supra*, *Ex parte De Beer* 1952 (3) S.A. 288 (T) at pp. 289H-290C, Hahlo and Sinclair *The Reform of the South African Law of Divorce op. cit.*, at p. 51, Sinclair “Financial provision on divorce - need, compensation or entitlement?” (1981) 98 *South African Law Journal* 469 at p. 471 and *Lee & Honore, op. cit.*, at para. 131.

estate has to be divided in proportion to the parties' respective contributions if the innocent plaintiff had contributed more than the defendant.<sup>420</sup> This will be the case where full forfeiture is ordered. The court may, on the other hand, decide to order partial forfeiture in a particular case. For example, where a husband has caused the marriage to break down but has also contributed much over a long period to the growth of the joint estate, the court may order that only half of the usual forfeiture should take place. In the absence of a forfeiture order, the joint estate is divided equally.<sup>421</sup>

The efficacy of forfeiture of benefits in divorce proceedings is difficult to measure.<sup>422</sup> Being premised, *inter alia*, on a spouse's misconduct, it is likely to provoke animosity and bitterness between the parties. In an era of no-fault divorce, it is appropriate that such emotions should be minimised if not entirely removed. Furthermore, it will prove superfluous where the parties agree to settle the division of the

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<sup>420</sup> See *Celliers v. Celliers op. cit.*, *Gates v. Gates op. cit.* and *Lee & Honore op. cit.*, at para. 131.

<sup>421</sup> See *Gillingham v. Gillingham op. cit.*, at p. 613 and *Gates v. Gates op. cit.*, at p. 363.

<sup>422</sup> See Sinclair "Financial consequences of divorce in South Africa..." *op. cit.*, at p. 791.

matrimonial property by negotiated settlement.<sup>423</sup> It seems however, that the retention of the forfeiture of benefits in the Divorce Act 70 of 1979 was due to public opinion in support of the principle that no one should benefit from his own misconduct.<sup>424</sup> This support notwithstanding, it is submitted that its inclusion in Act 70 of 1979 runs counter to the no-fault objective of the statute.<sup>425</sup>

#### (viii) Possible post-divorce problems

The dissolution of the joint estate upon divorce may give rise to some problems. For example, the satisfaction of antenuptial delictual debts which remained unpaid after the divorce. The payment of such debts is the sole responsibility of the spouse who incurred them.<sup>426</sup> However, if a forfeiture order has been made against such a spouse and as a result he

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<sup>423</sup> *Ibid.*

<sup>424</sup> See A.H. Barnard *The New Divorce Law*, Durban, Butterworths, 1979 at p. 73. See also para. 15.4 of the South African Law Commission's Report RP57/78 - *Report on the Law of Divorce and matters incidental thereto* 1978.

<sup>425</sup> See Hahlo & Sinclair *op. cit.*

<sup>426</sup> See *Blatchford v. Blatchford Estate* (1861) 1 E.D.L. 365 at p. 368 and *Thom v. Worthmann NO* 1962 (4) S.A. 83 (N) at p. 88.

has lost the means of paying such antenuptial debts, creditors may be left without satisfaction of their debts. There is a dearth of judicial authority as to how such a credit is to be paid. Hahlo suggests that if creditors are not to be penalised, then the only equitable solution will be to deal with the claims of existing creditors as if no forfeiture order had been made.<sup>427</sup>

Another problem that may arise is whether a forfeiture order affects rights of recourse between the spouses in respect of debts paid out of the joint estate before, or by one of them personally after the division of the estate, either by creating rights of recourse where none would otherwise exist or by abrogating them where they would otherwise exist. Here again there is no judicial authority on the point but Hahlo has suggested that the fact that debts personal to the spouse against whom the order was made were paid out of the joint estate before division or by the other spouse after division, must be taken into account in determining what financial benefits the penalised spouse has derived from the marriage.<sup>428</sup>

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<sup>427</sup> See Hahlo "*Husband and Wife*" *op. cit.*, p. 381 and Lee & Honore *op. cit.*, at para. 97.

<sup>428</sup> Hahlo "*Husband and Wife*" *op. cit.*, at p. 381.

**(ix) Advantages/disadvantages of community of property regime**

The obvious advantage of marriage in community of property is that the husband and wife share equally in each other's financial prosperity. This is particularly advantageous to a wife who, after marriage, does not go out to work and thus is unable to contribute financially to the increase of the joint estate. She is still entitled to share equally with her husband on the community coming to an end.<sup>429</sup> Thus, the system gives due recognition to the concept of marriage as a partnership of a collaborative and constructive enterprise on the part of husband and wife.<sup>430</sup> The resources of the spouses are pooled together and used for the joint benefit of the members of the household, without any thought being given to the ownership of short-term assets thus acquired.<sup>431</sup>

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<sup>429</sup> See *Thom v. Worthmann N.O. op. cit.*, at p. 88.

<sup>430</sup> See Gray *op. cit.*, at p. 35 and note 210 *supra*. See also the English Royal Commission on Marriage and Divorce, Cmd. 9678 (1956) para. 644 and the Canadian Law Commission's Working Paper No. 8 *Family Property* (1975) at pp. 9-10.

<sup>431</sup> See A.H. Van Wyk "Matrimonial property systems in comparative perspective" (1983) *Acta Juridica* 53 at pp. 64-65.

The community of property regime has theoretical and practical simplicity.<sup>432</sup> Since there is one single estate, there is virtually no possibility that the spouses will collude to the detriment of creditors. There is a purposive interaction between the spouses without the necessity for the spouses to keep detailed books of accounts and inventories for the possible accounting purpose when the community comes to an end by death or divorce.

Conversely, husband and wife also share in each other's financial setbacks and as such may ruin each other by their profligate behaviour.<sup>433</sup> The community of property regime also exposes any contribution by the one spouse to the claims of the other spouse's creditors. But this disadvantage can be countered by the view that it is fair for the assets of a household to be used to defray debts incurred on behalf of that household.<sup>434</sup>

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<sup>432</sup> *Ibid.*

<sup>433</sup> For a summary of the disadvantages of community of property, see paras. 5.3 and 4 of the Scottish Law Commission's consultative paper No. 57 of March 1983.

<sup>434</sup> See Van Wyk "Matrimonial property systems..." *op. cit.*, at p. 65.

Another disadvantage of the community of property system is that it leaves little scope for individuality of the spouses and that it gives the less well-to-do spouse an undeserved share in the pre-acquired and inherited property of the other.<sup>435</sup> One may rebut this latter view by posing a rhetorical question: Isn't the sharing of property in consonance with the marriage vows of "*with this ring...with my body...and with all my worldly goods I thee endow?*"<sup>436</sup>

The principle of equal management of the joint estate by the spouses can also be viewed as a disadvantage. This principle means that both husband and wife have equal capacity to perform juristic acts but in practice, they may perform certain important legal acts only with each other's consent. Thus, restrictions have been placed equally on both spouses capacity to act in relation to the joint estate.

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<sup>435</sup> *Ibid.*

<sup>436</sup> This is an undertaking which the bridegroom makes in most Christian marriages, for example, that in accordance with the rites of the Anglican church. On this, see Lord Simon, "With all my worldly goods" Holdsworth Club, Presidential Address, University of Birmingham (1964) pp. 1-4 cited by B. Hoggett & D. Pearl *The Family, Law and Society - Cases and Materials*, London, Butterworths, 1983 at pp. 100-101.

**(b) Marriage out of community of property without the accrual system (complete separation of property)**

This matrimonial property regime applies to marriages entered into after 1984 in terms of an antenuptial contract excluding community of property and of profit and loss and expressly excluding the accrual system.<sup>437</sup> The proprietary consequences of these marriages are substantially the same as those of the marriages entered into subject to complete separation of property prior to the commencement of the Act, that is, the spouses are financially virtually as strangers to each other.<sup>438</sup> On divorce however, the redistribution power of the court under s. 7(3) of Act 70 of 1979 does not apply to those marriages entered into after 1984.<sup>439</sup>

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<sup>437</sup> See s. 2 of the 1984 Act.

<sup>438</sup> See Sinclair "Financial consequences of divorce in South Africa..." *op. cit.*, at p. 788.

<sup>439</sup> The constitutionality of the limitation of the exercise of judicial discretion to redistribute matrimonial assets to pre-1984 marriages out of community of property and pre-1988 marriages in terms of the Black Administration Act has been raised by commentators. Sinclair assisted by Heaton *op. cit.*, at pp. 143-148, for instance, argue that if the purpose of the adjustive discretion is to avoid injustice (and that was the justification adduced for its introduction into the legal system) then the date of one's marriage and the range of the available choices should not constrain the power of the court.

**(i) The administration of the separate estates**

The administration of the separate estates is vested in the respective spouses.<sup>440</sup> Each spouse has full capacity to act and to litigate in regard to their separate estates and can administer such estate independently of the other. Each spouse can freely enter into transactions with a third party (or the other spouse) in connection with his own estate<sup>441</sup> and a spouse is not liable for the debts of the other spouse except those

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Many couples are still marrying after the commencement of the two statutes mentioned above with antenuptial contracts excluding the accrual system, thus creating marriages in which no sharing of assets takes place. Therefore there is developing another group of people, more often than not women, equally at risk, but who are denied the relief granted to their counterparts who married, fortuitously, before the cut-off dates. The date of the marriage, it is argued, cannot serve to differentiate between people in identical circumstances and the Constitutional Court is urged to strike down this criterion as it is arbitrary and unfairly discriminates against persons married according to the system of complete separation of property on the ground of the date of their marriage. See also J. Heaton "Family Law and the Bill of Rights" *op. cit.*, at para. 3C25 where it is submitted that the differentiation between the two groups purely on the ground of the date of their marriage infringes the guarantee of equality before and equal protection and benefit of the law as specified in s. 9(1) of the Constitution. See also the Law Commission's Report *Review of the Law of Divorce* Project 12 of 1990.

<sup>440</sup> See p. 163 *supra*.

<sup>441</sup> See *Rohloff v. Ocean Accident & Guarantee Corp. Ltd.* 1960 (2) S.A. 291 (A).

incurred for household necessities. They can also make donations of their assets to each other.<sup>442</sup>

## **(ii) Property rights of spouses on divorce**

On divorce, each spouse retains his or her own assets which he had during the marriage subject to an order for forfeiture of benefits.<sup>443</sup>

## **(iii) Redistribution of assets**

Despite the retention of their respective separate estates, a court granting a divorce decree in respect of a marriage with complete separation entered into before 1<sup>st</sup> November 1984, or 2<sup>nd</sup> December 1988 in the case of Black spouses has a discretion, in terms of s. 7(3) of Act 70 of 1979, to redistribute property between the parties to the divorce action.<sup>444</sup> In

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<sup>442</sup> See s. 22 of Act 88 of 1984 which provides that subject to the Insolvency Act 24 of 1936, donations between spouses are not “void or voidable”.

<sup>443</sup> See pp. 164 and 194-200 *supra*.

<sup>444</sup> See pp. 165-168 and note 439 *supra*.

*Beaumont v. Beaumont*<sup>445</sup> Botha J.A. expressed the view that the power to make a redistribution order under s. 7(3) was a reforming and remedial measure designed to remedy:

*“the inequity which could flow from the failure of the law to recognise the right of a spouse upon divorce to claim an adjustment of a disparity between the respective assets of the spouses which is incommensurate with their respective contributions during the subsistence of the marriage to the maintenance or increase of the estate of one or the other.”*<sup>446</sup>

The court may only exercise this power if the following prerequisites exist:

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<sup>445</sup> 1987 (1) S.A. 967 (A).

<sup>446</sup> *Ibid.* at p. 987.

(a) The marriage must have been entered into in terms of an antenuptial contract prior to 1984 excluding community of property and of profit and loss and any form of accrual sharing;<sup>447</sup> or

(b) The marriage must have been contracted in terms of s. 22(6) of the Black Administration Act 38 of 1927, as it existed immediately prior to its repeal by Act 3 of 1988.<sup>448</sup>

No agreement must have been made by the parties for the division of their assets. The presence of the above circumstances enables one of the spouses to apply to the court for an order to be incorporated in the divorce decree, to the effect that the assets or such part of the assets as the court may deem just, be transferred from one spouse to the other.<sup>449</sup>

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<sup>447</sup> This position contrasts sharply with that of England where the court is given a wide adjustive discretion, without any time limitation, under the Matrimonial Causes Act 1973 as amended by the Matrimonial and Family Proceedings Act 1984 and the Family Law Act 1996. See *infra* Chapter five for a discussion on the use of the English court's discretion to adjust matrimonial property on divorce.

<sup>448</sup> Under s. 22(6) of Act 38 of 1927 a civil marriage between two Blacks was deemed to be out of community of property. Since Act 3 of 1988 such marriages are now automatically in community of property and of profit and loss. See pp. 167-168 and note 282 *supra*.

<sup>449</sup> See s. 7(3) of the 1979 Act.

Furthermore, subsection 7(4) “contains two conjoined jurisdictional preconditions to the exercise of the discretion”,<sup>450</sup> namely, the spouse wanting the redistribution order must have made a contribution to the estate of the other and the court must be satisfied that, by reason of such a contribution, it will be equitable and just to make a redistribution order.

The first precondition involves a purely factual finding whilst the second involves the exercise of a purely discretionary judgment in equity.<sup>451</sup>

The requisite contribution may be made either directly or indirectly, by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.<sup>452</sup>

The nature of the contribution envisaged under the Act was the subject of judicial comment in *Beaumont v. Beaumont*.<sup>453</sup> It was there argued by

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<sup>450</sup> Per Kriegler J. in *Beaumont v. Beaumont* 1985 (4) S.A. 171 at p. 175.

<sup>451</sup> Per Botha J.A. in *Beaumont v. Beaumont* 1987 (1) S.A. 967 (A) at p. 987.

<sup>452</sup> S. 7(4) of the 1979 Act. A similar provision exists in English law under s. 25(2)(f) of the Matrimonial Causes Act 1973. See pp. 351-356 *infra*.

<sup>453</sup> 1987 (1) S.A. 967.

the appellant that the legislature could not have intended a contribution by either spouse, made purely in the discharge of the common-law reciprocal duty of support, to qualify as a contribution which entitled the spouse making it to claim "compensation" for it in the form of a redistribution order. Something more was required, namely, a contribution which exceeded the bounds of the duty of support which existed *ex lege*.<sup>454</sup> This argument was firmly rejected by the court which expressed the view that:

*"Our legislation does refer specifically to contributions made 'directly or indirectly...by the rendering of services, or the saving of expenses...or in any other manner.' In my view there can be no doubt that the plain meaning of these words is so wide that they embrace the performance by the wife of her ordinary duties of 'looking after the home' and 'caring for the family'; by doing that, she is assuredly rendering services and saving expenses*

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<sup>454</sup> This argument was premised upon an article written in Afrikaans by Prof. J.C. Sonnekus in (1986) 103 *South African Law Journal* 367 titled "Egskeiding en kwantifisering van die bydrae tot die ander gade se boedel - artikel 7(3)-(5) van die Wet op Egskeiding 70 van 1979". An English summary of the gist of the article can be found in Cronje & Heaton *op. cit.*, at pp. 158-159.

*which must necessarily contribute indirectly to the maintenance or increase of the husband's estate.*"<sup>455</sup>

On this view, a wife's domestic services count as a contribution for the purposes of redistribution of the matrimonial assets on divorce. Thus, in *Van Zummeren v. Van Zummeren*<sup>456</sup> the plaintiff (the wife), who was married out of community of property to the defendant (the husband), sought a decree of divorce against the defendant and, amongst others, a redistribution order compelling the defendant to transfer one half of his estate to her. The parties disputed whether the plaintiff was entitled to claim for a proportion of the assets belonging to the defendant. The said assets consisted of a fixed property registered in the defendant's name ("the property") and a Mercedes Benz motor car ("the motor vehicle"). The defendant contended that these were gifts given to him by his father

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At p. 997 of 1987 (1) S.A. 967 (A) *per* Botha J.A. In *Katz v. Katz* 1989 (3) S.A. 1 (A) the wife's domestic services were held to have contributed to the husband's estate even though she had help from servants, caterers and "*all of the accoutrements of a comfortable home*" (at p. 14 *per* Milne J.A.). In England, a wife's domestic contribution to the welfare of the family is statutorily recognized in s. 25(2)(f) of the Matrimonial Causes Act 1973 as amended. See *Wachtel v. Wachtel supra* at pp. 838-839 and pp. 351-356 *infra*.

<sup>456</sup>

[1997] 1 All S.A. 91 (E).

and could not as such, in law, be included in a redistribution order. It was held that the motor vehicle should be excluded from a redistribution order because it was a gift from the husband's father who has established a "tradition" of giving motor vehicles to each of his children. The property however, could not be so treated and should be included in the redistribution order. The court further held that the plaintiff, who successfully managed the household in difficult circumstances, cared for the children, provided the defendant with home comforts and a home to come to for some 16 years, should be awarded one-third share of the property. Ludorf J. said:

*"...on the evidence there can be no doubt that in so managing the household and the Property over the extended period mentioned, the Plaintiff made a valuable contribution by way of service to the estate of the defendant generally and in addition made a valuable contribution towards the preservation, and probably enhancement, of the major asset in the Defendant's estate, namely the Property. She took care of the Property and expended energy and time in that regard over many years. In those circumstances it matters not in my view, that the Property was a gift to the Defendant. In my judgment the Plaintiff*

*rendered services by which the Defendant's estate benefited and which contributed to the maintenance of the estate of the Plaintiff [sic] as contemplated in section 7 (4) of the Divorce Act 70 of 1979. That estate included the Property at the time of the rendering of the services and a substantial measure of the services rendered were in fact directed specifically at the Property to the direct benefit of the Property itself and the entire estate.*"<sup>457</sup>

On the question whether an asset which had accrued to an estate under consideration fortuitously, by way of donation or gift for example, should not be taken into account in the making of an order in terms of s. 7(3) of Act 70 of 1979,<sup>458</sup> the court held that the terms of s. 7(4) of the Act (the empowering section) are clear and explicit. Once a court is satisfied that it is just and equitable by reason of the applicant's contribution to the maintenance (or increase) of the estate of the other party to make an order, it may make a redistribution order in terms of s. 7(3). In the court's view, the qualifying factor is to be found, not in the *causa*

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<sup>457</sup> At p. 96d-g.

<sup>458</sup> Under s. 7(5)(d) the court has a wide discretion to take into account any other factor which should in the opinion of the court be taken into account.

underlying the acquisition of the assets comprising the estate, but rather in whether or not it has been shown that the services of the applicant spouse *vis-a-vis* the estate (in for example, maintaining the assets, or a particular asset) are such as to satisfy the court that an order in terms of s. 7(3) would be just and equitable. On this point, the court disagreed with *dicta* in *Beira v. Beira*<sup>459</sup> to the effect that an asset which had accrued to an estate fortuitously, by way of donation for example, could for that reason, in law, not (save in terms of s. 7(5)(a))<sup>460</sup> be taken into account in the making of an order in terms of s. 7(3) of the Act. The court in *Van Zummeren* was of the view that if it would be unjust and inequitable to take account of certain assets because of the circumstances of a particular case, such assets should be excluded, otherwise they must

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<sup>459</sup> 1990 (3) S.A. 802 (W) at p. 807E *per* Leveson J. The court held that assets in a trust fund do not form part of the estate of the beneficiary under the trust and can thus not be taken into account in the making of an order of redistribution.

<sup>460</sup> That subsection provides as follows: “*In the determination of the assets or part of the assets to be transferred as contemplated in ss. (3), the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in ss. (4), also take into account -*  
 (a) *the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in ss. 3(b) of this section may have in terms of s. 22(7) of the Black Administration Act, 1927 (Act 38 of 1927)...*”

be included. For example, an asset which accrued to an estate by way of an inheritance on the day before the commencement of the divorce proceedings should be excluded.<sup>461</sup> This exclusion, the court concluded, should not be on the basis that the asset had accrued by virtue of an inheritance, but rather because it could not be said that the applicant spouse had made any contribution in relation thereto as contemplated by s. 7(4) of the Act. In other words, it would not be just and equitable to make an order which takes account of such assets in those circumstances. It is submitted that although the court's view accords with the terms of s. 7(4) of Act 70 of 1979, in that the subsection envisages a "*contribution to the maintenance of the other party's estate*", it may create occasional hardship to a spouse applying for a redistribution order. For instance, a husband who cleverly succeeds in replacing all the assets to which his wife had contributed shortly before the divorce, cannot, on the above view, be ordered to transfer any assets to his wife. However, in such a case, it is submitted that the court can utilise its power under s. 7(5)(d) to take into account the fact of such replacement by the husband and order a transfer of other assets to which the wife had not contributed as

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<sup>461</sup>See the hypothetical case given by Leveson J. in *Beira's case* at p. 608H-I.

being equitable and just by reason of her contribution to the replaced assets.<sup>462</sup>

In *Kritzinger v. Kritzinger*<sup>463</sup> it was held that a spouse's contribution must be positive in nature. A mere refraining from a particular activity or course of conduct will not be enough contribution for the purpose of a redistribution order. In that case, the parties were married out of community of property. During the existence of the marriage the respondent husband was offered a post with Mobil Oil (his employers) in New York but he declined the offer as his taking up the position in New York would have been detrimental to the appellant's business career. When he was sued for divorce, the respondent counterclaimed an amount of R200, 000 on the basis that he had contributed to the growth in the appellant's estate by not settling in New York so that the appellant's career in South Africa could be furthered. The trial judge acceded to the counterclaim but on appeal it was held that:

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<sup>462</sup> The wording of the subsection is wide enough to justify this submission. See p. 222 *infra*.

<sup>463</sup> 1989 (1) S.A. 67 (A).

*“what was clearly envisaged was some positive act by means of which one spouse puts something into the maintenance or increase of the estate of the other spouse - whether by way of money or property, labour or skill. It does not envisage a mere refraining from a particular activity or course of conduct.”*<sup>464</sup>

An ancillary question pertaining to contribution which needs to be answered is: must a monetary value be placed on the contribution before a redistribution order is made? In *Kretschmer v. Kretschmer*<sup>465</sup> the court appeared to suggest that there must be some evidence which would enable the court to put a monetary value on contributions in the nature of domestic services.<sup>466</sup> But in *Katz v. Katz*<sup>467</sup> the then Appellate Division, now Supreme Court of Appeal, was of the view that this suggestion was not in consonance with the terms of s. 7(4) and was clearly rejected in *Beaumont's* case.<sup>468</sup> The court reiterated the view it expressed in

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<sup>464</sup> *Per* Milne J.A. at p. 88.

<sup>465</sup> 1989 (1) S.A. 566 (W).

<sup>466</sup> At pp. 580-581 *per* Flemming J.

<sup>467</sup> 1989 (3) S.A. 1 (A).

<sup>468</sup> At pp. 987 and 996-997 respectively *per* Botha J.A.

*Beaumont's* case that s. 7(4) was wide enough to include unquantifiable domestic services. It follows from this that there is no need to put a monetary value on such services before ordering a redistribution of the assets. As noted by Hazel Kyrk, housewives comprise an economic group

*"[p]roducing for use and not for profit, whose incentive to efficiency and effort is not financial reward, and whose returns are largely the health and happiness of others. In a world engaged in creating exchange values these workers are creating use values. From this flows the fact...that no financial value can be placed upon their services."*<sup>469</sup>

As marriage is a partnership, this species of contribution should be evaluated, not in the absolute terms of monetary value, but in the relative terms of differential equality with the financial contribution usually made by the husband.<sup>470</sup> The wide discretion given to the court under s. 7(4) of Act 70 of 1979 is most suited for this purpose.

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<sup>469</sup> *The Family in the American Economy* (Chicago, 1953) at p. 275 cited by Gray *op. cit.*, at pp. 68-69.

<sup>470</sup> See Gray *op. cit.*, at p. 68.

Another aspect of the redistribution of assets under the 1979 Act which needs to be commented upon is whether the court needs guidelines in deciding the quantum of the assets to be given to the spouse who had contributed to their acquisition. In *Beaumont's* case the so-called one-third rule enunciated in the English case of *Wachtel v. Wachtel*<sup>471</sup> by which one-third of the matrimonial assets is given to the spouse with fewer assets as a starting point, was rejected by the then Appellate Division.<sup>472</sup> Botha J.A. (with whom the other judges concurred) held, *obiter*, that the judicial discretion should not be curtailed by “judicial glosses” on s. 7(3) in the form of guidelines. In his view, the over-riding feature in the exercise of the court’s discretion as to what proportion of the assets is to be transferred in terms of s. 7(3) of the 1979 Act, is the court’s assessment of what would be “just”, having regard to the factors mentioned specifically and to “any other factor which should in the opinion of the court be taken into account.” He concluded by saying:

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<sup>471</sup> [1973] 1 All E.R. 829 at pp. 839-840 *per* Lord Denning M.R. For a discussion of the one-third rule, see *infra* pp. 392-398.

<sup>472</sup> *Per* Botha J.A at p. 991. This rule had hitherto been applied in *Van Gysen v. Van Gysen* 1986 (1) S.A. 56 (C), *MacGregor v. MacGregor* 1986 (3) S.A. 644 (C), *Kroon v. Kroon* 1986 (4) S.A. 616 (E) and was again applied in *Van Zummeren v. Van Zummeren op. cit.*

*“I do not see any real difficulty in starting with a clean slate, then filling in the void by looking at all the relevant facts and working through all the relevant considerations, and finally exercising a discretion as to what would be just, completely unfettered by any starting point. In any event it is an illusion to think that a one-third starting point will make the task of the courts easier, as the experience of the English courts has shown. In my opinion our courts can do without any starting points.”*<sup>473</sup>

Subsection 7(5) prescribes the considerations which the court must take into account in the determination of the assets or part of the assets to be transferred in terms of the redistribution order. These considerations are:

(a) the existing means and obligations of the parties,

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<sup>473</sup> 1987 (1) S.A. 967 (A) at p. 998. In *Redgard v. Redgard* 1989 (1) S.A. 113 (E) it was held that, although the plaintiff would in principle have been entitled to a transfer of assets from the defendant's estate, nothing could be awarded to her in this case as the defendant was insolvent. A distribution order in the circumstances would not advance the object of s. 7(3) to achieve a fair and just distribution of assets on divorce.

(b) any donation made by one party to the other during the subsistence of the marriage or which is owing and enforceable in terms of their antenuptial contract,

(c) any forfeiture order made under s. 9 of the Act or under any other law and

(d) any other factors which should in the opinion of the court be taken into account.

In the context of s. 7(5)(d), the question was raised in *Beaumont's* case as to whether the conduct of the parties should be taken into account in the redistribution of assets. The court's view was that it was entitled, in terms of the wide words of the subsection,<sup>474</sup> to take a party's misconduct into account in exercising its discretion to redistribute the assets of the parties. This view was taken despite the fact that unlike s. 7(2) of the 1979 Act which makes conduct a relevant factor in the award of

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<sup>474</sup>

See *Beira v. Beira* 1990 (3) S.A. 802 (W) at pp. 806-807 where it was held that although the ambit of s. 7(5)(d) of the 1979 Act is wide, it does not cover every conceivable thing, and *Webster v. Webster* 1992 (3) S.A. 729 (E) at p. 736 where the court was of the view that the ambit of the subsection was wide enough to include matters relating to the parties' first marriage.

maintenance, s. 7(3) does not expressly include conduct as a factor to be taken into account in redistributing assets. The court added however, that in considering the conduct of the parties a conservative approach must be adopted, for:

*“in many, probably most, cases, both parties will be to blame, in the sense of having contributed to the breakdown of the marriage...In such cases, where there is no conspicuous disparity between the conduct of the one party and that of the other, our courts will not indulge in an exercise to apportion the fault of the parties and thus nullify the advantages of the ‘no fault’ system of divorce”.*<sup>475</sup>

Thus, it could be said that unless the conduct in question is such that is both “*obvious and gross*” to an extent that to ignore it would offend

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<sup>475</sup> Per Botha J.A. at pp. 994-995. For the English position as to the relevance of conduct in post-divorce adjustment of proprietary rights of the spouses, see *Wachtel v. Wachtel supra* at pp. 835-836 and *infra* pp. 356-365.

anyone's sense of justice, it should not be a determining factor in the redistribution of the matrimonial assets.<sup>476</sup>

In the exercise of its discretion to redistribute assets, the court should strive as much as possible to achieve a "clean break"<sup>477</sup> between the parties, that is, a complete severance of the financial dependence of the one party on the other. But as stated by Botha J.A. in *Beaumont's* case,<sup>478</sup> whilst this is a desirable objective, the circumstances of particular cases may not permit it. There will be many cases in which the constraints imposed by the facts (the financial position of the parties, their respective means, obligations and needs, and other relevant factors) will not allow justice to be done between the parties by effecting a final

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<sup>476</sup> See the English case of *Wachtel v. Wachtel* [1973] 1 All E.R. 113 at p. 119 per Ormrod J at first instance. In *Kretschmer v. Kretschmer* 1989 (1) S.A. 566 (W), the court was of the view that possibly only conduct which relates to the breakdown of a marriage is relevant in the process of redistribution.

<sup>477</sup> The term "clean break" has various meanings - see R. Deech "Financial relief: The retreat from precedent and principle" (1982) 98 *Law Quarterly Review* 621 at pp. 635-639. The term as used in the text expresses the idea of a final settlement allowing the financial independence of the parties, whether achieved immediately on divorce or after a period of readjustment. The central notion is the termination of financial dependence. See *infra* pp. 398-412 for the application of the "clean break" in English law.

<sup>478</sup> At p. 993.

termination of the financial dependence of the one on the other. In the end everything will depend on the facts and the court's assessment of what would be just in the particular case before it. If the circumstances permit, the manner of achieving the "clean break" is to make only a redistribution order in terms of s. 7(3) of Act 70 of 1979 and no maintenance order in terms of s. 7(2).<sup>479</sup> However, the two subsections play a complementary role where the court is minded to award both maintenance under s. 7(2) and order redistribution of assets under s.7(3).<sup>480</sup> In that event, the quantum of the property to be transferred will be a factor in determining how much maintenance to award.<sup>481</sup>

Finally, in determining any patrimonial benefits to which the parties may be entitled, pension interests of a party are excluded where the couple

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<sup>479</sup> *Ibid.* See also *Katz v. Katz* 1989 (3) S.A. 1 (A) at p. 11 *per* Milne J.A.

<sup>480</sup> *Cf. Esterhuizen v. Esterhuizen* 1999 (1) S.A. 492 (C) where it was held, *per* Josman A.J., that redistribution serves two distinct purposes, namely, to transfer assets to a spouse and to provide for the future maintenance of a spouse. For a criticism of this case, see *Cronje & Heaton op. cit.*, at p. 164.

<sup>481</sup> See *Beaumont v. Beaumont* 1985 (4) S.A. 171 (W) at p. 184 *per* Kriegler J. and in 1987 (1) S.A. 967 (A) at p. 992 *per* Botha J.A.

married with complete separation after 1<sup>st</sup> November 1984.<sup>482</sup> The rationale for this seems to be that since parties about to marry are fully apprised of the consequences of excluding the accrual system in an antenuptial contract by way of expert financial advice they receive from attorneys, if they make a clear choice of this regime, then the division of pension interests should not be forced on them.<sup>483</sup> But, as has been argued by some commentators,<sup>484</sup> there is absolutely no evidence to suggest that choices made after 1984 by intending spouses are informed choices, whereas those made prior to 1984 were ill-informed necessitating legislative help. If, as is submitted, the purpose of treating pension interests as a specie of property is to enhance the future financial position of vulnerable spouses, then the date of one's marriage should not be a relevant factor in deciding whether to treat such interests as part of one's estate and if so whether to divide them.

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<sup>482</sup> See s. 7(7)(c) of Divorce Act 70 of 1979. *Cf.* the situation of marriages in community of property at pp. 191-194 *supra*.

<sup>483</sup> See the General Council of the Bar's reaction to the Law Commission's Report *Review of the Law of Divorce* Project 12 1990 which proposed the extension of the judicial discretion under s. 7(3) of Act 70 of 1979 to post-1984 marriages out of community excluding all forms of sharing. The reaction is cited by Sinclair assisted by Heaton *op. cit.*, at p. 144 note 386.

<sup>484</sup> See Sinclair assisted by Heaton *op. cit.*, at p. 147.

**(iv) Advantages/disadvantages of marriage out of community of property**

The main advantage of complete separation of property is that each spouse retains his/her own estate and has the power to do with it as he/she thinks fit. The spouses are generally not liable for each other's debts incurred before or during the marriage.<sup>485</sup> Thus, this matrimonial regime may prove advantageous to a well-off widower who contracts the so-called marriage of companionship with a wealthy widow. This would ensure that their respective estates are kept intact for their respective heirs.<sup>486</sup> It may, it is submitted, also be advantageous to a woman with a formal job, a business or some income-generating activity. Such a woman may prefer this type of matrimonial regime or the accrual system because they do not impose limitations on her freedom to enter into agreements and to deal with her separate property.

The main disadvantage of marriage out of community of property is that the spouses have no legal right (subject to a redistribution order if they

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<sup>485</sup> See p. 205 *supra*.

<sup>486</sup> See Cronje & Heaton *op. cit.*, at p. 128.

married before 1<sup>st</sup> November 1984 or 2<sup>nd</sup> December 1988 in the case of Blacks) to share in the growth of each other's estate.<sup>487</sup> This creates hardship for the spouse, usually the wife, who has an inferior economic power when the marriage is dissolved either by death or divorce. It fails to recognise the contribution to the prosperity of the household of the spouse who is not economically active thus making nonsense any argument that the separation of property is based on the principle of equality.<sup>488</sup> It also disregards the realities of the vast majority of households, where a *de facto* merger of the two estates takes place to such an extent that it is extremely difficult to distinguish and disentangle property belonging to each spouse.<sup>489</sup>

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<sup>487</sup> See *Beira v. Beira op. cit.*, at pp. 804-805.

<sup>488</sup> In England for instance, the doctrine of separate property was in accord with the notions of philosophical individualism under which the legal subordination of one sex to the other would be replaced by a "*principle of perfect equality, admitting no power or privilege on one side, nor disability on the other.*" See J.S Mill *The Subjection of Women*, London, 1869 at p. 263.

<sup>489</sup> See Van Wyk "Matrimonial property systems in comparative perspective" *op. cit.*, at p. 62.

**(c) Marriage out of community of property with the accrual system**

The Matrimonial Property Act 1984 introduced a system of accrual sharing as a secondary matrimonial property regime.<sup>490</sup> The underlying principle of the accrual system is that “*one spouse contributes financially and otherwise to the growth of the other spouse’s estate and should therefore be entitled to share in that spouse’s estate on the dissolution of the marriage.*”<sup>491</sup> The system is therefore designed to help a spouse, especially the one who is not economically active, who is married out of community of property and of profit and loss, to share in the economic wealth of the other spouse upon dissolution of the marriage.

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<sup>490</sup> See s. 2 of the Act which provides that the accrual system is applicable to all marriages out of community of property and community of profit and loss unless expressly excluded in the antenuptial contract. Prior to the introduction of the statutory accrual system, spouses were free to agree in their antenuptial contract upon a deferred sharing of accruals. This freedom however, was hardly exercised. See Bosman (1978) 41 *Journal of Contemporary Roman-Dutch Law/Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 402 at pp. 416-417 and Lee & Honore *op. cit.*, para. 111 note 3.

<sup>491</sup> See para. 17.1 of the South African Law Commission’s Report RP26/1982 *op. cit.* See also p. 148 and note 271 *supra*.

The accrual system applies to the following:<sup>492</sup>

(1) Marriages out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which are entered into by whites, coloureds and Asians on or after 1<sup>st</sup> November 1984 and on after 2<sup>nd</sup> December 1988 in case of Blacks, unless the parties have expressly excluded the accrual system;<sup>493</sup> and

(2) Marriages out of community of property in terms of an antenuptial contract by which community of property and profit and loss are excluded, which were entered into before the commencement of the Act,

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<sup>492</sup> See Hahlo "*Husband and Wife*" *op. cit.*, at pp. 304-505, Cronje & Heaton *op. cit.*, at pp. 118-119 and Visser & Potgieter *Introduction to Family Law op. cit.*, at p. 147.

<sup>493</sup> See s. 2 of the 1984 Act. The accrual system was originally not applicable to marriages in which the couples were Black because the wording of s. 2 of Act 88 of 1984 required the marriage to be out of community "*in terms of an antenuptial contract*" for that system to be applicable. Black marriages then were out of community of property by virtue of s. 22(6) of the Black Administration Act 1927 and not by antenuptial contract. Consequently, such marriages did not fall within s. 2 of the 1984 Act. In 1988 the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 repealed s. 22(6) of the Black Administration Act and brought marriages of Blacks in line with those of other racial groups. See p. 176-177 and note 282 *supra*.

if the parties adopted the accrual system within two years of the Act coming into effect by the execution and registration of a notarial contract.<sup>494</sup>

During the marriage the matrimonial property regime is one out of community of property and of profit and loss. Each party is the administrator of his or her own estate. In fact the administration of the separate estates is the same as in a marriage out of community of property without the accrual<sup>495</sup> system but the Act, in s. 8, provides additional protective measures.<sup>496</sup>

On the dissolution of the marriage the spouses share equally in the accrual, that is, the growth which the estate of each spouse showed during the subsistence of the marriage.<sup>497</sup> The accrual system thus

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<sup>494</sup> See s. 21(2)(a) of the 1984 Act. The two year period for whites, coloureds and Asians was extended for a further two years in 1986 by the Matrimonial Property Amendment Act 91 of 1986. See note 311 *supra*.

<sup>495</sup> See p. 163 *supra*.

<sup>496</sup> See pp. 237-241 *infra*.

<sup>497</sup> See s. 3 of the 1984 Act. The equal sharing may be varied by agreement of the spouses and the court may give effect to such an agreement under s. 7(1) of the Divorce Act 1979.

recognises that marriage is a partnership but that property acquired before marriage is not to be shared.<sup>498</sup>

### (i) The determination of the accrual

The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.<sup>499</sup>

Each spouse's estate is given a net value (assets minus liabilities) at the commencement of the marriage. This value can be put into the antenuptial contract or into a statement made within six months of the marriage.<sup>500</sup> If the spouse's liabilities exceed his or her assets or no value is recorded, then for the purpose of calculating the accrual it will be

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<sup>498</sup> For a detailed discussion of the accrual system see Sinclair *An Introduction to the Matrimonial Property Act 1984 op. cit.*, at pp. 33-36, Cronje & Heaton *op. cit.*, at pp.117-126, Hahlo "*Husband and Wife*" *op. cit.*, at chapter 17 and Visser & Potgieter *Introduction to Family Law op. cit.*, at pp. 146-154.

<sup>499</sup> See s. 4(1)(a) of the 1984 Act.

<sup>500</sup> See s. 6(1) of the 1984 Act.

presumed to be nil unless the contrary is proved.<sup>501</sup> In *Olivier v. Olivier*<sup>502</sup> it was held that where the spouses have specified the net value of their estate in an antenuptial contract they are bound by that value and cannot prove that it was inaccurate.

In determining how the accruals, if any, are to be shared on the dissolution of the marriage, the accrual of each party's estate, during the subsistence of the marriage, is determined by a revaluation of their respective estates and the spouse with the smaller or no accrual acquires a claim against the spouse with the greater accrual. The claim is for an amount equal to half of the difference between the accrual of the respective estates of the spouses. The net value at the dissolution is arrived at after payment of creditors but before effect is given to any testamentary disposition, donation *mortis causa* or succession out of that estate in terms of the law of intestate succession.<sup>503</sup> Also, due allowance is given for the fluctuation in the value of money and in this regard, the weighted average of the consumer price index as published from time to

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<sup>501</sup> See ss. 6(4)(a) and 6(4)(b) of the 1984 Act.

<sup>502</sup> 1998 (1) S.A. 550 (D).

<sup>503</sup> See s. 4(2) of the 1984 Act.

time in the Government Gazette is taken as *prima facie* proof of any change in the value of money.

Certain assets are excluded from the calculation. These are damages received for non-patrimonial loss;<sup>504</sup> an inheritance, legacy or donation received from a third party;<sup>505</sup> any asset excluded from the accrual system in the antenuptial contract<sup>506</sup> and any donations between the spouses made during the subsistence of the marriage.<sup>507</sup> The result is that, at the dissolution of the marriage, each spouse will usually acquire a claim against the other spouse for an amount equal to half of the total accrual of both estates<sup>508</sup> unless this proportion has been varied by agreement.<sup>509</sup>

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<sup>504</sup> See s. 4(1)(b)(i) of the 1984 Act.

<sup>505</sup> See s. 5(1) of the 1984 Act.

<sup>506</sup> See s. 4(1)(b)(ii) of the 1984 Act.

<sup>507</sup> See s. 5(2) of the 1984 Act.

<sup>508</sup> See note 497 *supra*. Under s. 8 of the 1984 Act, the court may order a different proportion of sharing, for example, 60% to wife, 40% to husband. A spouse's share of the accrual may also be subject to forfeiture of benefits under s. 9 of the Divorce Act 70 of 1979. See *infra* pp. 236-237.

<sup>509</sup> See pp. 188-190 *supra*.

The example given by Sinclair<sup>510</sup> may be used to illustrate the division of the accrual.

*“H and W marry in 1985 with a standard-form antenuptial contract.”*<sup>511</sup>

*At the date of marriage H has a net estate of R25000;*

*W has a net estate of R5000.*

*The parties become divorced in 1995.*

*At the date of divorce H has a net estate of R150 000;*

*W's net estate is R2000.*

*There is no accrual in W's estate.*

*It appears that the accrual in H's estate is R150 000 - R25 000 = R125 000. But the commencement value of H's estate must be adjusted to reflect the fluctuation in the value of money. For this purpose the weighted average of the Consumer Price Index is*

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<sup>510</sup> *An Introduction to the Matrimonial Property Act 1984 op. cit.*, at pp. 34-35.

<sup>511</sup> This type of contract is the usual one entered into by couples marrying out of community of property. It usually excludes community of property and profit and loss. See pp. 159-162 *supra*. In post-1984 antenuptial contracts, the accrual system must be specifically excluded otherwise, in terms of s. 2 of Act 88 of 1984, the marriage will be subject to the accrual system.

used.<sup>512</sup> Assume that the fluctuation in the value of money from 1985 to 1995 will be similar to that from 1974-1984: The R25 000 in H's estate on the date of marriage will be adjusted to (approximately) R75 000.

The accrual in H's estate in real terms, therefore, is only R150 000 - R75 000 = R75 000.

W, being a spouse with no accrual, will have a claim against H for half of the difference between R75 000 and R0, i.e. R37 500."<sup>513</sup>

## (ii) Forfeiture of benefits

The right to share in the accrual of the estate of a spouse is a patrimonial benefit which may on divorce be forfeited, either wholly or in part in terms of s. 9 of Act 88 of 1984.<sup>514</sup> Thus, the court may for example,

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<sup>512</sup> See s. 4(1)(b)(iii) of the 1984 Act.

<sup>513</sup> For similar calculations of the accrual, see Cronje & Heaton *op. cit.*, at p. 124, Hahlo "*Husband and Wife*" *op. cit.*, at pp. 309-310 and Visser & Potgieter *Introduction to Family Law op. cit.*, at pp. 151-152.

<sup>514</sup> Hahlo "*Husband and Wife*" *op. cit.*, at p. 385 note 166 expresses the view that s. 9 of Act 88 of 1984 was presumably inserted *ex abundante cautela* because s. 9 of Act 70 of 1979 is arguably wide enough to cover accruals.

order that no division of accruals takes place or may order that all the accruals or a greater proportion of the accruals is to go to the applicant spouse.<sup>515</sup>

### **(iii) Protection of a spouse's right to share in the accrual**

Although the accrual system effects a complete separation of estates between the spouses, it is clear that during the marriage the spouses have an interest in each other's estates.<sup>516</sup> That being the case, there is a need to protect a spouse's right to share in the accrual of the estate of the other. This is done by s. 8 of Act 88 of 1984. Subsection (1) of that section provides that if a spouse, during the subsistence of the marriage, seriously prejudices or will probably by his or her conduct seriously prejudice the right of the other spouse to share in the accrual of his or her estate at the dissolution of the marriage, the spouse who stands to be so prejudiced may apply to the High Court for the immediate division of the

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<sup>515</sup> See Hahlo "*Husband and Wife*" *op. cit.*, at p. 385.

<sup>516</sup> By s. 3(2) of the 1984 Act, the right to share in the accrual of the estate of the other spouse cannot be transferred or be liable to attachment of form part of the insolvent estate of a spouse during the marriage.

accrual. The court may only order such a division if it is satisfied that no other person, for example a creditor, will be prejudiced thereby.

In granting the application, the court may order equal division or division on any other basis it deems just. Thus, where for example, a spouse has maliciously alienated some of his assets with the intention of prejudicing the other spouse's right to share in the accrual, the court may order that the prejudiced spouse obtains 70% of the accrual. Under subsection (2) if the court orders a premature division of the accrual, it may order that the accrual system applicable to the marriage be replaced by a system which excludes all sharing.<sup>517</sup>

The efficacy of this protection has been doubted on the ground that by the time it is invoked, the damage may already have been done.<sup>518</sup> All that a financially more successful spouse needs to do is to simply transfer

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<sup>517</sup> Sinclair *An Introduction to the Matrimonial Property Act op. cit.*, at p. 37 note 137 has expressed the view that a spouse whose estate is likely to increase in the future (to a greater extent than the estate of the spouse against whom an order was sought in terms of s. 8(1)) would benefit by an order in terms of s. 8(2).

<sup>518</sup> See Hahlo "*Husband and Wife*" *op. cit.*, at p. 308. See also Cronje & Heaton *op. cit.*, at p. 125, Lee & Honore *op. cit.*, at para. 111 note 10, N. Zaal *op. cit.*, at p. 59-60 and Van Aswegen *op. cit.*, at p. 148.

his gains to a third party before the other spouse can get to court to stop it. Even if the other spouse gets to court before the completion of such transaction, it is conceivable that she will still fail if the third party is able to prove that an immediate division of accrual would “*prejudice*” him.<sup>519</sup> In terms of the section, a spouse claiming immediate division of accrual must satisfy the court, *inter alia*, “*that other persons will not be prejudiced thereby...*” Failure to satisfy the court on this point will lead to the court not granting the order. Furthermore, the protection operates only to prevent future prejudice and not to cancel prejudice already suffered.<sup>520</sup>

However, it has been suggested that where one of the spouses during the marriage makes donations out of his or her estate to a third party in fraud of the other’s right to share on the dissolution of the marriage in his or her accrual, the principles of the common law *actio Pauliana utilis* apply.<sup>521</sup> In other words, the prejudiced spouse can take legal action to

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<sup>519</sup> See N. Zaal *op. cit.*, at p. 60.

<sup>520</sup> See Van Aswegen *op. cit.*, at p. 148.

<sup>521</sup> See Cronje & Heaton *op. cit.*, at p. 125, Hahlo “*Husband and Wife*” *op. cit.*, at p. 309 and Van Aswegen *op. cit.*, at p. 148. For the difficulties entailed in the use of this remedy see pp. 157-158 *supra*.

reclaim the property on the same principles as where, in a marriage in community of property, one of the spouses makes a donation to a third party in fraud of the other spouse or his or her estate. Other common-law remedies are also available to the prejudiced spouse.<sup>522</sup> For example, upon the application of such a spouse, the court may interdict the other spouse as a prodigal and appoint a curator to administer his or her estate.<sup>523</sup> The prejudiced spouse may also apply for an interdict to prohibit the other spouse from donating his or her assets to third parties in fraud of the prejudiced spouse's right to accrual sharing.<sup>524</sup>

Furthermore, it has been argued that the section cannot be accurately depicted as equalising the financial status of spouses during the marriage.<sup>525</sup> This is because the section is clearly worded as a special power to advance the usual claim on divorce in cases of what the section describes as “*conduct or proposed conduct of the other spouse*”, proved

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<sup>522</sup> These common-law remedies are in addition to the statutory remedy.

<sup>523</sup> See *Yared v. Yared* 1952 (4) S.A. 182 (T) and *Ex parte Wilding* 1953 (1) S.A. 633 (O).

<sup>524</sup> See *Fawkes v. Fawkes* 1969 (1) S.A. 83 (O), *Laws v. Laws* (2) 1972 (2) S.A. 1 (T) and *Cullamah v. Munean* 1941 N.P.D. 163.

<sup>525</sup> See N. Zaal *op. cit.*, at p. 59.

to be causing or likely to cause serious prejudice to that claim. Litigation under this section, it is said, can hardly be promoted (even by the most ardent supporters of accrual) as a non-contentious way to enhance the financial powers of the wife during a marriage which is to subsist happily thereafter.<sup>526</sup> Perhaps, an introduction of a provision, by which the spouses must jointly consent to certain transactions involving the accruals of each other's estate, may go some way to enhance the protection of the right to share in each other's accruals.<sup>527</sup>

#### **(iv) Advantages/disadvantages of the accrual system**

The main advantage of the accrual system is that it combines the best elements of marriages in and out of community of property. It enables spouses to exercise the freedom to deal with their property without reference to one another associated with marriage out of community, as well as the benefit that they are normally not liable for each other's debts.<sup>528</sup> These benefits are supplemented by certain advantages of the

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<sup>526</sup> *Ibid.*

<sup>527</sup> See Hahlo "*Husband and Wife*" *op. cit.*, at pp. 308-309 and Cronje & Heaton *op. cit.*, at p. 125 note 91.

<sup>528</sup> See pp. 163-164 *supra*.

marriage in community of property, in that a spouse, usually a wife, may share in the profit generated through her husband's efforts.<sup>529</sup>

However, the absence of an existent share in matrimonial property during the subsistence of the marriage may create practical problems, such as a severe limitation of a married woman's creditworthiness,<sup>530</sup> especially where she is not economically active. If for example, a husband keeps his wife on a shoestring budget, the accrual system provides her with no remedy short of divorce.<sup>531</sup> The accrual system therefore leaves such a married woman at a financial disadvantage during the marriage in exchange for a dissolution right which is a mere *spes* vulnerable to unilateral erosion by an unscrupulous husband or by unforeseen circumstances.<sup>532</sup>

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<sup>529</sup> See Visser & Potgieter *Introduction to Family Law op. cit.*, at p. 88. See also Cronje & Heaton *op. cit.*, at p. 127 and Hahlo "*Husband and Wife*" *op. cit.*, at p. 312.

<sup>530</sup> See Van Wyk "Matrimonial property systems in comparative perspective" *op. cit.*, at p. 64.

<sup>531</sup> Such a spouse cannot argue under s. 8(1) of the 1984 Act that such conduct on the part of her husband *per se* prejudices her ultimate rights at dissolution. On the contrary, as argued by Zaal *op. cit.*, at p. 59, it could be said that the husband's parsimony is geared towards protecting her ultimate rights.

<sup>532</sup> See N. Zaal *op. cit.*, at p. 60.

The accrual system also has an air of artificiality about it. This quality which, according to a commentator,<sup>533</sup> can be described as the “mathematisation” of family law, becomes pronounced when one considers that in South Africa many marriages show no or only negligible accrual.<sup>534</sup> Prospective spouses, especially those who are not economically active, are warned not to rely alone on the speculative nature of the promise which the accrual system makes to the exclusion of other more traditional antenuptial settlements if these are also offered to them.<sup>535</sup>

#### 4. MATRIMONIAL PROPERTY REGIME UNDER CUSTOMARY LAW

##### (a) Customary-law marriage in the traditional setting

The customary-law matrimonial property regime is applicable only to Blacks who enter into a customary marriage (as opposed to a civil marriage). There is no common system of customary law applicable to

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<sup>533</sup> Van Wyk “Matrimonial property systems in comparative perspective” *op. cit.*, at p. 64.

<sup>534</sup> See Hahlo “*Husband and Wife*” *op. cit.*, at p. 312.

<sup>535</sup> See N. Zaal *op. cit.*, at p. 61.

all tribal groups but there are certain basic features regulating marriages that are common to all tribes.<sup>536</sup> A customary marriage is regulated by the customary law of the relevant tribe from which the spouses emanate although there are statutory provisions which regulate such marriages in parts of the country.<sup>537</sup> The Black Administration Act 38 of 1927 draws a distinction between “marriages” and “customary unions”. Section 35 of the Act<sup>538</sup> defines the two terms as follows:

*“Customary union’ means the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is a party to a subsisting*

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It has been stated in *Seymour’s Customary law in South Africa*, 5<sup>th</sup> ed. by J.C. Bekker Cape Town, Juta & Co., 1989 at Chap. XXXV that there are four main groups of Blacks in South Africa, namely, the Nguni, the Sotho-Tswana, the Tsongo and the Vhavenda. See also Sinclair assisted by Heaton *op. cit.*, at p. 239 especially note 91.

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For example, the Natal Code of Zulu Law 1987 and KwaZulu Act on the Code of Zulu Law 1985 are special statutes enacted to regulate customary marriages in the then Natal Province and the then self-governing territory of KwaZulu. The provisions of these Codes are identical. They are left intact by Act 18 of 1996 which repealed or amended most of the laws in the former “independent” and self-governing states.

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As amended by s. 9 of the Black Administration (Amendment) Act 9 of 1929.

*marriage; 'marriage' means the union of one man with one woman in accordance with any law for the time being in force in any Province governing marriages, but does not include any union contracted under Black law and custom or any union under the provisions of the Natal and KwaZulu Codes."*

Because of this distinction the common law does not give any recognition to "customary unions"<sup>539</sup> for, in the words of Innes C.J., the law only recognises "a voluntary union for life of one man and one woman to the

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539 Certain statutes were later to treat such unions as valid for the purposes of those statutes. For example, s. 21(13) of the Insolvency Act 24 of 1936 (extended over the whole national territory by s. 2(1) of Act 18 of 1996), s. 1 of the Income Tax Act 58 of 1962, s. 5(6) of the Maintenance Act 23 of 1963 (extended over the whole of the national territory by s. 2(1) of Act 18 of 1996), s. 1 of the Child Care Act 74 of 1983 (extended over the whole of the national territory by s. 19 of the Child Care Amendment Act 96 of 1996) and s. 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993. Customary marriages are however, recognised in KwaZulu/Natal (see note 537 *supra*), in Transkei by ss. 1 and 2 of the Marriage Act 21 of 1978 (ss. 42 to 50 were repealed by s. 3 of Act 18 of 1996) and in Ciskei by s. 2(1) the Customary Law (Amendment) Decree 23 of 1991 (this statute was left intact by s. 3 of Act 18 of 1996). The Recognition of Customary Marriages Act 120 of 1998 has given national recognition to customary marriages. See p. 257 *infra*.

*exclusion of all others.*"<sup>540</sup> Thus, the polygynous nature of customary marriages prevents the common law from according them validity as it is "reprobated by the majority of civilised peoples, on the ground of morality and religion."<sup>541</sup> But as will be discussed below, this position has changed to that of full recognition with the coming into effect of the Recognition of Customary Marriages Act 120 of 1998.

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<sup>540</sup> *Seedat's Executors v. The Master (Natal)* 1917 A.D. 302 at p. 309 applying the classic definition of an English marriage given by Lord Penzance in *Hyde v. Hyde and Woodmansee* (1866) L.R. 1 P. & D. 130 at p. 133. See also *Ismail v. Ismail* 1983 (1) S.A. 1006 (A) at pp. 1019-1020 per Trengove J.A.

<sup>541</sup> Per Innes C.J. in *Seedat's Executors v. The Master supra* at p. 307 and Trengove J.A. in *Ismail v. Ismail supra* at p. 1026. The latter case was followed by Van Dijkhorst J. in *Kalla v. The Master* 1995 (1) S.A. 261 (T) at p. 266 on the basis that the provisions of the South African Constitution 1993 cannot operate retrospectively to validate a marriage that was invalid at the time of its celebration. These cases dealt with Muslim marriages but the same principle applies to customary marriages. But cf. *Ryland v. Edros* 1997 (2) S.A. 690 (C) where the court rejected *Ismail* in so far as the recognition of a Muslim marriage as between the spouses is concerned. See also J. Church "The dichotomy of marriage revisited: A note on *Ryland v. Edros*" (1997) 60 *Journal of Contemporary Roman-Dutch Law/Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 294 and I.P. Maithufi "Possible recognition of polygamous marriages" (1997) 60 *Journal of Contemporary Roman-Dutch Law/Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 695.

A distinctive feature of customary marriages is that it is polygynous, that is, the husband is permitted to take more than one wife.<sup>542</sup> This gives rise to the ranking of wives. There are two systems of polygyny, namely, the simple system and the complex system. Under the simple system, the man has one great wife, his first wife, and all subsequent wives follow a chronological order of seniority.<sup>543</sup> The complex system creates “houses” which is defined as:

*“the family and property, rights and status, which commence with, attach to, and arise out of, the customary union of each Black woman.”*<sup>544</sup>

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<sup>542</sup> Polyandry, the system by which a woman is allowed to marry more than one husband, is not permitted.

<sup>543</sup> See Bekker *op. cit.*, at p. 127-134, Sinclair assisted by Heaton *op. cit.*, at p. 247 and T.W. Bennett *A Sourcebook of African Customary law for Southern Africa*, Cape Town, Juta & Co. 1990 at pp. 224-227.

<sup>544</sup> See S. 35 of the Black Administration Act 38 of 1927. The number of “houses” may depend on whether the said marriage comes under the “simple” or “complex” system of polygyny. In the latter case, there will be one main “house” with other subordinate “houses” whilst in the former, there may be two or more main “houses” with ancillary “houses” dependent upon and subordinate to them directly. See *Sijila v. Masumba* 1940 N.A.C. (C & O) 42 at pp. 44-47, Bekker *op. cit.*, *supra* at pp. 126-140 and Sinclair assisted by Heaton *op. cit.*, at pp. 247-248.

The ranking of wives and their houses, which together constitute the family group, differs from tribe to tribe but, in general, the first wife is the great wife and she creates the great house. The second wife may or may not enjoy a special status as the right-hand wife or the left-hand wife. If she does, her house, subservient to the great house, enjoys priority over the houses of subsequent wives.<sup>545</sup>

Customary marriage is also characterised by the giving or the undertaking to give property by the prospective husband or the head of his family to the head of the family of his future wife. This property is referred to generally as *lobolo*.<sup>546</sup> The exact role *lobolo* plays in a customary

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<sup>545</sup> See note 544 *supra*.

<sup>546</sup> This means the livestock or other property paid in respect of the marriage by the husband or his father, as the case may be, to the wife's guardian. It is also known by a variety of names such as *bogadi*, *bohali*, *lumalo*, *xuma*, *magadi*, bridewealth, and marriage gifts. The concept has generated a great deal of literature, some examples of which are, Bekker *op. cit.*, Chap. VI, Bennett *op. cit.*, at pp. 195-217, D.D.N. Nsereko "The nature and function of marriage gifts in customary African marriage" (1975) 23 *American Journal of Comparative Law* 682, C.R.M. Dlamini "The modern significance of Ilobolo in Zulu society" (1984) 17 *De Jure* 148, J.M. Hlophe "The KwaZulu Act on the Code of Zulu law, 6 of 1981 - a guide to intending spouses and some comments on the custom of lobolo" (1984) 17 *Comparative and International Law Journal of Southern Africa* 163, C.R.M. Dlamini "Should Ilobolo be abolished? A reply to Hlophe" (1985) 18 *Comparative and International Law Journal of Southern Africa* 361 and S.

marriage is a subject of debate.<sup>547</sup> In the uncodified systems<sup>548</sup> of customary law, it is said to be a major essential requirement of a customary marriage.<sup>549</sup> However, in the codified system of customary law it is not expressly stated as an essential requirement of a customary marriage.<sup>550</sup> This notwithstanding, it is customarily given prior to the marriage in the coded system of customary law. With increased urbanization of Blacks, the payment of the *lobolo* with livestock is being replaced by the payment of money.<sup>551</sup>

Despite the uncertainty about its role in a customary marriage, it is generally agreed that the payment of *lobolo* serves to transfer the woman

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Burman "Capitalizing on African Strengths" (1991) 7 *South African Journal of Human Rights* 215.

<sup>547</sup> See Bennett *op. cit.*, at pp. 204-207.

<sup>548</sup> That is, systems which are not regulated by any formal code.

<sup>549</sup> See Bekker *op. cit.*, at p. 107. See also I. Schapera *A Handbook of Tswana Law and Custom*, London, Frank Cass, 1955 at p. 138.

<sup>550</sup> See s. 38 of the KwaZulu-Natal Codes. The Codes however, regulate certain aspects of *lobolo*, for example, the nature, delivery and the quantum. See ss. 43, 47, 51, 52, and Chap. 8 of the Codes.

<sup>551</sup> See Bennett *op. cit.*, at p. 107.

and her reproductive capacity, from the family of her guardian into the family of her husband. It operates to bestow parental rights over any children born to the marriage upon the husband's patrilineage.<sup>552</sup>

### (i) Proprietary consequences of customary marriage

It has been asserted that in the context of customary law, "*proprietary consequences*" sounds somewhat contrived.<sup>553</sup> The reason for this is that customary law has no clearly conceived property law<sup>554</sup> and writers of the western legal tradition are hard pressed to find language appropriate to describe this aspect of the customary marriage relationship. Furthermore, the courts when faced with deciding issues relating to property in this

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<sup>552</sup> See Schapera *op. cit.*, at p. 139, Sinclair assisted by Heaton *op. cit.*, p. 243 and Bekker *op. cit.*, at p. 150.

<sup>553</sup> See Bennett *op. cit.*, at p. 230.

<sup>554</sup> The possible reason for this was given by the Law Commission in its *Report on Customary Marriages* (Project 90) 1998 at para. 6.3.1.3 as follows: "*It is quite understandable why customary law should be so vague on questions of property. Before colonization, there would have been little need for an elaborate code of rules, because people had a relative abundance of food and land, and the economy was geared mainly to subsistence. An individual's responsibility to support dependents was given far greater emphasis. It was inevitable, then, that customary law would have few rules specifying rights to property.*"

context, adopt a pragmatic approach by transposing their familiar common-law institutions, such as ownership, *usufruct* and trusts, onto the structure of the polygynous family.<sup>555</sup> Within such a family property will comprise of family/general and “house” property. Family/general property is made up of the general estate of a family head, namely, his earnings or property bought with those earnings together with his inheritances, *lobolo* received for daughters<sup>556</sup> and that part of family property which has not been allotted to any house. “House” property is made up of, *inter alia*, property specifically allotted by the family head to a particular “house” or accruing to a “house” by the operation of customary law, gifts to the wife and her earnings, and acquisitions by other inmates of the “house”.<sup>557</sup> The control and administration of family/general and “house” property fall on the head of the family or the

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<sup>555</sup> Bennett *op. cit.*, at p. 230.

<sup>556</sup> According to Bennett *op. cit.* at p. 238 *Lobolo* received for daughters is regarded as family property in Venda. In other places it forms part of the property of the “house”.

<sup>557</sup> See s. 1(1) of the KwaZulu-Natal Codes, Bekker *op. cit.*, at p. 71 and Bennett *op. cit.* at pp. 232-238.

husband and on the son of his major wife on his death as the case may be.<sup>558</sup>

This situation notwithstanding, the proprietary consequences of a customary marriage are generally accepted as one of out of community of property because, *inter alia*, the polygynous nature of the marriage is more compatible with separate estates.<sup>559</sup> The reality of the relationship between a husband and his wife is however one of subjection of the wife to the overall authority of the husband as a result of patriarchal tradition.<sup>560</sup> Thus, it has been held that whatever a woman earns after her marriage belongs to the husband<sup>561</sup> who exercises overall control over the

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<sup>558</sup> See s. 20 of the KwaZulu-Natal Codes, Bekker *op. cit.*, at pp. XXV and 70 and Sinclair assisted by Heaton *op. cit.*, at p. 248.

<sup>559</sup> See the Law Commission's Report Project 90 *op. cit.*, para. 6.3.

<sup>560</sup> See Law Commission's Report, Project 90 *op. cit.*, at para. 6.2.1 and Bennett *op. cit.*, at 302 where it is argued that the patriarchal nature of African society does not necessarily mean women lack power. Through various devices, such as, gossip, magic and the withholding of services, women have always contrived to mitigate male authority.

<sup>561</sup> See for example, the Transkei case of *Sixakwe v. Nonjoli* (1896) 1 N.A.C. 11. The position is different in KwaZulu-Natal where s. 13 of the Kwa Zulu-Natal Codes permits any Black person to acquire movable and immovable property.

matrimonial property. Furthermore, it has been held that women can have outright ownership in only a very limited category of things, such as, the *ngquthu* beast,<sup>562</sup> and property of an intimate nature, such as traditional wearing apparel.<sup>563</sup> This inferior status that customary law gives to wives has prompted the comment that they are:

*“economically dependent, without the power to overcome their poverty, and without the self-determination to make decisions regarding their own lives.”*<sup>564</sup>

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<sup>562</sup> A Zulu term meaning a beast paid by a bridegroom or a seducer of a virgin. See *Mohlakula v. Elizabeth* (1902) 1 N.A.C. 56 and *Mpongo v. Mandela & Anor.* (1913) 3 N.A.C. 34.

<sup>563</sup> See *Xakaxa v. Mkize* (1947) N.A.C. (N&T) 85 and Bennett *op. cit.*, at p. 327.

<sup>564</sup> K.L. Robinson “The minority and subordinate status of African women under customary law” (1995) 11 *South African Journal on Human Rights* 463 at p. 464. See s. 6 of the Recognition of Customary Marriages Act 120 of 1998 which now confers equal status and capacity on customary-law spouses. See p. 257 *infra*.

**(ii) Proprietary rights of spouses on divorce**

In terms of traditional customary law, a customary-law wife cannot upon divorce expect a share of the matrimonial estate.<sup>565</sup> She has no claim to a right of ownership in any house property (other than some personal belongings and ceremonial items)<sup>566</sup> or to redistribution or division of property regardless of any contribution she may have made to the maintenance or increase in value of the family estate.<sup>567</sup> She is perceived as an unpaid servant of her husband. At the end of the marriage she virtually leaves the matrimonial home empty-handed. She is not even entitled to maintenance as she is expected to be taken care of by her own family.<sup>568</sup> This untenable position of customary-law wives gave rise to

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<sup>565</sup> Bennett *op. cit.*, at p. 277.

<sup>566</sup> *Ibid.*, citing N.J. Van Warmelo & W.M.D. Phophi *Venda Laws* Pretoria, Government Printer, 1948, Part 3 pp. 633-639.

<sup>567</sup> See T.W. Bennett *Human Rights and African Customary law Under the South African Constitution*, Cape Town, Juta & Co., 1995 at p. 125.

<sup>568</sup> The giving of *Lobolo* is seen as the provision of security for this eventuality. See Bennett *Sourcebook of African Customary law... op. cit.* at p. 275.

calls for legislative intervention to reflect the socio-economic changes in South Africa.<sup>569</sup>

**(iii) “Converted” customary marriages<sup>570</sup>**

The inferior status of the customary-law wife may be enhanced by her husband marrying her again in a civil marriage, provided the husband is not also a partner in a subsisting customary “union” with another woman.<sup>571</sup> Their potentially polygynous union is “converted” into a monogamous one with its attendant incidents. The proprietary consequences of such a marriage were, by s. 22(6) of the Black Administration Act 38 of 1927 (before it was repealed in 1988 by

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<sup>569</sup> See Law Commission’s Report, Project 90 *op. cit.*, para. 6.2.1.7 and T.W. Bennett “The compatibility of African customary law and human rights” (1991) *Acta Juridica* 18 at pp. 26-27.

<sup>570</sup> The phrase “to convert” has many meanings. See *Stroud’s Judicial Dictionary* 5<sup>th</sup> ed. by J.S. James, London, Sweet & Maxwell, 1986 vol. 1. In the context of the text, it is used to mean “to make new”.

<sup>571</sup> S. 22(1) of the Black Administration Act 38 of 1927 as amended by s. 1 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 allows this type of second marriage. Otherwise, by s. 22(2) no person who is married according to customary law “shall be competent” to enter into a civil marriage while the customary “union” subsists. See also pp. 168-169 *supra*.

Marriage and Matrimonial Property Act),<sup>572</sup> complete separation of property with the marital power.<sup>573</sup> Community of property could be introduced by declaration within one month prior to the marriage only if the man was not a partner in a customary "union" with another woman.<sup>574</sup> After the commencement of the 1988 Act (2<sup>nd</sup> December 1988), all civil marriages between Blacks are automatically in community of property and of profit and loss. Marriage by antenuptial contract produces separation of property with the accrual system unless expressly excluded.<sup>575</sup> The patrimonial consequences of this "conversion" of the customary marriage are the same as those described under the various civil-marriage regimes above.

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<sup>572</sup> See s. 1(e) of the Act.

<sup>573</sup> See p. 168-169 *supra*.

<sup>574</sup> *Ibid.*

<sup>575</sup> See s. 2 of Act 88 of 1984.

## (b) Customary-law marriage under the Recognition of Customary Marriages Act 1998

The catalyst for the enactment of the Recognition of Customary Marriages Act 120 of 1998 was the Law Commission's Report on customary marriages.<sup>576</sup> The Act was assented to by the State President on the 20<sup>th</sup> of November 1998 and came into effect on the 15<sup>th</sup> of November 2000.<sup>577</sup> The Commission recommended, *inter alia*, that customary marriages must be fully recognised, that is, be put on an equal footing with civil marriages.<sup>578</sup> This has been done by s. 2 of the Act.<sup>579</sup> Also, equal status

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<sup>576</sup> See Project 90 *op cit.* especially Annexure A where a draft Bill is set out. However, the Act differs markedly in many respects from that draft Bill.

<sup>577</sup> See Proclamation No. 66 of 2000, Government Gazette 21700 of 1<sup>st</sup> November 2000.

<sup>578</sup> *Ibid.* para. 3.1.13.

<sup>579</sup> The section provides that a valid marriage at customary law existing at the commencement of the Act and one entered into after the commencement of the Act are for all purposes recognized as a marriage. See generally Cronje & Heaton *op. cit.*, Chap. 12.

and capacity is given to the spouses, thus enhancing the hitherto inferior status of the customary-law wife.<sup>580</sup>

**(i) Proprietary consequences of customary-law marriage under the Act**

S. 7 of the Act is of particular relevance to this study. That section provides that the proprietary consequences of all customary marriages entered into prior to the commencement of the Act will continue to be governed by customary law<sup>581</sup> whilst those pertaining to monogamous marriages entered into after the commencement of the Act will be in community of property unless community is specifically excluded by antenuptial contract. Interestingly, the latter position is the same as that in civil marriages but it does not seem that the rationale is to unify the law

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<sup>580</sup> See s. 6 of the Act which provides that a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law. See also Cronje & Heaton *op. cit.*, at pp. 235-236.

<sup>581</sup> See pp. 250-253 *supra*.

relating to civil and customary marriages.<sup>582</sup> Parties to a monogamous customary marriage entered into before the commencement of the Act are given the opportunity to change their matrimonial property system.<sup>583</sup> Spouses who marry after the coming into operation of the Act may also change their matrimonial property system by complying with the requirements and procedure laid down in s. 21(1) of the Matrimonial Property Act 1984, provided the husband does not have more than one wife.<sup>584</sup>

Under s. 7(6) of the Act, a husband who is a party to an existing customary marriage and who wishes to enter into a further customary marriage with another woman after the commencement of the Act, must make an application to the High Court to approve a written contract which will regulate the future matrimonial property system of his marriages.<sup>585</sup> When considering such an application, the court must, if the

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<sup>582</sup> See para. 6.3.4.22 of the Law Commission's Report.

<sup>583</sup> See s. 7(4) of the Act. The change is effected by way of a court application similar to s. 21(1) of the Matrimonial Property Act 88 of 1984.

<sup>584</sup> See s. 7(5) of the Act.

<sup>585</sup> On the selection of the available matrimonial property systems for the proposed marriage, see Cronje & Heaton *op. cit.*, at pp. 234-235.

existing marriage is in community of property or subject to the accrual system, terminate the matrimonial property system which is applicable to the marriage and effect a division of the matrimonial property.<sup>586</sup> The court is further obliged to ensure an equitable distribution of the property and to take into account all the relevant circumstances of the family groups which would be affected if the application is granted. All persons having sufficient interest, (in particular the wives), must be joined in the proceedings.<sup>587</sup>

The court may allow amendments to the terms of the contract, grant the order subject to any condition it may deem just or refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.<sup>588</sup>

A question that may be relevant in this context will be whether the court may allow different matrimonial property systems to operate in the various marriages of one man? Submissions to the Law Commission on

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<sup>586</sup> See s. 7(7)(a) of Act 120 of 1998.

<sup>587</sup> See s. 7(8) of Act 120 of 1998.

<sup>588</sup> See s. 7(7)(b) of Act 120 of 1998.

this issue were diverse<sup>589</sup> but they raised the possibility of different matrimonial property systems applying to the various marriages of a man.<sup>590</sup> However, the provisions of s. 7(6) of the Act do not lend themselves to multifarious matrimonial property systems. The subsection provides that the contract approved in terms of the subsection “*will regulate the future matrimonial property system of his marriages*”. Thus, only a single matrimonial property system is envisaged under the subsection.<sup>591</sup>

## (ii) Proprietary rights of spouses on divorce

A court granting a decree of divorce in respect of a customary marriage has generally the same powers to regulate the consequences of the dissolution as a court granting a decree of divorce in respect of a civil

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<sup>589</sup> See paras. 6.3.4.15- 6.3.4.16 of its Report *op. cit.*

<sup>590</sup> See for example the views expressed at the Legal Profession Workshop reported in para. 6.3.4.15 of the Report to the effect that only the first marriage should be in community; subsequent marriages should be out of community. The rationale of this approach was said to be that only the first wife may have had expectations of monogamy. Subsequent wives would be aware of the type of union they were contracting.

<sup>591</sup> See Cronje & Heaton *op. cit.*, at pp. 233-234.

marriage under the Divorce Act 70 of 1979.<sup>592</sup> However, in exercising these powers a distinction seems to be drawn between polygynous customary marriages and monogamous customary marriages. In the case where the decree of divorce is granted in a marriage of a man who is a spouse in more than one customary marriage, s. 8(4)(b) of the Act requires the court to take all relevant factors (including specifically whether the spouses have changed their matrimonial property system during the marriage<sup>593</sup> and, if the husband entered into another customary marriage after the coming into operation of the Act, what order the court made in respect of the matrimonial property system applicable to his marriages) into consideration and to make any equitable order that it deems just. Thus, by this provision, the court can exercise discretion in distributing the assets of the parties to a polygynous customary marriage but cannot do so where the customary marriage is a monogamous one. This creates an anomaly especially if one takes into account the fact that the court does not have this discretion in dissolving civil marriages unless they were entered into subject to complete separation of property before

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<sup>592</sup> See s. 8(4)(a) of the 1998 Act.

<sup>593</sup> See notes 536 and 537 *supra*.

1<sup>st</sup> November 1984,<sup>594</sup> or 2<sup>nd</sup> December 1988<sup>595</sup> in the case of Black couples.<sup>596</sup>

**(iii) “Converted” customary marriages**

It was pointed out above that it was possible for parties to a customary marriage to “convert” their marriage into a civil one.<sup>597</sup> This conversion is also available under s. 10(1) of the Act. This section provides that spouses who are parties to a customary marriage may not later enter into a civil marriage except with each other and before they can enter into a civil marriage with each other, the husband’s other customary marriages (if any) must first be dissolved.<sup>598</sup> Parties to a civil marriage are not

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<sup>594</sup> The date of commencement of the Matrimonial Property Act 88 of 1984.

<sup>595</sup> The date of commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

<sup>596</sup> See Cronje & Heaton *op. cit.*, at p. 227. On the exercise of the court’s discretion to redistribute the assets of spouses in a civil marriages see pp. 207-226 *supra*.

<sup>597</sup> See pp. 255-256 *supra*.

<sup>598</sup> As read with s. 3(2). The provisions of ss. 10(1) and 3(2) are similar to ss. 22(1) and (2) of the Black Administration Act 38 of 1927, which governed the position until 15<sup>th</sup> November 2000 when the Recognition of Customary

permitted to convert such a marriage into a customary one.<sup>599</sup> The conversion therefore, is only from a polygynous or potentially polygynous marriage to that of a monogamous one.

Furthermore, s. 10(2) provides that when a marriage is concluded as contemplated in subsection (1), the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract. This means that the provisions of the Matrimonial Property Act 1984<sup>600</sup> relating to joint administration of the joint estate,<sup>601</sup> litigation by or against a spouse who is married in community of property,<sup>602</sup> damages for non-patrimonial loss incurred or

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Marriages Act came into operation. See Sinclair assisted by Heaton *op. cit.*, at pp. 222-223 for a discussion on the effect of ss. 22(1) and (2) of the Black Administration Act.

<sup>599</sup> S. 10(4) of the Act.

<sup>600</sup> See s. 10(3) of the Act.

<sup>601</sup> See s. 14 of the 1984 Act.

<sup>602</sup> See s. 17 of the 1984 Act.

recovered by such spouse,<sup>603</sup> the spouses' delictual liability<sup>604</sup> and the statutory protective measures one spouse can employ against the other<sup>605</sup> apply to the marriage.

The provisions of s. 10 have been criticised as not being adequate to regulate the consequences of a conversion of a customary marriage into a civil marriage.<sup>606</sup> It is asserted that the purported rationale behind s. 10(2)<sup>607</sup>, namely, to ensure that there is no implication that the customary marriage is superceded by a civil marriage when the parties have contracted both, and that the parties in such a situation are merely converting from one set of consequences to another, is not adequately addressed by the subsection.<sup>608</sup> Questions, such as, does the "conversion" mean that the customary marriage continues to exist with the result that the spouses are simultaneously married according to two systems of law?

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603 *Ibid.*

604 See s. 19 of the 1984 Act.

605 See s. 16 of the 1984 Act.

606 See Cronje & Heaton *op. cit.*, at pp.236-237.

607 See Cronje & Heaton *op. cit.*, at p. 237.

608 *Ibid.*

are left unanswered by the provisions of s. 10. The following solution is offered for this unsatisfactory situation.<sup>609</sup> The wording of s. 10(2) reveals that customary law applies in respect of the proprietary consequences before the date of the civil marriage and that the provisions of s. 10(2) apply only as from the date of the civil marriage. The reasoning given for this solution is that the subsection prescribes the matrimonial property consequences in “*the marriage*” “[w]hen a marriage is concluded as contemplated in subsection (1)”. S. 10(1) governs the capacity of the spouses who are married at customary law to “*contract a marriage with each other under the Marriage Act*”, that is, their capacity to conclude a civil marriage. S. 10(2) therefore only deals with the consequences of the civil marriage. Thus, all assets acquired before the civil marriage will still be governed by the customary-law principles of family and house property while assets acquired from the date of the civil marriage fall into the joint estate and will be controlled by the spouses, subject to the limitation imposed by the Matrimonial Property Act.

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<sup>609</sup>See Cronje & Heaton *op. cit.*, at p. 237-238.

It is submitted that an alternative solution will be to treat the civil marriage as having superceded the customary marriage. This will be the outcome of drawing an inference from the fact that since no special procedure is specified for the conversion of the marriage, the same procedure for contracting a civil marriage will be used for the purpose of conversion. It is therefore legitimate to infer that s. 10(1) contemplates that the second marriage is to be regarded as a new one despite the professed intention to the contrary. Under s. 30(1) of the Marriage Act 25 of 1961, the prescribed marriage formula must be adhered to in all civil marriages. Before the marriage officer declares the parties to be married, he is required to address them as follows:

*“Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?”*

If the answer to the question is in the affirmative, then the marriage officer shall declare the marriage solemnised in the following words:

*“I declare that A.B. and C.D. here present have been lawfully married”.*

Thus, the general formula for the solemnisation of the civil marriage does not acknowledge the existence of a prior customary marriage<sup>610</sup> and the compliance with the statutory requirements is sufficient in itself to constitute a civil marriage independently of the pre-existing customary marriage. Consequently, it is submitted that the civil marriage creates a marriage *de novo* and the pre-existing customary marriage is superceded by this new marriage and therefore only the community of property regime should govern the civil marriage. This conclusion accord with judicial attitude to similar problems raised by Marriage Acts in Ghana and Nigeria.<sup>611</sup>

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<sup>610</sup> Cf. s. 9 of the Kenya African Marriage Ordinance (1962 Rev.) which provides as follows: *“Do I understand that you A.B. and you C.D., have been heretobefore married to each other by native law and custom, and that you come here for the purpose of binding yourself to each other as man and wife so long as both of you shall live?”* This formula duly acknowledges the pre-existing customary marriage.

<sup>611</sup> See s. 14(4) of the Ghana Marriage Ordinance 1884 which permits conversion of a customary marriage into a civil marriage and the case of *Graham v. Graham* [1965] G.L.R. 407. See also W.C.E. Daniels “Marital family law and social policy” in *Essays in Ghanaian Law*, Legon, Faculty of Law, University of Ghana, 1976 at pp. 104-105 and K.O. Adinkrah “Ghana’s Marriage Ordinance: An inquiry into a legal transplant for social

One may concede though that treating the second marriage as a marriage *de novo* may give rise to the impression that the pre-existing customary marriage does not create a status. The full recognition of customary marriages under the 1998 Act gives spouses of such marriages the same status of “married persons” as is given to spouses of a civil marriage. The question then will be asked: Why should couples already possessing the status of married persons seek to acquire the same status by marrying again under the Marriage Act? To answer this question one may have to adapt the meaning of “convert” from “making new” to one of “change of user” or “structural alteration”<sup>612</sup> of the pre-existing customary marriage. In terms of this meaning, the parties to the pre-existing customary marriage should be treated as married persons for the purpose of the second, civil marriage. The only change that comes about as a

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change” (1980) 18 *African Law Studies* 1 at pp. 17-18. In Nigeria s. 33 of the Marriage Act 1914 allows conversion of a customary marriage into a civil marriage. In *Ohochuku v. Ohochuku* [1960] 1 All E.R. 253, an English court accepted expert evidence on Nigerian law from the eminent Nigerian jurist, Dr. T.O. Elias, that when a customary marriage is converted into a civil marriage, the latter marriage supercedes the former. The case was however, decided on a different ground. See also pp. 426-428 and note 1045 *infra*.

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See W.C.E. Daniels “Towards the integration of the laws relating to husband and wife in Ghana” in *Integration of Customary and Modern Legal Systems in Africa*, New York & Ile Ife, African Publishing Co & University of Ife Press, 1964, 352 at pp. 361-362.

consequence of the civil marriage is a change of user or a structural alteration of the pre-existing customary marriage.<sup>613</sup> Accordingly, the status created by the customary marriage becomes merged in the status offered by the civil marriage whilst the matrimonial consequences of the civil marriage will do the same with those of the customary marriage. The customary marriage will thereby cease to exist and so, a decree of divorce granted in respect of the subsequent civil marriage, for instance, will be sufficient to terminate the spouses' status as "married persons".

#### **(iv) Customary law and the Constitution**

The constitutional apportionment of legislative competence between the National Assembly and the Provincial Assemblies has been stated to have created some uncertainty about the future of customary law.<sup>614</sup> Legislation concerning customary law is under the concurrent competence of the National and Provincial Assemblies under Schedule four of the Constitution. It is therefore conceivable that both legislatures may enact

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<sup>613</sup> *Ibid.*

<sup>614</sup> See Sinclair assisted by Heaton *op. cit.*, at p. 161. Ss. 44(1) and 104(1) of the Constitution confer legislative competence on the National and Provincial Assemblies respectively.

legislation covering the same matter giving rise to possible conflicts. S. 146 of the 1996 Constitution does provide a solution to this situation. It provides that where there is a conflict between national and provincial legislation falling within a functional area listed in Schedule four, the national legislation which applies uniformly over the whole country shall prevail provided, *inter alia*, that the national legislation deals with a matter that cannot be regulated effectively by legislation enacted by respective provinces individually.<sup>615</sup> Thus, a statute such as the Recognition of Customary Marriages Act 1998, will come within the provision of s. 146 in that it deals with the recognition of customary marriages, marriages which may be entered into by persons who do not necessarily live in a single province. Consequently, with the enactment of the 1998 Act a Provincial Assembly cannot enact a law which covers the same subject matter as that covered by the 1998 Act.

It is conceivable that the constitutionality of the recognition afforded by the 1998 Act to customary marriages may be raised. S. 15(3) of the Constitution allows legislation to be made recognising marriages concluded under any tradition or system of religious, personal and family

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<sup>615</sup> S. 146(2)(a) of the Constitution.

law. In addition legislation may also recognise systems of personal and family law under tradition or religion. There is no doubt that the Act falls within the ambit of s. 15(3) of the Constitution. What is doubtful is whether the said section clothes it with immunity from constitutional challenge. Since the provisions of s. 15(3) are qualified to the extent that they should be consistent with the provisions of s. 15(1) (the section guaranteeing, *inter alia*, freedom of religion, belief and opinion) and other provisions of the Constitution,<sup>616</sup> the answer seems to be that the Act is not immune from constitutional challenge.<sup>617</sup> It is possible that such a challenge may be mounted against the Act on the ground, for example, that it infringes the sex and gender provisions of the Constitution<sup>618</sup> in that customary law marriages require the payment of “*lobolo*”.<sup>619</sup>

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<sup>616</sup> See s. 15(3)(b) of the Constitution. S. 15(3) is said to read more naturally as an immunization of certain practices from constitutional attack but in view of s. 15(3)(b) this is unlikely to be achieved. See N. Smith “Freedom of religion under the final Constitution” (1997) 114 *South African Law Journal* 217 at p. 222.

<sup>617</sup> See Cronje & Heaton *op. cit.*, at p. 240.

<sup>618</sup> See s. 9(3) of the Constitution.

<sup>619</sup> For a definition of this term, see note 546 *supra*. There is however, no unanimous agreement about the answer to the question whether “*lobolo*” unfairly discriminates against women. On this lack of unanimity, see Cronje & Heaton *op. cit.*, at p. 239 and the *South African Law Commission Report*

Another aspect of customary marriage which may also raise a constitutional issue on the ground of discrimination is the practice of polygyny. The question whether this practice discriminates against women has attracted the attention of various commentators.<sup>620</sup> It has been asserted that the mere fact that the husband is permitted to take more than one wife but the wife is not permitted to take more than one husband means that there is no formal equality in polygyny.<sup>621</sup> However, in the

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*op. cit.*, at paras. 4.3.2.6 and 4.3.2.7.

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See Cronje & Heaton *op. cit.*, at pp. 238-239, Sinclair assisted by Heaton *op. cit.*, at pp. 164-169, A. Sachs *Protecting Human Rights in a New South Africa* Cape Town, Oxford University Press, 1990 at p. 64, J.C. Bekker "Interaction between constitutional reform and family law (1991) *Acta Juridica* 1, T.W. Bennett "The compatibility of African customary law and human rights" (1991) *Acta Juridica* 18, F. Kaganas & C. Murray "Law, women and family: The question of polygyny in a New South Africa" (1991) *Acta Juridica* 116, J. Sinclair "Family Law" in *Constitutional Law of South Africa*, Chaskalson *et al* (eds.), Cape Town, Juta & Co. 1996 at para. 34-10-34-11 and I.P. Maithufi "Customary law of marriage and a bill of rights in South Africa: Quo vadis?" (1996) *Journal of Contemporary Roman-Dutch Law/Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 298.

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See Cronje & Heaton *op. cit.*, at p. 238. The learned authors distinguish between formal and real or substantive equality. According to them, formal equality presupposes that all persons are essentially in the same position and that discrimination between the sexes can be eradicated by the removal of express discrimination based on sex or gender. Real or substantive equality, on the other hand, presupposes an acknowledgment that mere removal of formal discrimination is insufficient to achieve equality of outcome. They conclude that the object of real equality is to achieve effective equality

as has been stated by a commentator,<sup>624</sup> African customary law is to take an honoured position within South African jurisprudence, it must continuously undergo revitalisation and development in the same manner as does Roman-Dutch law. Hopefully, the legal recognition given to customary marriages under the 1998 Act is a significant step on the road to such revitalisation and development which will in turn lead to a change of the “Cinderella” image of customary law in general and customary-law marriages in particular. Such recognition brings not only respect for the African legal tradition but also an improvement in the position of women and children, two groups previously disadvantaged by the traditional customary-law regime.<sup>625</sup>

## 5. CONCLUSION

A striking characteristic of the matrimonial property regimes governing civil marriages in South Africa is that they provide two extreme points in a range of options linked by a bridge. On the one hand, the community

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<sup>624</sup> W. Van der Meide “Gender equality v. right to culture: Debunking the perceived conflicts preventing the reform of the marital property regime of the ‘official version’ of customary law” (1999) 116 *South African Law Journal* 100.

<sup>625</sup> See para. 2.1.5 of the Report.

of property and, on the other, the contractual alternative of complete separation of property. The bridge linking these two extreme points is the accrual system. The Matrimonial Property Act 1984, as subsequently amended, has provided improvements in the matrimonial property regimes but each regime still has some disadvantage attached to it. To adapt an observation made by a commentator,<sup>626</sup> the 1984 Act is only a half-way mark towards a legal facilitation of a genuine parity and financial security for all married couples, especially wives. There is therefore a need for further reform of aspects of the present regimes. One has in mind, particularly, the unsatisfactory protection afforded to spouses whose marriages are governed by the accrual system in protecting their rights to share in the accrual of each other's estate, the non-extension of the court's discretion to redistribute assets on divorce to marriages out of community of property entered into after 1984, the overprotection of third parties in transactions conducted by a spouse married in community of property without the requisite consent and the continuance of the right of a spouse, on divorce, to demand forfeiture of benefits against his or her spouse. As far as the customary-law marriage is concerned, the recognition of this type of marriage and the equalisation of its

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See Zaal *op. cit.*, at p. 69.

consequences with that of a civil marriage is a welcome development. This has made South African matrimonial law all inclusive as married couples, irrespective of race, will generally be able to have the same matrimonial consequences apply to their marriage irrespective of whether they choose to contract a customary or a civil marriage.

**CHAPTER FIVE**  
**AN OVERVIEW OF THE MATRIMONIAL PROPERTY**  
**REGIME IN ENGLAND**

**1. INTRODUCTION**

*“There is really no such thing in English law as ‘family property’. We have a very elaborate law of property, but the family, though a social unit of great importance and recognised as such by the law, is not an entity that is given rights or even defined: it has failed to attract rights and duties comparable with those of an individual human being, a company, or a partnership. And so it is not surprising that English ‘family property law’ is hardly more than a label given to the hesitant moves made by Parliament during the last hundred years to eliminate the grosser injustices inflicted by the common law upon married women in property matters”.*<sup>627</sup>

This extract from the English Law Commission's Working Paper on family property precisely sums up English law's attitude to matrimonial property. The current law on matrimonial property can only be properly understood with its historical background in mind. Consequently, a brief historical background will be given.

## 2. HISTORICAL BACKGROUND

The development of English matrimonial property law has been said to be a story of "*compromise and failure; of successive attempts of salvage from a shipwrecked vessel; or (to change the metaphor) groping in the dark.*"<sup>628</sup> The story began with the insistence of the common law that on marriage, husband and wife become one. In the words of the eminent jurist, Blackstone, "*the very being or legal existence of the woman is suspended during the marriage, or at least incorporated into that of the husband.*"<sup>629</sup> This position, though fictitious, had wide ramifications. For

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<sup>628</sup> See M.D.A. Freeman "Towards a rational reconstruction of family property law" in (1972) *Current Legal Problems* 84 at p. 85.

<sup>629</sup> *Commentaries on the Laws of England* (4<sup>th</sup>. ed. 1770) at p. 442. For a historical sketch of the origins and development of the doctrine of unity of husband and wife, see *Midland Bank Trust Co. Ltd. & Anor. v. Green & Anor. (No. 3)* [1979] Ch. 496 at p. 510 *et seq.* On the historical development of matrimonial rights between spouses, see S.M. Cretney *Principles of*

example, the wife's personal property, except her clothes and personal ornaments, as well as her income vested in her husband on marriage. The law regarded husband and wife as one and that one was the husband.<sup>630</sup> This system was described as resting "on the doctrine of what is mine is yours, but what is yours is not mine..."<sup>631</sup> However, despite its apparent unfairness, it has been argued that, based as it was on a land-owning society, there were special built-in rules to mitigate the consequences of a rigid application of the unity of spouses.<sup>632</sup> In fact equity<sup>633</sup> developed a system whereby a transfer of property at any time to trustees to hold for the wife's "separate use" would prevent any interest in that property from

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*Family Law* (4<sup>th</sup> ed.) London, Sweet & Maxwell, 1984 at pp. 629-634 and the literature referred to in the notes therein and P.M. Bromley *Family Law* (6<sup>th</sup> ed.) London, Butterworths, 1981 at Chap. 13.

<sup>630</sup> See *Williams & Glyn's Bank Ltd. v. Boland* [1979] Ch. 312 at p. 332 *per* Lord Denning M.R.

<sup>631</sup> See J.S. Mill *The Subjection of Women* Everyman's Library ed. 1869 at p. 263.

<sup>632</sup> See Cretney (4<sup>th</sup> ed.) *op. cit.*, at p. 630.

<sup>633</sup> A system developed by the old Court of Chancery prior to the Judicature Act 1873 to ameliorate the rigidity of the common law. For a fuller account of the development of equity see Sir William Holdsworth *History of English Law* Vol. 1 (3<sup>rd</sup> Impression 1978) London, Sweet & Maxwell, 1924, at pp. 395 *et seq.*

vesting in the husband. The wife retained in equity the same right of holding and disposing of the property as if she was a *feme sole*, an unmarried woman.<sup>634</sup> Accordingly, a prudent parent would ensure that a proper settlement was made on marriage, securing first that his daughter's existing property was held for her separate use, and secondly that any after-acquired property would be so held.

After a long agitation<sup>635</sup> for separate property for the wife, the Married Women's Property Act<sup>636</sup> was passed in 1870. This Act provided a number of specified cases (for example, her earnings, deposits in savings banks, stocks and shares) in which property acquired by the wife were deemed to be held for her separate use. This clumsy half-measure<sup>637</sup> was repealed by the Married Women's Property Act 1882.<sup>638</sup> The combined

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<sup>634</sup> See Holdsworth *op. cit.*, vol. V at pp. 310-315.

<sup>635</sup> See Cretney (4<sup>th</sup> ed.) *op. cit.*, at pp. 631-634 and Freeman *op. cit.*, at pp. 85-87.

<sup>636</sup> 33 & 34 Vict. c. 93.

<sup>637</sup> See Freeman *op. cit.*, at p. 85.

<sup>638</sup> 45 & 46 Vict. c. 75. There were further Married Women Property Acts in 1884, 1893, 1907 and 1908. These statutes did not effect any change of principle but were passed to clear up a number of difficulties, ambiguities and one or two gaps left in the 1882 Act.

effect of sections 2 and 5 of the 1882 Act were that any woman marrying after 1882 was entitled to retain, as her separate property, all property she owned at the time of the marriage as well as all property she acquired during the marriage and that, regardless of when she married, any property acquired by a married woman after 1882 was held by her in the same way. The detailed provisions of the Act are too complex to be discussed here, except to state that, subject to the restraint on anticipation,<sup>639</sup> a married woman's capacity to hold and dispose of property was very nearly the same as that of a *feme sole*. The Law Reform (Married Women and Tortfeasors) Act 1935<sup>640</sup> completed the emancipation of the married woman by abolishing the concept of the "*separate property*" as introduced by the 1882 Act. The 1935 Act gave

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<sup>639</sup> This was a conveyancing device, inserted in marriage settlements, to stop a wife getting control of anything beyond the current income of the property held by trustees for her separate use. It prevented her from selling, mortgaging or giving away the property which was thus preserved intact, usually for the wife's family. In equity she was owner of the property and any instruction given by her to the trustees to transfer the property to a third party was to be obeyed. Thus the device was to prevent the married woman from transferring such property to her husband at his instigation. See further, W.G. Hart "The origin of the restraint upon anticipation" (1924) 40 *Law Quarterly Review* 221. Restraint upon anticipation was finally abolished in 1949 by the Married Women (Restraint upon Anticipation) Act 1949.

<sup>640</sup> 25 & 26 Geo. 5, c. 30.

the wife the same rights and powers as were already possessed by other adults of full legal capacity.<sup>641</sup> But as will be clear from the discussions below, the legal position of married women was far from satisfactory.

### 3. THE CURRENT LAW

The underlying principle of English matrimonial property law is that marriage under English law has no effect on the property of the spouses, that each retains what he or she had at the time of the marriage or acquires during the marriage, that each can freely dispose of that property, and that each has full and unrestricted right to the income derived from it.<sup>642</sup> The

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<sup>641</sup> See ss. 1(a) and 2(1) of the Act. Doubts have been expressed about the efficacy of the 1882 Act. See for example, Freeman *op. cit.* at p. 85 who opines that, with the exception of s. 17, the teeth of which were extracted by the House of Lords in *Pettitt's* case, the Act is not really remembered. The said s. 17 gave power to a judge to "make such order...as he thinks fit" where any question arose between husband and wife as to the title to or possession of property. It was claimed that this gave the court a free hand to do what was just. But in *Pettitt v. Pettitt op. cit.* the House of Lords held that the section was purely procedural. The task of the court was to ascertain the rights of the parties and it had no power to vary established rights. The question was "Whose is this?" and not "To whom shall this be given?" per Lord Morris at p. 798.

<sup>642</sup> See Freeman *op. cit.*, at pp. 85-86, Law Commission Working Paper No. 42 *op. cit.*, at para. 0.9, Miller *op. cit.*, at Chap. 2 and Cretney (4<sup>th</sup> ed.) *op. cit.*, at p. 633.

acceptance of the principle of separate property led to a situation where there is no longer “*one law of property applicable where a dispute as to property is between spouses or former spouses and another law of property where the dispute is between others*”.<sup>643</sup> A wife who wants to claim a share in her husband’s property thus has to base her claim on some recognised principle of property law. She can only do so if someone who has never been married to the husband can equally do so. In the words of Lord Upjohn:

*“The rights of the parties [to a marriage] must be judged on the general principles applicable in any court of law when considering questions of title, and though the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims between those not so related, while making full allowances in view of the relationship.”*<sup>644</sup>

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<sup>643</sup> *Per* Viscount Dilhorne *Gissing v. Gissing op. cit.*, at p. 899. See also the *dicta* in *Pettitt v. Pettitt op. cit.*, at p. 803 *per* Lord Morris, at p. 813 *per* Lord Upjohn, and at p. 821 *per* Lord Diplock.

<sup>644</sup> *Pettitt v. Pettitt op. cit.*, at p. 813. See also *per* Lord Morris at p. 803 and *per* Lord Diplock at p. 821.

There are formidable obstacles in the way of a wife who seeks to make such a claim. For instance, if the deed of conveyance of the matrimonial home is taken in the husband's name, the wife can make no claim to be entitled to the legal estate in the absence of any subsequent conveyance to her.<sup>645</sup> Furthermore, no interest in land can be created or disposed of except by a signed written document.<sup>646</sup> Thus, if a husband verbally tells his wife that she has a share in the matrimonial home which is in his sole name, this is insufficient to confer a share on her. In the leading case of *Gissing v. Gissing*,<sup>647</sup> the husband said to the wife "*Don't worry about the house - it's yours. I will pay the mortgage payments and all other outgoings.*" This promise was held by the House of Lords to be ineffective at law since there was no deed which could displace the legal estate, and no written document which could give her any other interest.

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<sup>645</sup> This is as a result of s. 52 of the Law of Property Act 1925 (15 & 16 Geo. 5, c. 20) which stipulates that a deed is required to convey or create any legal estate in land.

<sup>646</sup> See s. 53 of the Law of Property Act 1925.

<sup>647</sup> *Supra.*

Thus, it became a paradox that a system which was created to further married women's rights was perpetrating serious injustice to them.<sup>648</sup> It had become out of touch with the contemporary reality, a reality in which most families practice community rather than separation of property. For instance, the matrimonial home, around which most disputes are centred, is purchased in joint names from savings in joint bank accounts. Household furniture and other goods are regarded as "ours" rather than "yours" or "mine".<sup>649</sup> There was therefore the need to adjust the system to the realities of contemporary conjugal roles. The courts resorted to the trust concept in order to bring about this adjustment.

In terms of s. 53 (2) of the Law of Property Act 1925 the legal rules for the creation of the legal estate or other interest in land do not affect the "*creation or operation of resulting, implied or constructive trusts*". In the absence of a signed written document as required by s. 53 (1) of the 1925 Act, a spouse may therefore be able to establish a claim under these equitable doctrines, which are based on the underlying principle that it would in the circumstances be unconscionable to allow the legal owner

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<sup>648</sup> See Cretney (4<sup>th</sup> ed.) *op. cit.*, at p. 633.

<sup>649</sup> See Freeman *op. cit.*, at p. 87.

to continue to assert the absolute ownership which appears on the title documents to be his.<sup>650</sup> However, the courts' attempt at modernising the system has been "*unsystematic, haphazard, partial and uncertain of conclusion*".<sup>651</sup> This situation prompted Mustill L.J. to remark in *Grant v. Edwards*<sup>652</sup> that the time had not yet "*arrived when it is possible to state the law in a way which will deal with all the practical problems which may arise in this difficult field, consistently with everything said in the cases.*" The equitable principles relied upon by the courts in trying to redress the injustice created by the separate property principle can be grouped under two main headings:

(a) cases in which a common intention is imputed to the parties to share the equitable ownership; and

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<sup>650</sup> See *Winkworth v. Edward Baron Development Co. Ltd.* [1987] 1 All E.R. 114 at p. 118 *per* Lord Templeman.

<sup>651</sup> *Per* Lord Simon in an extrajudicial lecture to the Holdsworth Club in Birmingham in 1964 titled "With all my worldly goods...." at p. 16 cited by Freeman *op. cit.*, at p. 87.

<sup>652</sup> [1986] 1 All E.R. 426 at p. 435.

(b) cases where there is evidence of an express but informal promise made by one party to the other that the other shall have a share in the property.<sup>653</sup>

The principles underlying the cases falling under the two groups used to be treated differently. Those falling under (a) used to be referred to as cases of implied/resulting trust and those under (b) as cases of constructive trust.<sup>654</sup> There have recently been some attempts in academic<sup>655</sup> and judicial circles<sup>656</sup> however, to treat them as having become essentially indistinguishable and referring to both as examples of

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<sup>653</sup> See J. Dewar *Law and the Family*, (2<sup>nd</sup> ed.) London, Butterworths, 1992 at p. 185.

<sup>654</sup> *Ibid.*

<sup>655</sup> E.g. D.J. Hayton "Equitable rights of cohabittees" [1990] *Conveyancer* 370 at p. 378.

<sup>656</sup> See Browne-Wilkinson V.-C. in *Grant v. Edwards* [1986] 2 All E.R. 426 at pp. 437-440 and Lord Bridge in *Lloyds Bank Plc v. Rosset* [1991] 1 A.C. 107 at pp. 132E-133A. It has been noted that in the latter case, Lord Bridge may have assumed that there was no question of a resulting trust in the traditional sense arising on the facts. See J. Dewar *op. cit.*, at p. 185 note 12.

constructive trust.<sup>657</sup> For the purpose of clarity, the traditional distinction between the principles will be maintained in this discussion.

**(a) Imputed common intention: Implied/Resulting Trust**

Where there is no evidence of an express agreement between the parties concerning the ownership of the property, the court will impute an intention to the parties to share the equitable (beneficial) ownership where it is reasonable to do so.<sup>658</sup> The court will scrutinise all the available evidence, especially contributions which have been made by each party in cash, kind or services in order to obtain some clue as to the parties' "*unexpressed and probably unconsidered intentions as to the beneficial ownership...*"<sup>659</sup> This search for what has been described as the "*fugitive*

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<sup>657</sup> See *Lloyds Bank Plc v. Rosset*, *supra*, Hayton *op. cit.*, p. 378 note 1 and Dewar *op. cit.*, at p. 185. Cf. the views of P. Ferguson "Constructive trusts - a note of caution" (1993) *Law Quarterly Review* 114 who argues that to overlook the distinction between constructive trusts and estoppel will lead to adverse consequences. See further, D. Hayton "Constructive trusts of homes - a bold approach" (1993) 109 *Law Quarterly Review* 485.

<sup>658</sup> *Per* Lords Reid and Diplock in *Pettitt v. Pettitt* *supra*, at pp. 793 and 811 respectively.

<sup>659</sup> See *Bernard v. Joseph* *op. cit.*, at pp. 402 and 404 *per* Griffiths L.J., at p. 398 *per* Lord Denning M.R.

*common intention*<sup>660</sup> has led to an “*air of unreality*” about the exercise.<sup>661</sup> This situation notwithstanding, the court tends to regard financial contributions to the acquisition of the disputed property as sufficient grounds for imputing this intention. It will not be sufficient to show that, for example, “*a house is to be renovated as ‘joint venture’ [or] that the house is to be shared by parents and children.*”<sup>662</sup>

The type of contribution recognised by the courts as justifying the inference of a common intention may be summarised as follows.<sup>663</sup>

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<sup>660</sup> Per Dickson J. in *Pettkus v. Becker* (1980) 117 D.L.R. (3d) 257 at p. 269 (Supreme Court of Canada) cited by Waite J. in *H. v. M. (Property: Beneficial Interest)* [1992] 1 F.L.R. 229 at p. 231.

<sup>661</sup> See *Bernard v. Joseph supra* at p. 404 *per* Griffiths L.J.

<sup>662</sup> Per Lord Bridge in *Lloyd's Bank plc v. Rosset supra* at p. 130. See also *Burns v. Burns* [1984] 1 All E.R. 244, *Grant v. Edwards supra*, *Thomas v. Fuller-Brown* [1988] 1 F.L.R. 237, *Bernard v. Joseph supra*, *Pettitt v. Pettitt supra* and *Gissing v. Gissing supra*. It must be remarked that in the cases involving unmarried couples, the courts have in practice shown themselves less ready to draw inferences of a commitment to sharing.

<sup>663</sup> See Dewar *op. cit.*, at p. 186 and S.M. Cretney and J.M. Masson *Principles of Family Law* (6<sup>th</sup> ed.) Sweet & Maxwell, London, 1997 at pp. 126-154.

(a) The payment of a deposit on a house, or any other direct financial contribution to its purchase, such as the payment of mortgage instalments.<sup>664</sup> Thus, if one partner provides all or part of the purchase price of a matrimonial home conveyed into the name of the other, he or she will, in the absence of admissible evidence that some other result was intended, be entitled in equity to a share in the property proportionate to the amount of his or her contribution. This is by way of resulting trust.<sup>665</sup> In some situations the presumption of resulting trust may be rebutted by the so-called presumption of advancement,<sup>666</sup> that is, that the transferor

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<sup>664</sup> See *Pettitt v. Pettitt supra*, *Gissing v. Gissing supra*, *Burns v. Burns supra* and *Bernard v. Joseph supra*.

<sup>665</sup> See *Cowcher v. Cowcher* [1972] 1 W.L.R. 425, *Springette v. Defoe* [1992] 2 F.L.R. 388 (C.A.) and *Tinsley v. Milligan* [1994] 1 A.C. 340. Resulting trusts are classified into two types - "automatic" and "presumed". The former arises automatically whenever some or all of the beneficial interest in an expressed trust, that is, a trust created expressly by the settlor, has not been effectively exhausted. The unexhausted part is presumed to automatically revert to the original settlor. For example, where property is bought with money provided by two or more persons, it will rebuttably be presumed that they intended the property to belong to those who provided the purchase money. Accordingly, in the absence of any contrary evidence, the property is held on a resulting trust for them in shares proportionate to their contribution (see *Re Vandervell's Trusts (No. 2)* [1974] 1 All E.R. 47). It is the latter type that the text is concerned with.

<sup>666</sup> The presumption of advancement is usually implied in circumstances where a special relationship, such as husband/wife or parent/child, exists between the parties.

intends to make a gift of the property. Thus, in *Silver v. Silver*<sup>667</sup> successive dwelling-houses were purchased in the name of the wife. In each case, the property had been financed by building society mortgages, the instalments being paid entirely by the husband. It was held, at first instance and affirmed on appeal, that, on the facts, there was nothing to rebut the presumption that in having the houses put in the name of the wife and paying the mortgage instalments, the husband intended to make an advancement to the wife.

It must be remarked that the strength of the presumption of advancement between husband and wife is nowadays very weak and the court will only resort to it as a last resort.<sup>668</sup> A concerted effort will usually be made to look for the intentions of the parties from the available evidence. The presumption of advancement is rebuttable by evidence to the contrary, in which case a resulting trust is imposed. In *Loades-Carter v. Loades-*

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<sup>667</sup> [1958] 1 W.L.R. 259.

<sup>668</sup> In *Pettitt v. Pettitt supra*, two Law Lords treated the presumption of advancement as applicable but two others treated it as inappropriate for modern times. In *Harwood v. Harwood* [1991] 2 F.L.R. 274 at p. 294, Slade J. stated that the presumption must be applied with caution in modern circumstances. Thus it is a weak starting point, especially if the wife makes some contribution to a house mainly purchased by the husband in his name.

*Carter*,<sup>669</sup> a house was put in the name of the wife for the purpose of obtaining a mortgage. This was held to be sufficient evidence to rebut the presumption of advancement. The limits within which such rebuttal may be made were set by the House of Lords in *Shepherd v. Cartwright*.<sup>670</sup> The case reaffirmed the rule that evidence of subsequent acts, though not admissible in favour of the party doing the acts, is admissible against him. The rebuttal evidence must not be based on illegality, for “*he who comes to equity must come with clean hands*”. Thus in *Gascoigne v. Gascoigne*<sup>671</sup> a husband took a lease of land in his wife’s name and built a house upon it with his own money. He used the wife’s name in the transaction with her knowledge and connivance because he was in debt and was desirous of protecting the property from his creditors. In an action by him against the wife for a declaration that she held the property as trustee for him, the court held that he could not be allowed to set up his own fraudulent design as rebutting the presumption that the conveyance

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<sup>669</sup> (1996) 110 S.J. 51.

<sup>670</sup> [1995] A.C. 431.

<sup>671</sup> [1918] 1 K.B. 223. See also *Tinsley v. Milligan supra*, *Re Emery’s Investment Trusts* [1959] Ch. 410 and *Tinker v. Tinker* [1970] P. 136. In *Tribe v. Tribe* [1995] 4 All E.R. 236, the Court of Appeal held that where the illegal purpose had not been carried out, it should not have any effect on the rebuttal evidence.

was intended as a gift to her. It was further held that she was entitled to retain the property for her own use notwithstanding that she was a party to the fraud.

(b) The contribution of money to general household expenses which thereby enables the other partner to make the mortgage payments. This particular contribution has proved to be problematic. On one view, the making of such indirect contribution suffices if, but only if, either:

(i) husband and wife have consistently applied a system of meeting all expenses, including those of the house purchased, out of a common fund formed by their pooling their resources,<sup>672</sup> or

(ii) if those contributions are directly referable to the acquisition costs.<sup>673</sup> Another view is that the court may draw the inference that the parties

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<sup>672</sup> See *Cowcher v. Cowcher supra*, at p. 437.

<sup>673</sup> See *Falconer v. Falconer* [1970] 1 W.L.R. 1333.

intended joint ownership whenever there has been a substantial contribution in money or money's worth to family expenses.<sup>674</sup>

However, following the decision of *Lloyd's Bank Plc v. Rosset*<sup>675</sup> it may now be doubtful whether contribution to household expenses will qualify the contributor for a share in a house purchased by the other spouse. Lord Bridge, with whom the other Law Lords agreed, thought it was “*extremely doubtful*” whether anything less than direct contribution to the purchase price, whether initially or by mortgage instalments, will justify the necessary inference of a common intention.<sup>676</sup> In that case, the matrimonial home, a derelict farmhouse, was purchased in the sole name of the husband. The purchase money had come from the husband's family trust in Switzerland and the trustees had insisted it be purchased in his name. He paid for the renovation work. The wife, a skilled decorator and painter, made no financial contribution to the purchase, but spent all her time over a seven-week period trying to make the house

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<sup>674</sup> See *Falconer v. Falconer supra*, at p. 1336E, *Wachtel v. Wachtel supra*, at p. 838J, *Burns v. Burns supra*, at p. 252 and *Hazell v. Hazell* [1972] 1 W.L.R. 301 at p. 304.

<sup>675</sup> *Supra*.

<sup>676</sup> *Ibid.* at p. 133.

ready for occupation by Christmas. Unknown to the wife, the husband had charged the house to a bank as security for an overdraft. When the husband defaulted, the bank sought possession of the house. The wife, by way of a defence to the possession action, contended, *inter alia*, that she was entitled to a half share of the beneficial interest under a constructive trust.<sup>677</sup> The House of Lords, (*per* Lord Bridge), rejected as “*quite untenable*” the trial judge’s view that the wife’s contributions were sufficient evidence of a common intention that she should have a beneficial interest in the house. “*Considerable doubt*” was expressed as to whether such “*trifling*” contributions were capable of constituting the necessary detriment to enable the wife to acquire a share in the house. It was “*the most natural thing in the world for any wife...to spend all the time she could spare and to employ any skills she might have...in doing all she could to accelerate progress of the work...*”<sup>678</sup>

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<sup>677</sup> For a general discussion of constructive trusts, see A.W. Scott “Constructive Trusts” (1955) 71 *Law Quarterly Review* 39 and *Hayton & Marshall Commentary and Cases on the Law of Trusts and Equitable Remedies* (10<sup>th</sup> ed. by D.J. Hayton), London, Sweet & Maxwell, 1996 Chap. Six. On the evidence required for such a trust to occur, see the *dicta* of Lord Bridge in *Lloyds Bank Plc v. Rosset supra*, at pp. 132E-133A and Nourse L.J. in *Grant v. Edwards supra* at pp. 431-432.

<sup>678</sup> *Per* Lord Bridge at p. 131.

On the principle that equity will not assist a volunteer,<sup>679</sup> the finding of contribution on the part of a spouse, will not *per se* entitle him to a share in the property acquired by the other spouse. The court would have to examine the subsequent course of dealings between the parties for some evidence of conduct detrimental to the spouse without legal title referable to a reliance upon an arrangement to share the beneficial interest in the property acquired.<sup>680</sup> In other words, the spouse claiming an interest in the property acquired will have to show that he has acted on the presumed intention to his detriment. The provision of some contribution will in practice go to establish that the claimant has suffered detriment, albeit not necessarily in a way specifically referable to the acquisition of the property in question. In *Grant v. Edwards*<sup>681</sup> the claimant was told that her name was not going to go on the title because if it did, there might be problems in her then pending divorce proceedings. The Court of Appeal accepted that this fact, coupled with evidence that the parties treated the house as belonging to them both and that they had a principle of sharing

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<sup>679</sup> A "volunteer" is one who has not given valuable consideration, which may be money, marriage or the suffering of some detriment on his part. See *Re Plumtre's Marriage Settlement* [1910] 1 Ch. 609.

<sup>680</sup> See *H. v. M. (Property: Beneficial Interest)* *op. cit* at p. 231 *per* Waite J.

<sup>681</sup> *Supra*.

everything, constituted sufficient proof that she was intended to have an interest in the house. *Browne-Wilkinson V.-C.* said:

*"...once it has been shown that there was a common intention that the claimant should have an interest in the house, any act done by her to her detriment relating to the joint lives of the parties is...sufficient detriment to qualify. The acts do not have to be inherently referable to the house."*<sup>682</sup>

However, in *Midland Bank Plc v. Dobson and Dobson*<sup>683</sup> the Court of Appeal accepted that the husband and the wife had a common intention to share the beneficial interest in the matrimonial home, but the wife nonetheless failed in her claim to a beneficial interest because there was no evidence that she acted to her detriment on the basis of that intention. She had made no direct contribution to the acquisition costs or mortgage instalments, and her contributions in buying domestic equipment and decorating the house was held to be unrelated to the intention that the ownership of the house was to be shared.

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<sup>682</sup> At p. 439. See also *Jones v. Jones* [1977] 1 W.L.R. 438 and *Pascoe v. Turner* [1979] 1 W.L.R. 431.

<sup>683</sup> [1986] 1 F.L.R. 171.

The undue reliance by the courts on purely financial contributions has meant that in the absence of an express promise or agreement relating to beneficial ownership, certain types of contributions will not qualify a claimant to a share in the property acquired by another. Thus, contributions in the form of caring for children, running the household, buying clothes, furnishings or consumer durables for the family,<sup>684</sup> 'do-it-yourself' improvements to, or re-decoration of the family home,<sup>685</sup> and supervision of building works<sup>686</sup> have all been held to be insufficient to impute the necessary common intention to the parties. This situation is obviously disadvantageous to those spouses, usually wives, who give up, or who never undertake, regular full-time employment in order to discharge home care responsibilities.

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684 *Burns v. Burns supra.*

685 *Pettitt v. Pettitt and Gissing v. Gissing supra.*

686 *Lloyds Bank Plc. v. Rosset supra.*

## (b) Acquisition of interest by way of a constructive trust

The restrictive tendency of the courts to the question of what constitutes financial contribution have led claimants to rely on an alternative body of equitable doctrine, which falls under the general rubric of constructive trust<sup>687</sup> and estoppel.<sup>688</sup> As mentioned above,<sup>689</sup> there have been attempts to treat these two concepts as indistinguishable because one basic principle of unconscionability underlies them,<sup>690</sup> and that it is this principle, rather than any apparent differences remaining between them

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<sup>687</sup> A constructive trust traditionally arises when the court imposes it in a given situation irrespective of the intention, actual or imputed, of the parties. See *Gissing v. Gissing supra* at p. 905 *per* Lord Diplock.

<sup>688</sup> The doctrine of estoppel recognises that if a person incurs expenditure or does some other detrimental act in the belief, encouraged by the legal owner of property, that he already owns or is to be given some proprietary interest in a specific property, an equity will arise to have the expectations which have been encouraged, made good so far as may fairly be done between the parties. See *Taylor's Fashions Ltd. v. Liverpool Victoria Trustee Co. Ltd.* [1982] Q.B. 133 and p. 299 *infra*.

<sup>689</sup> See pp. 288-289 *supra*.

<sup>690</sup> See notes 655, 656 and 657 *supra*.

which should guide the courts in deciding cases.<sup>691</sup> In *Lloyds Bank Plc. v. Rosset*, for example, Lord Bridge set out a concise statement of the principles to be used in constructive trust cases. He said:

*"I...draw attention to one critical distinction which any judge...should always have in the forefront of his mind. The first and fundamental question...is whether, independently of any inference to be drawn from the conduct of the parties...there has...been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of [such] an agreement or arrangement...can only...be based on evidence of expressed discussions...Once a finding...is made it will only be necessary for [the claimant] to show that he or she has acted to his or her detriment...in reliance on the agreement in order to give rise to a constructive trust...where there is no evidence to support a finding of an agreement or an arrangement...and where the court must rely entirely on the*

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It has, however, been judicially accepted in *Stokes v. Anderson* [1991] 1 F.L.R. 391 at p. 399 *per* Nourse L.J. that the doctrines of constructive trust and those of estoppel have not been assimilated. Estoppel is a remedial concept based on intervention by the court whilst a constructive trust is a means of creating a proprietary right which operates entirely independently of the court. See Cretney & Masson *op. cit.*, at p. 140.

*conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust...direct contributions to the purchase price by [the claimant]...will readily justify the inference necessary to the creation of a constructive trust. But...it is...extremely doubtful whether anything less will do.*<sup>692</sup>

This *dictum* seems to treat both constructive and implied trusts as derived from the same basis and reiterates the *dictum* of Lord Diplock in *Gissing v. Gissing*.<sup>693</sup> By saying the making of direct contributions to the purchase price would “*readily justify the inference necessary to a constructive trust*”, Lord Bridge could easily have said, based upon the discussions on implied trust above, that such a trust arises from the circumstances. Furthermore, his stated requirements for a constructive trust where there is no expressed agreement appear to be indistinguishable from those for a resulting trust.<sup>694</sup> These differences of terminology are

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<sup>692</sup> At pp. 132E-133A. See also *Grant v. Edwards supra* at pp. 431-432 per Nourse L.J.

<sup>693</sup> *Supra* at p. 905C-D.

<sup>694</sup> *Ibid.* See also Ferguson *op. cit.*, at p. 118.

not only confusing but also have little or no practical effect according to commentators.<sup>695</sup> The important issue of principle is whether a constructive trust can be imposed in cases where there is no common agreement, express or implied. The House of Lords does not think that is possible at present. English law is yet to embrace a general principle whereby the courts would have a discretion to do whatever they might consider to be just or reasonable in the circumstances of a particular case, without reference to a common agreement, arrangement or understanding between the parties, and impose a constructive trust on the property in such shares as justice and equity require.<sup>696</sup>

It can be deduced from the above *dictum* of Lord Bridge that there are two situations in which a constructive trust may arise. The first is where there is an express agreement, arrangement or understanding that the property is to be shared beneficially. The second is where there is no express agreement, arrangement or understanding, but where an agreement can be inferred provided there has been a direct contribution to the purchase

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<sup>695</sup> Cretney & Masson *op. cit.*, at pp. 132 (note 43a) and 138.

<sup>696</sup> Attempts were made by the late Lord Denning M.R. to establish such a general principle but it does not seem to have been embraced by his colleagues. See his *dicta* in *Williams & Glyn's Bank v. Boland supra* at p. 329 and *Hussey v. Palmer* [1972] 1 W.L.R. 1286.

price. In both situations it is necessary to prove detriment, which may be either financial, labouring work on improving the property<sup>697</sup> or staying at home looking after children by a previous marriage and children of the marriage,<sup>698</sup> in order to satisfy the maxim that “equity will not assist a volunteer”.<sup>699</sup> An act of detrimental reliance usually provides the necessary consideration to enable the court to find the existence of a constructive trust. However, it is clear from the case that constructive trust cannot be imposed just to do justice in a particular case and that payment of money *per se* is not sufficient to establish an interest in another person’s property.<sup>700</sup>

A narrower variant of the constructive trust is the doctrine of estoppel<sup>701</sup> which has been treated sometimes as the same as constructive trust properly so-called.<sup>702</sup> There is however, a difference between the two

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<sup>697</sup> *Eves v. Eves* [1975] 1 W.L.R. 1338.

<sup>698</sup> *Grant v. Edwards supra*.

<sup>699</sup> See note 679 *supra*.

<sup>700</sup> See *Thomas v. Fuller-Brown supra* at p. 240 *per* Slade L.J.

<sup>701</sup> See note 688 *supra*.

<sup>702</sup> See note 687 *supra*.

doctrines. Firstly, estoppel requires unilateral conduct by one party which leads the other party to act to his or her detriment, whereas constructive trust is based on evidence of a bilateral agreement, arrangement or understanding. Secondly, the imposition of a constructive trust gives the claimant equitable rights of ownership, but once estoppel is proved, the court has a discretion to decide what remedy to grant. Thirdly, interests under a constructive trust are retrospective, in that they are assumed to arise when the claimant acts to his or her detriment, but interests under estoppel arise from the date of the court decree, for until then the remedy is uncertain.<sup>703</sup>

The doctrine of estoppel may be relied upon if one partner has incurred expenditure or done other acts to his detriment in the reasonable belief that he already owned or would be given a proprietary interest in the property. Equity will give effect to that belief. There are three stages in the process,<sup>704</sup> namely, the court, having analysed the conduct and relationship of the parties, asks, first, whether an equity has been

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See *K. Standley Cases & Materials on Family Law*, London, Blackstone Press, 1997 at p. 96. See also *Cretney & Masson op. cit.*, at p. 140 and *Ferguson op. cit.*, at p. 124.

<sup>704</sup>

See Scarman L.J. in *Crabb v. Arun R.D.C.* [1976] Ch. 179 at p. 193.

established, secondly, if so, what is the extent of that equity, and thirdly, what is the relief appropriate to satisfy the equity? Thus in *Pascoe v. Turner*<sup>705</sup> the plaintiff, on the breakdown of their relationship, told the defendant, that the house “*is yours and everything in it.*” The defendant, in reliance on this assurance, then used a large proportion of her small capital for repairs, improvements, and maintenance. The court held that the plaintiff’s encouragement and acquiescence gave rise to an estoppel which could only be satisfied by ordering him to do what the defendant had been led to expect, namely that he would transfer the property to her.<sup>706</sup>

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*Supra.*

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This case, on the face of it, is indistinguishable from that of *Gissing v. Gissing supra*. But a crucial distinction between the two cases is that while in the latter case the wife’s contributions in the form of payment for household items and clothes for herself and the children were found to be insufficient, in the former case the expenditures were regarded as sufficient. Estoppel does not however provide a general remedy for injustice. In *Coombes v. Smith* [1986] 1 W.L.R. 808 the defendant assured the plaintiff that he would always provide for her and that she would always have a roof over her head. After 10 years the relationship came to an end. The plaintiff claimed a proprietary interest in a house bought by the defendant. It was held that she was not entitled to an interest by way of estoppel since, on the evidence, she had not been under any misapprehension about her legal rights.

The disadvantage of bringing a claim based on estoppel is that, once estoppel has been established, the court must look at the circumstances of the case to decide how the “*equity can be satisfied*”.<sup>707</sup> This involves a great deal of discretion and in the exercise of such discretion, the court may grant a licence to remain in the property,<sup>708</sup> or award financial compensation for the detriment suffered,<sup>709</sup> rather than give the claimant a right of ownership in equity.

### (c) Conclusion

The doctrinal basis for the ascertainment of the interest of a non-legal claimant is unsatisfactory. The “*present legal rules are uncertain and difficult to apply and can lead to serious injustice.*”<sup>710</sup> Despite this

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<sup>707</sup> See *Plimmer v. Wellington Corp.* [1881-85] All E.R. Rep. 1320.

<sup>708</sup> See *Matharu v. Matharu* [1994] 2 F.L.R. 597 and *Greasley v. Cooke* [1980] 3 All E.R. 710.

<sup>709</sup> See *Baker v. Baker* [1993] 2 F.L.R. 247.

<sup>710</sup> The Law Commission’s *Sixth’s Programme of Law Reform* (Law Com. No. 234) 1995 p. 34. See also *Midland Bank Plc. v. Cooke* [1995] 4 All E.R. 562 at p. 565 per Waite L.J.

unsatisfactory state of the law, the attitude of the courts to such claims may be summarised as follows:

*“The court first has to ask itself whether there have at any time prior to acquisition of the disputed property, or exceptionally at some later date, been discussions between the parties leading to any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Any further investigation carried out by the court will vary in depth according to whether the answer to that initial inquiry is ‘Yes’ or ‘No.’ If there have been discussions of that kind and the answer is therefore ‘Yes’, the court then proceeds to examine the subsequent course of dealing between the parties for evidence of conduct detrimental to the party without legal title referable to a reliance upon the arrangement in question. If there have been no such discussions and the answer to the initial inquiry is therefore ‘No’, the investigation of subsequent events has to take the form of an inferential analysis involving a scrutiny of all events potentially capable of throwing evidential light on the question whether, in the absence of expressed discussion, a presumed intention can be spelt out of the parties’ past course of*

*dealing...The process is detailed, time-consuming and labourious.*"<sup>711</sup>

#### **(d) Quantification of the non-legal owner's share**

If after going through the above process the court comes to the conclusion that there was an intention on the part of the legal owner to share the property with the non-legal owner, then the latter's share in the property will have to be quantified. The approach to be adopted in evaluating the proportionate shares of the parties was spelt out by Lord Diplock in *Gissing v. Gissing*.<sup>712</sup> His Lordship was of the view that, if there is no express agreement, the court should "*do its best to discover from the conduct of the spouses whether an inference can reasonably be drawn as to the probable common understanding about the amount of the share of the contributing spouse*"; failing which, the court is entitled to resort to the maxim "*equality is equity*", and to hold that the beneficial interest belongs to the spouses in equal shares. His Lordship went on to illustrate how certain facts, such as contribution towards mortgage repayment,

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<sup>711</sup> Per Waite J. in *Hammond v. Mitchell* [1991] 1 W.L.R. 1127 at p. 1129-1130.

<sup>712</sup> *Supra* at pp. 908-909.

might indicate common understandings as to certain quanta and concluded that:

*“...there is nothing inherently improbable in [the spouses’] acting on the understanding that the wife should be entitled to a share which was not to be quantified immediately on the acquisition of the home but should be left to be determined when the mortgage was repaid or the property disposed of, on the basis of what would be fair having regard to the total contributions, direct or indirect, which each spouse had made by that date.”*

From the above view, it can be said that, in the absence of an express agreement, the court should look for an implied agreement, which may take the form either that the spouses’ shares should be fixed at particular percentages, or that they should float and be quantified by the court’s decision as to what is fair. In looking for the implied agreement direct or indirect contributions to the purchase price may be evidence, not only of such implied agreement but also as to any agreed quantum and as a benchmark of fairness in floating cases.

Whether fixed or floating, Lord Diplock regarded the size of the parties' interests as depending on their intentions.<sup>713</sup> This approach was cited with approval in *Midland Bank Plc. v. Cooke and Anor.*<sup>714</sup> The court took the view that once a beneficial interest had been found in favour of the non-legal claimant, the court would undertake a survey of the whole course of dealing between the parties to establish what proportion of the beneficial interest should be granted. In that case, a house had been bought as Mr and Mrs Cooke's matrimonial home, but the title was conveyed into Mr Cooke's name alone. Its price, £8,500, was funded mainly by a mortgage taken out in Mr Cooke's name, partly by some savings belonging to Mr Cooke, and partly by a wedding present of £1,100 from Mr Cooke's parents. Mrs Cooke made significant contributions to the family income by using her earnings to meet household bills, and by doing various types of work in kind. None of these contributions amounted to the "*direct contributions to the purchase price*" which, under *Lloyds Bank Plc. v. Rosset*,<sup>715</sup> are alone to count as evidence from which a court may infer a common intention that the contributor should have a beneficial interest.

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<sup>713</sup> *Ibid.* at p. 909.

<sup>714</sup> [1995] 4 All E.R. 562 at pp. 572-573 and 574 *per* Waite L.J.

<sup>715</sup> *Supra*, at pp. 132E-133A. See pp. 295-296 *supra*.

However, the court took the view that the wedding gift of £1,100 was given jointly to Mr and Mrs Cooke and consequently, Mrs Cooke made a direct contribution of £550 towards the purchase price and could claim a beneficial interest in the house. This interest constituted an overriding interest binding on the bank, which had subsequently taken a mortgage of the house from Mr Cooke. The said contribution of Mrs Cooke represented 6.47% of the value of the property but she was granted 50% share of the property. The court based its conclusion on the following *dictum*:

*“One could hardly have a clearer example of a couple who had agreed to share everything equally: the profits of his business while it prospered, and the risks of indebtedness suffered through its failure; the upbringing of their children; the rewards of her own career as a teacher; and, most relevantly, a home into which he had put his savings and to which she was to give over the years the benefit of the maintenance and improvement contribution. When to all that there is added the fact (still an important one) that this was a couple who had chosen to introduce into their relationship the additional commitment which marriage involves, the conclusion becomes inescapable that their presumed intention*

*was to share the beneficial interest in the property in equal terms.*"<sup>716</sup>

It is interesting to point out that Mr and Mrs Cooke gave evidence to the fact that they had come to no view, shared or otherwise, regarding the beneficial title to their home. This however, did not deter the court from inferring one. The court expressed the view that the existence of "*positive evidence that the parties neither discussed nor intended any agreement as to the proportions of their beneficial interest does not preclude the court, on general equitable principles, from inferring one.*"<sup>717</sup>

This case has been criticised for being too flexible an application of *Lloyds Bank Plc. v. Rosset*.<sup>718</sup> It has also been asserted that the point may well have been reached where the classical authorities' approach (that is the approach in *Gissing v. Gissing* and *Lloyds Bank Plc. v. Rosset*) has been so marginalised that it has lost the mass of institutional influence

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<sup>716</sup> At p. 576D-F.

<sup>717</sup> *Per* Waite L.J. at p. 575.

<sup>718</sup> See P. Wylie "Computing shares in the family home" [1995] *Fam. Law* 633.

critical for sensible survival.<sup>719</sup> Despite criticism of the case, it is submitted that Equity, as a body of rules, has always taken pride in matching established principle to the demands of social change. The reality of married relationship is that many couples, from the outset of their relationship, do not discuss the basis on which they will share their interest in property they may happen to own jointly. If anything at all, they enter into such relation on the basis of mutual trust and in expectation that their relationship will endure. It is therefore unfair to expect that there will always be some expressed agreement as to the basis of sharing such property and in the absence of such agreement to deny the existence of an intention to share even though the conduct of the spouses point to the contrary. Consequently, the court's approach in the case is to be supported, otherwise there will be many spouses (mainly wives) who will be severely disadvantaged. It is further submitted that the correct approach is to look at the contribution (even where it is not directed to the purchase of the property in question) of the non-legal claimant in the overall scheme of things and to accord him/her a proportion of the beneficial interest in consonance with such contribution. After all, the

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<sup>719</sup> See S. Gardiner "Fin de Siecle chez *Gissing v. Gissing*" (1996) 112 *Law Quarterly Review* 378 at p. 382. See also M. Oldham "Quantification of beneficial interests in land" (1996) *Cambridge Law Journal* 19.

fundamental premise of Equity is fairness and such an approach accords with it.

An option open to spouses who want the beneficial interest in property to be quantified is to make an application under s.37 of the Matrimonial Proceedings and Property Act 1970. This section addresses the uncertainty that arose as to the circumstances in which a spouse who paid for, or carried out improvements on, property acquired by the other spouse could acquire a beneficial interest in that property.<sup>720</sup> The said section provides as follows:

*“It is hereby declared that where a husband or wife contributes in money or money’s worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the*

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See *Pettitt v. Pettitt supra*. Despite the variety of opinions expressed by the Law Lords in the case as to the principles on which one spouse might acquire a beneficial interest in property vested in the other, they were unanimous in the view that the efforts of the husband in that case, namely, laying out the garden with a lawn and patio, putting up a side wall and a gate and redecorating the house, were insufficient to give him a beneficial interest. See Lord Reid at p.796, Lord Hodson at p. 807 and Lord Diplock at pp. 825-826.

*husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed or, in default of such an agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or in any other proceedings)."*

The section is declaratory of the then existing law and has the intention of applying the same principle as the courts had adopted in the case of contributions to the initial acquisition of property.<sup>721</sup> However, it was thought better not to prescribe any rule that the share must be commensurate with or proportional to the cost or value of the improvements, but to allow the court, in the event of a dispute, to make such order as it thinks just in the circumstances.<sup>722</sup>

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<sup>721</sup> Miller *op. cit.*, at p. 41.

<sup>722</sup> See the Law Commission Report (Law Com. 25) *Financial Provision in Matrimonial Proceedings*. (1969) pp. 29, 103 and 105.

The discretion conferred upon the court is, however, limited by three factors. First, the contribution must be substantial,<sup>723</sup> secondly, it must be in money or money's worth (such as work or labour)<sup>724</sup> and thirdly, it must relate to improvements<sup>725</sup> to the property as distinct from the

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<sup>723</sup> Thus, improvements by way of “do-it-yourself jobs which husbands often do” will not be considered “substantial” for this purpose. See *Button v. Button op. cit.*, at p. 461 per Lord Denning M.R.

<sup>724</sup> In *Griffiths v. Griffiths* [1974] 1 W.L.R. 1350 a spouse who paid a contractor £4,500 for an extension to the matrimonial home was awarded a share in the property and in *Re Nicholson* [1974] 2 All E.R. 386 a payment of £189 towards the installation of central heating in the matrimonial home was held to entitle the contributor to an enlarged share in the property. See also *Davis v. Vale* [1971] 1 W.L.R. 1022 at pp. 1024 and 1028 respectively.

<sup>725</sup> Improvements seem to be used by the courts in contradistinction to “maintenance” - see *Re Nicholson supra*, at p. 393 where Pennycuik V.-C. was of the view that the replacement of a gas cooker may not amount to an improvement. Cretney & Masson *op. cit.*, at p. 182-183 comment that this distinction may lead to some curious anomalies. For example, if a husband who is a jobbing builder takes time off from work to carry out extensive repairs to the roof or structure of the house this will not enable him to claim under the section. But he can claim if he installs a prefabricated garage, although the value of this work is much less. They add however, that what will constitute an “improvement” may be a question of degree. Thus, in *Jansen v. Jansen* [1965] P. 478, a husband who devoted his full time to converting a house vested in his wife into three self-contained flats was held to have made substantial improvements. The House of Lords in *Pettitt v. Pettitt supra* expressed different opinions as to whether *Jansen* was correctly decided.

acquisition of the property to which the equitable principles discussed above are concerned with.

In *Re Nicholson*<sup>726</sup> the court expressed the view that in principle the proper approach in quantifying the beneficial interests under the section is to ascertain the value of the property at the date immediately before the making of the improvement, and then to ascertain what addition to the value of the property was due to that improvement. The court should then treat the share of the party who made the improvement as enlarged by a proportionate amount corresponding to the increase in value represented by the improvement. It was acknowledged that difficulty may arise where one party carries out a series of relatively small improvements. In the court's view the section did not require that on each separate occasion the shares of the parties should be readjusted. In such a case, a legitimate course in deciding what is just would be to look with hindsight at the series of repairs and treat them as a single improvement and take some date at which that improvement should be taken as having been made.

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*Supra* at p. 392-393 *per* Pennycuik V.-C.

It must be emphasised here that improvements *per se* do not confer an interest upon the provider of such improvements. The improvement must add some value to the property, for, as Lord Green M.R. said in *Re Diplock*,<sup>727</sup> improvements “*may add not one penny to the value of the house. Indeed, the alteration may well lower its value, for the alteration, though convenient to the owner, may be highly inconvenient in the eyes of the purchaser.*”

The section applies subject to any agreement, expressed or implied, between the spouses to the contrary. Such an agreement may be either negative, that is, that, notwithstanding the work, no interest shall be acquired, or positive, for instance, that the interest shall be a certain percentage of the proceeds of sale.<sup>728</sup>

Finally, though one cannot doubt the efficacy of the section, it is now important only in a relatively small number of cases where it will be necessary or advantageous to bring proceedings under the s. 17 of the

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<sup>727</sup> [1948] Ch. 465 at p. 546.

<sup>728</sup> See Cretney & Masson *op. cit.*, at p. 183.

Married Women's Property Act 1882.<sup>729</sup> This is because the powers given to the courts under s. 25 of the Matrimonial Causes Act,<sup>730</sup> are more suitable to giving effect to contributions than the provisions of the 1970 Act. Some recent cases about quantifying interests of contributors of improvements to property have been decided entirely without reference to the section. In *Midland Bank Plc. v. Cooke*,<sup>731</sup> for example, no reference was made to the section even though the wife's claim to a beneficial interest in that case appears to have been substantially founded on the improvements she had carried out.

#### 4. PROPERTY ADJUSTMENT ON DIVORCE

The equitable principles discussed above were applied mainly to cases involving unmarried couples. In those cases the court was reluctant to

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<sup>729</sup> See Miller *op. cit.*, at p. 44.

<sup>730</sup> Particularly, s. 25(2)(f) which enjoins the court to take into account the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family. See pp. 351-356 *infra*.

<sup>731</sup> *Supra*. See also *Re Pavlou (A Bankrupt)* [1993] 2 F.L.R. 751 where a decision about giving a co-owner credit for improvements was resolved without any specific reference to the section.

draw inferences of a commitment to sharing<sup>732</sup> especially in the absence of direct contribution in money or money's worth.<sup>733</sup> Marriage, on the other hand, involves a commitment to a permanent relationship, at least that is the intention of the parties from the start. Consequently, the court is more inclined to infer an intention of sharing but, since the same principles apply in both cases, the problems implicit in the equitable principles apply with equal force to married couples. A spouse however, has the option of applying for an interest in the other spouse's property under statutory provisions enacted specifically for that purpose under the Matrimonial Proceedings and Property Act 1970. This Act was subsequently consolidated under Part II of the Matrimonial Causes Act 1973 (MCA 1973).<sup>734</sup>

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<sup>732</sup> See for example, *Bernard v. Josephs op. cit.*, p. 402E-H per Griffiths L.J.

<sup>733</sup> See *Burns v. Burns supra* and *Layton v. Martin* [1986] 2 F.L.R. 227.

<sup>734</sup> See ss. 23-25 of the Act as amended by Matrimonial and Family Proceedings Act 1984. It is envisaged by s. 15 and scheds. 2 and 8 of the Family Law Act 1996, an Act introducing a new divorce law, that Part II of the 1973 Act will still operate with amendments. However, the relevant sections of the 1996 Act, found in Part II of that Act, which will make the necessary amendments to the stated part of the 1973 Act, have not yet come into force. Presently, only a few sections, such as, Part I (general principles underlying Parts II and III), s. 22 (funding for marriage support services), Part IV (dealing with domestic violence except s. 60) and scheds. 4-7 are in force. See the Family Law Act 1996 (Commencement No. 1) Order 1997 (S.I. No.

The powers given under Part II of the 1973 Act are to enable a divorce court to adjust property rights of spouses on the breakdown of their marriage. The relative importance of ascertaining ownership of matrimonial property is considerably reduced by this Act.<sup>735</sup> Under its provisions, a divorce court is given powers to redistribute and reallocate matrimonial property according to the needs and resources of the parties, largely irrespective of their respective rights of ownership but focussed on the question of need.<sup>736</sup> The orders which a court can make are

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1077 C. 38) and the Family Law Act 1996 (Commencement No. 2) Order 1997 (S.I. No. 1892 C. 76). Meanwhile, sched. 15 of the Access to Justice Act 1999 has repealed Part III (dealing with legal aid for mediation) of the 1996 Act. In June 1999 the Lord Chancellor announced that the government did not intend to implement Part II of the 1996 Act in 2000. See J. Black *et al A Practical Approach to Family Law* (6<sup>th</sup> ed.), London, Blackstone Press, 2000 at p. 166.

<sup>735</sup> The Law Commission, in a report which preceded the 1970 Act, (Law Com. No. 25 1969 *op. cit.*, at para. 61), expressed the view that on a breakdown of marriage it will often be appropriate to utilize the summary procedure under s. 17 of the Married Women's Property Act 1882 to determine the existing proprietary rights of the parties and then to invoke the powers under the amended Matrimonial Causes Act to enable those rights to be altered to produce an equitable result in the light of the breakdown. This view did not however prevail. In *Kowalczyk v. Kowalczyk* [1973] 1 W.L.R. 930 at p. 934, Lord Denning M.R. held that it was unnecessary to decide the exact property rights of the spouses under s. 17 of the 1882 Act when all appropriate orders could be made under the 1970 Act. See also *P. v. P.* [1978] 3 All E.R. 70 at p. 75 *per* Ormrod L.J.

<sup>736</sup> See Gray *op. cit.*, at pp. 313-315.

extremely wide and by a combination of the available powers the court can usually achieve whatever result is regarded as fair, just and equitable. The process of adjusting property rights under the Act has been described as follows:

*“The Family Court takes the rights and obligations of the parties all together and puts the pieces into a mixed bag. Such pieces are the right to occupy the matrimonial home or have a share in it, the obligation to maintain the wife and children, and so forth. The court then takes out the pieces and hands them to the two parties - some to one party and some to the other - so that each can provide for the future with the pieces allotted to him or to her. The court hands them out without paying any too nice a regard to their legal or equitable rights but simply according to what is fairest provision for the future, for mother and father and the children.”*<sup>737</sup>

The Act does not discriminate between the sexes, as Scarman L.J. put it, *“husbands and wives come to the judgment seat...upon a basis of*

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<sup>737</sup> *Hanlon v. The Law Society* [1981] A.C. 124 at p. 147 per Lord Denning M.R.

*complete equality.*"<sup>738</sup> However, the economic realities normally dictate that financial orders will be made against the husband in favour of the wife.<sup>739</sup>

The overriding objective of the powers given to the court under Part II of the MCA 1973 was originally to place the parties in the position in which they would have been had the marriage not broken down. In other words, the financial position of the parties should so far as possible be unaffected by their divorce.<sup>740</sup> This came to be known as the "*principle of minimum loss.*"<sup>741</sup> The effect of this statutory regime was said to alter the legal axes of regulation of the family in such a way as to reveal the marriage contract

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<sup>738</sup> *Calderbank v. Calderbank* [1976] Fam. 93 at p. 103.

<sup>739</sup> But see *B. v. B. (Financial Provision)* (1982) 3 F.L.R. 298 where a wife was ordered to pay £50,000 to her husband.

<sup>740</sup> See Law Com. No. 103 *The Financial Consequences of Divorce: The Basic Policy* (1980) para. 22.

<sup>741</sup> See J. Eekelaar *Family Law and Social Policy* (2<sup>nd</sup> ed.) London, Weidenfeld & Nicholson, 1984 at p. 109. Gray *op. cit.*, at p. 319 called it "*the mandate of restitution... misconceived [and]... almost always incapable of fulfilment*". In *Harnett v. Harnett* [1973] Fam. 156 at p. 161, Bagnall J. remarked that the notion of restitution in terms of s. 25(1) of the MCA 1973 was "*indeed an elusive concept based on a difficult hypothesis*".

to be an economic or financial one rather than a contract based on sexual fidelity and moral obligation.<sup>742</sup>

The assumption underlying the said Part II of the 1973 Act, namely, that the parties to the marriage remained bound to provide for each other even when the marriage had been dissolved, came under criticism.<sup>743</sup> The central criticism was that it was inconsistent with modern divorce law. Divorce law now seeks to give legal recognition to the fact that the marriage has broken down, and on this view, if the marriage is over the financial obligations of the marriage should also be over.<sup>744</sup> The Law Commission analysed the arguments against the retention of the objectives underlying Part II of the 1973 Act under four heads:<sup>745</sup>

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<sup>742</sup> See C. Smart "Marriage, divorce and women's economic dependency: A discussion of the politics of private maintenance" in *State, Law and the Family* (M. Freeman ed.) Tavistock, London, 1984 Chap. 1.

<sup>743</sup> See Eekelaar *Family Law and Social Policy op. cit.*, at p. 262, and B. Baker *et al Matrimonial Jurisdiction of Registrars: The Exercise of the Matrimonial Jurisdiction by Registrars of England and Wales*, Social Sciences Research Council, Oxford, 1977.

<sup>744</sup> See Law Com. No. 103 para. 23.

<sup>745</sup> Law Com. No. 103 para. 30.

- (a) The argument that marriage can no longer be regarded as a life-time union, and that the financial consequences of divorce should no longer be based on this assumption.
  
- (b) The argument that the change to “irretrievable breakdown” as the basis for divorce required a new approach to its financial consequences.
  
- (c) The argument that the objective of life-long support is impossible to attain in most cases.
  
- (d) The argument that the changed economic position of women has rendered the concept of life-long support out of date.

In its 1981 report,<sup>746</sup> the Commission avoided a wholesale reconsideration of the basis of the law. Instead it suggested certain changes of emphasis within the statutory framework set up by the Act.<sup>747</sup>

The changes suggested by the Commission were:

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<sup>746</sup> Law Com. No. 112 *The Financial Consequences of Divorce* (1981).

<sup>747</sup> Law Com. No. 112 para. 23.

- (a) to give greater priority to the needs of children;<sup>748</sup>
- (b) to place greater emphasis on the need for the parties to become self-sufficient following divorce;<sup>749</sup> and
- (c) to promote the use of the so-called “clean break” in financial matters, which results in a once-and-for-all financial settlement involving no continuing economic links between the parties.<sup>750</sup>

The Commission also proposed that the statute should no longer impose on the court the duty so to exercise its powers as to place the parties in the financial position in which they would have been if the marriage had not broken down (the “*principle of minimal loss*”).<sup>751</sup> However, the Commission suggested no replacement for the removal of the “*principle of the minimal loss*”.

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<sup>748</sup> Law Com. No. 112 para. 24. See s. 25(1) of the MCA 1973.

<sup>749</sup> Law Com. No. 112 paras. 26-27. See s. 25A(3) of the MCA 1973.

<sup>750</sup> Law Com. No. 112 paras. 28-29. See ss. 25A, 28(1A) and 31(7) of the MCA 1973.

<sup>751</sup> Law Com. No. 112 para. 17.

The above proposals<sup>752</sup> were embodied in the Matrimonial and Family Proceedings Act 1984 which effected amendments to the Matrimonial Causes Act 1973 (MCA 1973).<sup>753</sup> The primary aim of the 1984 Act is to restrict the use of income maintenance after divorce, although the changes envisaged are to be applied equally to property awards.

The 1984 Act was also subjected to criticism, for example, that its objectives are contradictory. It has been argued that according priority to the needs of children may be inconsistent with the priority to be accorded to self-sufficiency and the clean break, since it may not be in the best interest of the children for a wife to go out to work or to be dependent on welfare benefit.<sup>754</sup> Despite these criticisms, the guidelines given under

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<sup>752</sup> For critical comments on the proposals, see J. Eekelaar "Law Commission reports on the financial consequences of divorce" (1982) 45 *Modern Law Review* 420, R. Deech *op. cit.* and J. Dewar "Reforming financial provision: The alternatives" (1984) *Journal of Social Welfare Law* 1.

<sup>753</sup> See for example, ss. 24A and 25A making provision for order for sale and the "clean break" principle respectively. For a history of and background to the 1984 Act, see *Whiting v. Whiting* [1988] 1 W.L.R. 565 at pp. 571-574 *per* Balcombe L.J.

<sup>754</sup> See P. Symes "Indissolubility and the clean break" (1985) 48 *Modern Law Review* 44, J. Dewar "Financial provision reformed: An abdication of responsibility?" (1986) *Conveyancer and Property Lawyer* 96 and G. Douglas "Family law under the Thatcher government" (1990) 17 *Journal of*

Part II of the 1973 Act, as modified by the 1984 Act, seem to have worked fairly well in practice.<sup>755</sup>

### (a) The statutory guidelines

These guidelines are to be resorted to in the absence of agreement between the former spouses. In deciding whether to exercise its powers to order financial provision or adjustment of property rights in favour of a party to a marriage, and if so, in what manner, the court is empowered to take all the circumstances into account, first consideration being given to the interest of any child of the family who has not attained the age of 18 years.<sup>756</sup> In particular, the court is to have regard to the following:

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*Law and Society* 411. See also K. O'Donovan "Should all maintenance of spouses be abolished?" (1982) 45 *Modern Law Review* 424.

<sup>755</sup> See S. Edwards & A. Halpern "Financial provision, case-law and statistical trends since 1984" (1987) *Family Law* 354-357 and J. Eekelaar *Regulating Divorce*, OUP, Oxford, 1991 at pp. 68-70.

<sup>756</sup> S. 25(1) of the 1973 Act. "First" in this subsection has been held in *Suter v. Suter & Jones* [1987] 2 All E.R. 336 at p. 342 *per* Cumming-Bruce L.J. not to be the same as "paramount" consideration overriding all other considerations pointing to a just result. The court has to consider all the circumstances always bearing in mind the important consideration of the welfare of the child(ren) and then attempt to attain a financial result which is just as between husband and wife. Accordingly, it is possible to terminate

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage have or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would, in the opinion of the court, be reasonable to expect a party to the marriage to take steps to acquire (s. 25(2)(a) MCA 1973),
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage have or is likely to have in the foreseeable future (s. 25(2)(b) MCA 1973),
- (c) the standard of living enjoyed by the family before the breakdown of the marriage (s. 25(2)(c) MCA 1973),

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one party's financial obligations to the other even where there are minor children involved. S. 25(3) enumerates a variety of factors (such as the financial needs of the child, the child's financial resources and any physical or mental disability of the child) the court is to take into account in exercising its power to order financial provision or adjustment of property in relation to a child of the family. Very little guidance has emerged from the case law as to how these factors are used in making financial provision for a child. In *Wachtel v. Wachtel supra*, the wife was awarded a sum based on the "one-third" rule (see *infra*); the court then awarded an "additional sum" for the child without specifying the basis of the calculation.

(d) the age of each party to the marriage and the duration of the marriage (s. 25(2)(d) MCA 1973),

(e) any physical or mental disability of either of the parties to the marriage (s. 25(2)(e) MCA 1973),

(f) the contribution which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family (s. 25(2)(f) MCA 1973),

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it (s. 25(2)(g) MCA1973),

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit (for example, a

pension) which, by reason of the dissolution or annulment of the marriage that party will lose the chance of acquiring<sup>757</sup> (s. 25(2)(h) MCA 1973).

The above statutory provisions are not ranked in any kind of hierarchy. The weight, or importance, to be attached to them depends upon the facts of the particular case<sup>758</sup> but the court must ensure that they are carried out rigorously.<sup>759</sup>

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<sup>757</sup> The Pensions Act 1995 inserted ss. 25B, 25C and 25D into the Matrimonial Causes Act 1973 to allow the court to “ earmark ” pensions on divorce so as to enable income to be paid to a divorced spouse at the time of retirement. These provisions came into force on the 1<sup>st</sup> of August 1996. Ss. 25B-25D of the 1973 Act have been amended by sched. 3 of the Welfare Reform and Pensions Act 1999 while s. 25B(2) (dealing with certain factors to be taken into account in making an order under s. 23 ) has been repealed by sched. 13 of the 1999 Act. See s. 21 of the 1999 Act and The Welfare Reform and Pensions Act 1999 (Commencement No. 5) Order 2000 (S.I. No. 1116 (C. 35)) of 2000 which will come into force on the 1<sup>st</sup> December 2000. Pension splitting on divorce, which was to be introduced by s. 16 of the Family Law Act 1996, has also been repealed by sched. 13 of the 1999 Act. See S.I. No. 1116 (C. 35) of 2000.

<sup>758</sup> See *Piglowska v. Piglowski* [1999] 1 W.L.R. 1360 at p. 1379 *per* Lord Hoffmann.

<sup>759</sup> See *Scheeres v. Scheeres* [1999] 1 F.L.R. 241.

Finally, there are provisions to direct the court's attention to the principle of self-sufficiency, and to facilitate the making of a "clean break" between the parties to the marriage in appropriate cases.<sup>760</sup>

The above guidelines first came up for discussion in *Wachtel v. Wachtel*<sup>761</sup> where the view was taken that Parliament had intended to bring about a shift of emphasis from the old concept of "maintenance" of the wife and children by the husband to one of redistribution of assets and "purchasing power".<sup>762</sup> However, this latter emphasis has, since the enactment of the 1984 Act, been shifted to one of having regard to all the circumstances whilst giving first consideration to the welfare of any child of the family who is younger than 18.<sup>763</sup>

Of particular relevance to this study are the claims between the spouses which may be subject to the needs of children, if any. While the needs of

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<sup>760</sup> See s. 25A of the 1973 Act. See also ss. 28(1A) and s. 31(7) of the same Act.

<sup>761</sup> *Supra*.

<sup>762</sup> *Ibid.* at p. 834.

<sup>763</sup> See note 756 *supra*.

children may have some bearing on how the court will exercise its powers in favour of a spouse, the extent to which this will be the case is not clear. Empirical evidence that exists suggests that court decisions as to the level of child support awards remain arbitrary and their basis undisclosed.<sup>764</sup> A dependent child is likely to have two main financial needs, namely, to be maintained and to have a home. Consequently, the court's task will be to assess carefully whether the parent who has day to day custody of the child has sufficient income to bring up the child. This will be relevant in cases where the court orders maintenance payments by the absent parent but in practice the Child Support Act 1991 has usurped the courts' jurisdiction in respect of maintenance orders for the benefit of children in the great majority of cases<sup>765</sup> and so the effect of the child's needs on the exercise of the court's powers in favour of a spouse is of limited importance. The 1991 Act creates a new scheme for the assessment and enforcement of child maintenance. The scheme, it has been said, will soak up most of the resources available to the parties with the practical

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<sup>764</sup> See R. Sax *et al* "Child maintenance: A fresh look" (1987) *Family Law* 275.

<sup>765</sup> See ss. 1 and 3 of the Act.

effect being to propel child support issues into the forefront of matters to be dealt within agreed settlements or if there is any dispute.<sup>766</sup>

The case law dealing with the statutory guidelines are numerous and it is not intended to discuss them in detail. It will be sufficient only to discuss significant points about each of them.

**(i) S. 25(2)(a) MCA 1973**

This provision, in the broadest possible terms, directs the court's attention to the parties' assets and income. All possible assets and income, present and future,<sup>767</sup> are considered. Thus, a flat bought by the wife with personal injury damages awarded to her has been taken into account,<sup>768</sup> as

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<sup>766</sup> See *Eekelaar Regulating Divorce op. cit.*, at p. 120.

<sup>767</sup> For example, in *Happe v. Happe* [1990] 2 F.L.R. 212, a gratuity to be paid in the future was taken into account.

<sup>768</sup> See *Daubney v. Daubney* [1976] 2 All E.R. 453.

has the likelihood that a party will benefit under the will of a relative who is terminally ill<sup>769</sup> and the ability to raise money by borrowing.<sup>770</sup>

### Earning capacity

The court must have regard to the earning capacity of the parties and to any possible increase in that earning capacity which it would be reasonable to expect. Thus, in *McEwan v. McEwan*<sup>771</sup> the court took into account the potential earning capacity of a retired detective constable aged 59. In the light of the evidence of a demand for labour in his home town the court inferred that he was voluntarily unemployed. In *Hardy v. Hardy*,<sup>772</sup> the husband worked in his father's racing stables for much less than he could have earned on the open market. The court took the view that he should not be allowed this privilege at the expense of his wife and

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<sup>769</sup> See *Morgan v. Morgan* [1977] 2 All E.R. 515 and *MT v. MT (Financial Provision: Lump Sum)* [1992] 1 F.L.R. 362. The court is sometimes reluctant to do this since the fact of the inheritance and the possible death of the relative concerned are often fraught with uncertainties. See *Michael v. Michael* [1986] 2 F.L.R. 389 at p. 397 *per* Nourse L.J.

<sup>770</sup> See *Newton v. Newton* [1990] 1 F.L.R. 33.

<sup>771</sup> [1972] 2 All E.R. 708.

<sup>772</sup> [1981] 2 F.L.R. 321.

children and made an order based on the earnings he could have made on the open market.

There is, however, some confusion over whether the court should take into account the earning capacity of the applicant (so as to reduce the award). In *Leadbeater v. Leadbeater*,<sup>773</sup> the wife, who had been a secretary but earned only £1,608 per annum as a part-time receptionist, was considered to be capable of working longer hours to increase her earnings. But in *M. v. M. (Financial Provision)*<sup>774</sup> the court took the view that a wife who had worked as a secretary prior to her 20-year marriage was unlikely, at her age and experience, to secure more than a fairly modest secretarial job. Consequently, her earning capacity should be reduced. The difference between the two cases may perhaps be explained on the basis that in the former case the wife was working during the marriage and as such her earning capacity could be fairly assessed whereas in the latter case she was not and consequently, her earning capacity could merely be speculated upon. But should it be reasonable to expect a wife to increase her earning capacity after a long marriage during

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<sup>773</sup> [1985] F.L.R. 789.

<sup>774</sup> [1987] 2 F.L.R. 1.

which she did little or no work outside the home? The answer will of course depend on whether such a wife is trainable, that is, capable of learning new skills to adapt whatever job experience she may have had before the marriage to the situation prevailing at the time of the dissolution of the marriage. Thus, if a wife had experience as a secretary using typewriters before marriage and there is the possibility that by retraining on computers she may be able to get a well paid secretarial job, this earning capacity may be taken into account. In terms of the statutory provision, is it reasonable to expect her to do so? Reasonableness in this context will be relative to the circumstances of the particular case. Thus, in *Leadbeater v. Leadbeater*,<sup>775</sup> the court did not think it was reasonable to expect a 47-year-old woman to familiarise herself with modern office technology. In contrast, in *Mitchell v. Mitchell*<sup>776</sup> the court thought that it would be reasonable to expect a woman, who had been a full-time secretary for a period during the marriage, once again to take up such comparatively highly paid work when her children had left school in preference to a part-time job as a canteen assistant.

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<sup>775</sup> *Supra.*

<sup>776</sup> [1984] F.L.R. 387.

However, in assessing whether or not it is reasonable for a wife to take up employment after the dissolution of the marriage, it is important for the court to bear in mind the salutary *dictum* made in *Camm v. Camm*<sup>777</sup> to the effect that:

*“...experience in this court indicates that it is much easier to talk about married women who have not been working for a good number of years getting back into full-time employment. It is to be remembered that 15 years or more of looking after children and not earning is a serious economic handicap...”*

### **Support from third parties**

A factor which the court takes into account in determining the parties' income is the availability of the resources of the new partner of one of the spouses<sup>778</sup> but in this case the court is not empowered to make an order that a third party with whom a spouse is living should provide for an

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<sup>777</sup> [1982] 4 F.L.R. 577 at p. 586 *per* Sir Roger Ormrod.

<sup>778</sup> See *Macey v. Macey* [1982] 3 F.L.R. 7.

applicant.<sup>779</sup> Neither can the court make an order which can only be satisfied by dipping into the resources of a third party.<sup>780</sup> Also, the availability of welfare benefits from the State are taken into account although a husband should not be allowed to shift his responsibilities onto the community more than is necessary. The proper approach in this case is for the court to consider what would be the appropriate amount to order the husband to pay to the wife ignoring the fact that supplementary benefit will be available to her to make up any deficiency. However, if an order for such an amount would have the effect of reducing the husband's income to below subsistence level, a court should limit the amount of the order so that the husband will be left with an income at subsistence level. The result would be unsatisfactory but at least it would be just as between the spouses and their children on the one hand and the community on the other.<sup>781</sup>

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<sup>779</sup> See *B. v. B. (Periodical Payments: Transitional Provisions)* [1995] 1 F.L.R. 459.

<sup>780</sup> *Re L. (Minors) (Financial Provision)* [1979] 1 F.L.R. 39.

<sup>781</sup> See *Ashley v. Ashley* [1968] P. 582 at p. 590 *per* Sir Jocelyn Simon P. See also *Barnes v. Barnes* [1972] 1 W.L.R. 1381.

## (ii) S. 25(2)(b) MCA 1973

**Needs**

The concept of need have been interpreted in “relative” rather than in “absolute” terms and hence it must correspond with the reasonable requirements of the spouses.<sup>782</sup> It follows from this that the needs of wealthy spouses would be regarded as greater than the equivalent needs of poorer spouses. Thus, in *Preston v. Preston*,<sup>783</sup> the Court of Appeal refused an appeal of a wealthy husband against a lump sum of £600,000 awarded to his wife. In *Dart v. Dart*<sup>784</sup> the spouses had a lavish lifestyle spending some £400, 000 a year. The Court of Appeal upheld an award of £9 million pounds to the wife but expressed the view that too much weight was being put on the “reasonable requirements” against other criteria when it came to assessing the needs of wealthy spouses. This

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<sup>782</sup> See *Preston v. Preston* [1982] 1 All E.R. 41. The court however said that the meaning of “needs” was coloured by the then “*principle of minimum loss*”. This notwithstanding the case was approved in the post-1984 case of *Duxbury v. Duxbury* [1987] 1 F.L.R. 7.

<sup>783</sup> *Supra*. See also *Bullock v. Bullock* [1986] 1 F.L.R. 372, *Duxbury v. Duxbury supra* and *Gojkovic v. Gojkovic* [1990] F.L.R. 140.

<sup>784</sup> [1996] 2 F.L.R. 286.

view was reiterated by the House of Lords in *White v. White*<sup>785</sup> where it held that the statutory provisions do not lend support to the idea that a claimant's financial needs, even interpreted generously and called "reasonable requirements", are to be regarded as determinative. The correct approach to be taken by a judge where resources exceed needs (the so-called "big money" cases) is to have regard to all the facts of the case and the overall requirements of fairness. When doing so, the judge is entitled to have in mind the wish of a claimant wife that her award should not be confined to living accommodation and a vanishing fund of capital earmarked for living expenses which would leave nothing for her to pass on. The judge should give to that factor whatever weight, be it much or little or none at all, he considers appropriate in the circumstances of the particular case.<sup>786</sup>

In that case, the overall net worth of the couple was some £4.6 million. This comprised: Mrs. White's sole property valued at £193,300, her share of property owned jointly, either directly or through the farming partnership run with her husband valued at £1,334,000; Mr. White's share

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<sup>785</sup> [2000] 3 W.L.R. 1571.

<sup>786</sup> At p. 1581 *per* Lord Nicholls with whom all the other Law Lords agree.

of the joint property valued at £1,334,000; and Mr. White's sole property valued at £1,783,500. The trial judge decided that the wife reasonably required £980,000. This was to be satisfied by payment of £800,00 and by her keeping her sole assets. On being paid this amount she was to transfer all the jointly owned assets to her husband. Under this arrangement, the wife was to receive slightly over one-fifth of their assets. The wife appealed and the amount of her payment was increased to £1.5 million by the Court of Appeal, thus raising her share of the total assets, taking some deductions into account, to about two-fifths. The husband appealed to the House of Lords, seeking the restoration of the trial judge's order. The wife cross-appealed seeking an order giving her an equal share in all the assets. The House of Lords unanimously dismissed both appeals. Lord Nicholls, who delivered the leading judgment with which all the other Law Lords agreed, held that the trial judge misdirected himself by making the parties' reasonable requirements the determinative factor for making the award. Accordingly, the Court of Appeal was entitled to exercise afresh the statutory discretionary powers and on the principles expounded in *Piglowska v. Piglowski*,<sup>787</sup> there was no ground

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*Supra* at p. 1372 *per* Lord Hoffmann. It was there stated that in order for an appellate court to hold that the exercise of a judicial discretion was plainly wrong, the appellate court should have regard to the advantage which the trial court had in seeing the witnesses both in respect of its findings of

entitling the House to interfere with the Court of Appeal's exercise of its discretion.

In the case of spouses with limited resources, the court can do no more than allocate the limited resources to cover the basic needs for food, clothing and accommodation. In the words of Ormrod L.J. in *Browne v. Pritchard*<sup>788</sup>

*“Whenever a court is dealing with families with limited resources ‘needs’ are likely to be much more important than resources, when it comes to exercising discretion. In most individuals and most families the most urgent need is a home. It is therefore to the provision of homes for all concerned that the courts should direct their attention in the first place.”*

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primary fact and its evaluation of them, and should assume unless demonstrated to the contrary, that the court knew how to perform its functions and which matters it should take into account; that when the exercise of discretion involved value judgments on which reasonable people might differ, a degree of diversity was inevitable.

## Housing

The need for housing, particularly where a spouse is to have custody of minor children, in most cases is the “need” that has to be satisfied. It may be convenient in some cases to transfer the house outright to the other spouse. In *Hanlon v. Hanlon*,<sup>789</sup> for example, an outright transfer of the matrimonial home was ordered in favour of the wife where the husband had rent-free housing available to him by virtue of his employment as a police officer.<sup>790</sup>

However, the commonest type of order used by the courts used to be the “*Mesher* order.”<sup>791</sup> This order directs a transfer of the matrimonial home

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<sup>789</sup> [1978] 2 All E.R. 889.

<sup>790</sup> See pp. 380-386 *infra*.

<sup>791</sup> Derived from *Mesher v. Mesher* [1980] 1 All E.R. 126. In this case, the matrimonial home was held by the spouses jointly. The order provided that they continue to hold the house on trust for sale and should hold the proceeds of sale and rents and profits until sale on trust for themselves in equal shares, provided that as long as the daughter of the marriage was under 17, or until further order, the house should not be sold.

into the joint names of the spouses on trust for sale<sup>792</sup> for themselves in some specified shares provided that the property is not to be sold until the youngest child attains a specified age or stops full-time education.<sup>793</sup> The advantage of this order is that it not only preserves a home for one former spouse who will be able to bring up the children there, but it does so without depriving the other former spouse of all interest in that property. However, this form of compromise between retention and sale of the family home will only be appropriate under certain circumstances, for example, where both parties have remarried, so that at the eventual date of sale the resident spouse will not be without resources to find alternative accommodation.<sup>794</sup> Thus, the courts have realised that where there is serious doubt about the ability of a spouse, usually the wife, to rehouse herself on the charge taking effect, the “*Mesher* order” will be

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<sup>792</sup> That is, a trust under which the trustees have an obligation to sell the trust property and hold the proceeds of sale in trust for the beneficiary. There is an implied power to postpone the sale as long as they think fit under s. 25 of the Law of Property Act 1925.

<sup>793</sup> See *Chamberlain v. Chamberlain* [1974] 1 All E.R. 33, *Alonso v. Alonso* (1974) 4 *Fam. Law* 164 and *Allen v. Allen* [1974] 3 All E.R. 385.

<sup>794</sup> See Dewar *op. cit.*, at p. 331.

inappropriate.<sup>795</sup> Besides, the order seems to be in conflict with the “clean break” principle as it preserves a financial link between the spouses rather than sever it. Consequently, of late, the order has been used infrequently.

The courts now make an outright transfer order<sup>796</sup> or, if that is not appropriate in the circumstances, it makes a “*Martin* order”<sup>797</sup> which gives a spouse the right to occupy the house until her death or remarriage or, sometimes, her becoming dependent on another man or living with him as his wife.<sup>798</sup> This specie of the “*Mesher* order” has an advantage over

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<sup>795</sup> See *Clutton v. Clutton* [1991] 1 W.L.R. 359 at p. 365 *per* Lloyd L.J. See also the criticism of the order by Parker L.J in *Mortimer v. Mortimer-Griffin* [1986] 2 F.L.R. 315 at p. 319 where he said that the order is “likely to produce harsh and unsatisfactory results” and should “no longer [be] regarded as the ‘bible’”. See also *Carson v. Carson* [1983] 1 W.L.R. 285 and *Thompson v. Thompson* [1986] Fam. 38. Despite this criticism, *Eekelaar Regulating Divorce op. cit.*, at pp. 71-72 has found that some court registrars regard them favourably.

<sup>796</sup> See *Mortimer v. Mortimer-Griffin supra*.

<sup>797</sup> Derived from *Martin (BH) v. Martin (D)* [1977] 3 All E.R. 762. In this case the spouses were childless. The court held that since the husband had secured council housing, and the wife would not get sufficient money from a sale of the house to rehouse herself, the appropriate solution would be to settle the house on trust for the wife during her life or until remarriage or such earlier date as she should cease to live there. Subject thereto the house was to be held on trust for the spouses in equal shares.

<sup>798</sup> See *Chadwick v. Chadwick* [1985] F.L.R. 606.

its parent order in that, by the time the charge takes effect, the needs of the resident spouse will either be non-existent or have been taken care of in some other way.<sup>799</sup>

**(iii) S. 25(2)(c) MCA 1973**

The abolition of the principle of “minimum loss” by the 1984 Act has greatly diminished the relevance of this guideline but in *Gojkovic v. Gojkovic*<sup>800</sup> it was suggested that the repeal of the principle of “minimum loss” did not prevent the court, where finances permit, from keeping the parties’ post-divorce standard of living in proportion to each other. Thus, in *Leadbeater v. Leadbeater*<sup>801</sup> the wife had been married for four years to a man worth £250,000 and had in consequence enjoyed a “*much enhanced*” lifestyle. This factor as well as her modest pre-marital lifestyle was taken into account in awarding her a comparatively modest lump sum of £37, 500. In *R. v. R. (Financial Provision: Reasonable*

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<sup>799</sup> See *Clutton v. Clutton supra* at p. 248 *per* Lloyd L.J. and Dewar *op. cit.*, at p. 331.

<sup>800</sup> *Supra.*

<sup>801</sup> *Supra.*

*Needs*)<sup>802</sup> the court was of the view that the wife was entitled to continue living in a “*splendid mansion*” and was awarded a lump sum of £550,000.<sup>803</sup> The above cases concern spouses with substantial resources but where the resources are limited this guideline will be a factor of little, if any, weight. In the latter case, there will inevitably be some reduction in the previous standard of living and the task of the court will be to ensure that both spouses enjoy a comparable standard of living.<sup>804</sup> But even this attempt at ensuring a comparable standard of living will not always be successful.<sup>805</sup>

#### (iv) S. 25(2)(d) MCA 1973

The age of the spouses will be an important factor to be taken into account in assessing their needs. The needs of a young and healthy wife,

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<sup>802</sup> [1994] 2 F.L.R. 1044.

<sup>803</sup> At p. 1049. See also *F. v. F. (Ancillary Relief: Substantial Assets)* [1995] 2 F.L.R. 45 at p. 63 where the court was of the view that the standard of living of the wife would continue to rise and this was to be maintained. It awarded her £1.75 million per annum.

<sup>804</sup> See *Scott v. Scott* [1978] 1 W.L.R. 723.

<sup>805</sup> See *Martin v. Martin* [1976] Fam. 167 at p. 182 *per Purchas J.*

for instance, will not be as great as an elderly and infirm one since in the former case she is likely to go back to work or capable of enhancing her earning capacity and prospects.<sup>806</sup>

What constitutes a “short” marriage has not been judicially defined<sup>807</sup> and will depend on the facts of the individual cases. However, where the court has concluded that the duration of the marriage has been short, this will affect the level of the award. Thus, in *Leadbeater v. Leadbeater*<sup>808</sup> the wife’s award was reduced by 25% because the marriage has lasted for only four years.

Where the spouses are older, the effect of even a short marriage may be adverse to their financial circumstances. Thus, in *S. v. S.*<sup>809</sup> where the parties were more than 50 years and the marriage lasted for two years, the Court of Appeal was of the view that in considering a short marriage where the parties are not young, the primary consideration should be the

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<sup>806</sup> See *Khan v. Khan* [1980] 1 All E.R. 497.

<sup>807</sup> See *Glengler v. Glengler* [1976] 2 All E.R. 81 at p. 82.

<sup>808</sup> *Supra.*

<sup>809</sup> [1977] 1 All E.R. 56.

need of the parties. Their resources and obligations should be ascertained and balanced against each other in relation to all the circumstances of the marriage. On the facts of that case, the husband was ordered to settle £11,000 on the wife on trust until death or earlier marriage, together with a lump sum of £2,000 to cover the cost of moving house and furniture.

**(v) S. 25(2)(e) MCA 1973**

In practice this factor does not add very much to the factors which will have been taken into account under paragraphs (a) and (b) above. This is because mental or physical disability obviously has an effect on a person's earning capacity and/or foreseeable future needs.<sup>810</sup> It seems to have fallen into desuetude as it has not as yet featured as a separate matter in the case law.

**(vi) S. 25(2)(f) MCA 1973**

This provision gives clear recognition to the indirect contributions which are usually made by wives who do not normally undertake paid

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See *C. v. C. (Financial Provision: Personal Damages)* [1995] 2 F.L.R. 171.

employment during the subsistence of the marriage. In *Wachtel v. Wachtel*<sup>811</sup> Lord Denning considered the object of this provision and said:

*“...we may take it that Parliament recognised that the wife who looks after the home and family contributes as much to the family assets as the wife who goes out to work. The one contributes in kind. The other in money or money's worth. If the court comes to a conclusion that the home has been acquired and maintained by the joint efforts of both, then, when the marriage breaks down, it should be regarded as the joint property of both of them, no matter in whose name it stands. Just as a wife who makes a substantial money contribution usually gets a share, so should a wife who looks after the home and cares for the family for 20 years or more.”*

On the facts of the case, the wife was found to have made a substantial contribution to the home over a period of some 18 years and to be an excellent mother.

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*Supra* at p. 838-839.

The kind of "contribution" that may be considered under this provision may come in a variety of forms. Apart from the usual cases in which "*a wife has faithfully carried out the duties and functions of a loving wife and mother*" there are cases in which, in addition, "*she has been practically involved and has participated in the family business project, whether in farming, industry, or otherwise, or possibly in acquisition of an asset.*"<sup>812</sup> This active participation will be recognised as a contribution under this provision. Thus, in *O'D v. O'D*<sup>813</sup> the wife had worked as a receptionist, chambermaid, cook, waitress and clerk while building up a hotel business. The court awarded her a lump sum of £70,000 in partial recognition of this fact, although her needs could have been satisfied by a payment of £30,000. In *P. v. P.*<sup>814</sup> a gift of property given to the wife by her father was taken into account as part of her contribution and in *Vicary*

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<sup>812</sup> Per Wood J. in *Page v. Page* [1981] 2 F.L.R. 198 at p. 205.

<sup>813</sup> [1976] Fam. 83. See also *Gojkovic v. Gojkovic supra* and *White v. White supra*. In the latter case, one of the reasons given by the Court of Appeal for the increase of the wife's share of the matrimonial assets was to recognize her contribution to the family as wife and mother for 33 years over and above her role in the farming business. See *White v. White* [1999] 2 W.L.R. 1213 (C.A.) at pp. 1225 and 1228 *per* Thorpe and Butler-Sloss L.JJ. respectively.

<sup>814</sup> [1978] 1 W.L.R. 483 at p. 489.

v. *Vicary*<sup>815</sup> it was accepted that a wife of a millionaire businessman who had supplied the infrastructure and support in the context of which the husband was able to work hard, prosper and accumulate wealth could be credited for such indirect contribution.<sup>816</sup>

Whilst consideration of this provision will generally work in favour of a spouse, it can also be a disadvantage. Thus in *West v. West*<sup>817</sup> the wife had unreasonably refused to join the husband in the home he had purchased and set up a family of their own as she preferred to stay with her own parents. Although the case was concerned with whether the wife's conduct was "*gross and obvious*" within the context of s. 25 (2) (g) of the 1973 Act, Ormrod L.J. said<sup>818</sup> that the limited provision made for the wife could be justified under paragraphs (d) and (f) of the Act:

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<sup>815</sup> [1992] 2 F.L.R. 271.

<sup>816</sup> See also *Trippas v. Trippas* [1973] Fam. 134 at p. 144 *per* Scarman L.J. See also *Kokosinki v. Kokosinki* [1980] 1 All E.R. 1106 where the contribution was in the form of finance for business purposes.

<sup>817</sup> [1978] Fam. 1.

<sup>818</sup> At p. 9E-F.

*“The duration of the marriage, to all intents and purposes in this case, was nil, and the wife’s contribution to looking after the home, as there was no home, was virtually nil, and so far as caring for the family is concerned, she has never cared for her husband in any sense. On the other hand, she has cared for the child in her own family’s home.”*

The domestic contributions are assessed only in relation to the aggregate of the matrimonial assets, for as has been pointed out by Lesser:<sup>819</sup>

*“in looking to the contributions made to the welfare of the family, (the court) would find it difficult, perhaps impossible, to draw any precise link between such contributions and the purchase of the particular asset...”*

Thus in *Harnett v. Harnett*,<sup>820</sup> the court distinguished between the “mere general contributions that are brought into reckoning” under s. 25(1)(f)

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<sup>819</sup> “The acquisition of inter vivos matrimonial property rights in English law: A doctrinal melting pot” (1973) 23 *University of Toronto Law Journal* 148 at p. 208 cited by Gray *Reallocation of Property on Divorce op. cit.*, at p. 119 note 9.

<sup>820</sup> [1973] Fam. 156 at p. 167 per Bagnall J.

and contributions to the improvement of property which are relevant under s. 37 of the Matrimonial Proceedings and Property Act 1970. Under the 1970 Act, the contribution must be “*identifiable with the relevant improvement.*”<sup>821</sup>

**(vii) S. 25(2)(g) MCA 1973**

Prior to the Divorce Reform Act 1969<sup>822</sup> the conduct of the spouses, particularly the wife, was of crucial importance to the determination of post-divorce financial provision.<sup>823</sup> The matrimonial offence doctrine ensured that only an “innocent” wife was entitled to be maintained whilst

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<sup>821</sup> See pp. 315-320 *supra*.

<sup>822</sup> This Act, which was subsequently consolidated into the Matrimonial Causes Act 1973, altered the conceptual basis of divorce from that based on proof of the commission of a matrimonial offence to that of irretrievable breakdown of the marriage. For the evolution of the law, see Cretney & Masson *op. cit.*, pp. 305-383. See also H.A. Finlay “Reluctant, but inevitable: The retreat of matrimonial fault” (1975) 38 *Modern Law Review* 153 and “Fault causation and breakdown in the Anglo-Australian law of divorce” (1978) 94 *Law Quarterly Review* 120.

<sup>823</sup> See the Law Commission’s discussion paper, *The Financial Consequences of Divorce: The Basic Policy* (1980, Law Com. No. 103) paras. 8-13.

a “guilty” wife was deprived of maintenance.<sup>824</sup> The abandonment of the matrimonial offence doctrine by the 1969 Act<sup>825</sup> brought into question the role of conduct in determining post-divorce financial provision. In *Wachtel v. Wachtel*<sup>826</sup> Lord Denning M.R. was of the view that the fact that the court was to have regard to the parties’ conduct did not mean that the court was to hear the parties’ “*mutual recrimination and...go into their petty squabbles for days on end*” as was the case before the passing of the 1969 Act. In his Lordship’s view there was no need for “*a post-mortem to find out what killed*” the marriage because:

*“In most cases both parties are to blame - or, as we would prefer to say - both parties have contributed to the breakdown. It has been suggested that there should be a ‘discount’ or ‘reduction’ in what the wife is to receive because of her supposed misconduct,*

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<sup>824</sup> See *Ashcroft v. Ashcroft* [1902] P. 270 at p. 273 *per* Gorell Barnes J., *Dailey v. Dailey* [1947] 1 All E.R. 847 at p. 851 *per* Willmer J. and Law Com. No. 103 para. 13. Subsequently the doctrine developed that a “guilty” wife should not forfeit all right to maintenance unless her conduct was of a really serious nature, disruptive, intolerable and unforgivable. See *Ackerman v. Ackerman* [1972] Fam. 1 at p. 6.

<sup>825</sup> The Act came into force on the 1<sup>st</sup> of January 1971.

<sup>826</sup> *Supra* at pp. 835-836.

*guilt or blame (whatever word is used). We cannot accept this argument. In a vast majority of cases it is repugnant to the principles underlying the new legislation, and in particular the 1969 Act. There will be many cases in which a wife (although once considered guilty or blameworthy) will have cared for the home and looked after the family for very many years. Is she to be deprived of the benefit otherwise to be accorded to her by s. 5 (1) (f) because she may share responsibility for the breakdown with her husband? There will no doubt be a residue of cases where the conduct of one of the parties is in the judge's words<sup>827</sup> both 'obvious and gross', so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to*

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<sup>827</sup>[1973] 1 All E.R. 113 at p. 119 *per* Ormrod J. at first instance.

*impose a fine for supposed misbehaviour in the course of an unhappy married life."*

This *dictum* was an elaboration of that of Ormrod J at first instance<sup>828</sup> and makes it clear that conduct should generally not be given any appreciable weight unless it is "*both obvious and gross*". In other words, it must be conduct of exceptional gravity, "*of a kind that would cause the ordinary mortal to throw up his hands and say, 'surely that woman is not going to be given any money'...*"<sup>829</sup> Thus, where a wife, for example, has an adulterous relationship with her husband's father,<sup>830</sup> or if one party without reasonable excuse totally fails to set up any married life at all,<sup>831</sup> or where the husband commits adultery with a daughter-in-law,<sup>832</sup> or

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<sup>828</sup> *Supra.*

<sup>829</sup> *Per* Sir George Baker P. in *W. v. W. (Financial Provision: Lump Sum)* [1976] Fam. 107 at p. 110. See also *Armstrong v. Armstrong* (1974) 118 S.J. 579 *per* Stephenson L.J. cited in *Kokosinski v. Kokosinski supra* at p. 1116 *per* Wood J., *Harnett v. Harnett* [1974] 1 All E.R. 764 at pp. 768 and 770 *per* Cairns and Roskill L.JJ. and *Robinson v. Robinson* [1983] 1 All E.R. 391 at p. 395 *per* Waller L.J.

<sup>830</sup> *Bailey v. Tolliday* [1982] 4 F.L.R. 542.

<sup>831</sup> *West v. West supra.*

<sup>832</sup> *Dixon v. Dixon* [1974] 6 Fam. Law 58.

where the wife assisted her husband with suicide attempts in order to set up home with her lover and get as much from the husband's estate as possible,<sup>833</sup> the court will be satisfied that the requirement of exceptional conduct which would be inequitable to disregard has been satisfied.

These types of conduct will for the most part be used to reduce the amount of financial provision which the court might otherwise have awarded to a party. However, in *Kokosinki v. Kokokinski*<sup>834</sup> the court held that in an appropriate case conduct will be regarded as a circumstance which should be taken into account as a positive factor in influencing the financial provision to be awarded to a spouse. In that case the respondent left Poland in 1939, leaving behind a wife and child, and settled in the United Kingdom. In 1947 the respondent began to live with the petitioner and their son was born in 1950. During the period of cohabitation the petitioner was faithful, loving and hard-working. She played a significant role in building up the husband's business and from her earnings she contributed substantially to the maintenance of the household. In 1969

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<sup>833</sup> *K. v. K. (Financial Provision: Conduct)* [1988] 1 F.L.R. 469. The wife's lump sum was reduced from £14 000 to £5 000. See also *A. v. A. (Financial Provision: Conduct)* [1995] 1 F.L.R. 345.

<sup>834</sup> [1980] Fam. 72.

the respondent's Polish wife divorced him and in 1971 the respondent and the petitioner were married. Early in 1972 cohabitation ceased and, in 1977, the petitioner obtained a decree *nisi* on the grounds of the respondent's desertion. On the question whether, in view of the short duration of the marriage, the petitioner should be granted a lump sum by way of financial provision, the court held that s. 25(1) of the MCA 1973 required the court not only to consider the duration of the marriage but "*all the circumstances of the case*" and the conduct of the parties. The court held that:

*"The wife has given the best years of her life to the husband. She has been faithful, loving and hard-working. She has helped him to build what is in every sense a family business. She has managed his home and been a mother to and help him bring up a son of whom they are both justly proud. I believe that she has earned for herself some part of the value of the family business."*<sup>835</sup>

These matters, in the court's view, were to be taken into account under s. 25(1) of the MCA 1973. Accordingly, in the particular circumstances of the case, it was just that the respondent should be ordered to pay the petitioner the sum of £8, 000.

Although the courts are able to assess what is "*obvious and gross conduct*" their view of the extent to which such conduct should affect an order has not been consistent.<sup>836</sup> In *Cuzner v. Underdown*<sup>837</sup> a wife who had accepted a half share of the matrimonial home whilst carrying on an adulterous affair was ordered to forfeit her share to her husband. In *Armstrong v. Armstrong*<sup>838</sup> a wife who had been shut out of the matrimonial home and who fired a gun at her husband (luckily causing no serious injury), was awarded a quarter of the family assets. One would question whether Mrs. Underdown's conduct was so much worse than that of Mrs. Armstrong's and yet the one was deprived of financial

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<sup>836</sup> See M.L. Parry "'Having regard to their conduct' - financial provision on divorce" (1975) *New Law Journal* 960.

<sup>837</sup> [1974] 2 All E.R. 351.

<sup>838</sup> *Supra*.

provision whilst the other was provided for. In *Jones v. Jones*<sup>839</sup> a husband, who attacked his wife causing her permanent injury, was ordered to forfeit all interest in the family assets. The attack took place some two months after the decree absolute and eight months after the decree nisi. The court held that conduct was not limited to events which had taken place before the breakdown of the marriage or indeed before the decree was made absolute.<sup>840</sup> Furthermore, conduct in this context was not to be treated as being confined to matrimonial misconduct.<sup>841</sup> However, in *F. v. F.*<sup>842</sup> the finding that the husband had casual sexual encounters, including from time to time visiting prostitutes, apparently did not influence the court in any way.

These inconsistencies notwithstanding, it seems that the above cases represent the extreme and that in the ordinary run of cases conduct is only

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<sup>839</sup> [1976] Fam. 8. See also *H. v. H. (Financial Provision: Conduct)* [1994] 2 F.L.R. 801 where the husband was held to be guilty of brutal violent assault on his wife.

<sup>840</sup> [1976] Fam. 8 at p. 15 *per* Orr L.J.

<sup>841</sup> *Ibid.* at p. 16 *per* Megaw L.J.

<sup>842</sup> [1996] 1 F.L.R. 833.

rarely relevant in practice.<sup>843</sup> This infrequent reliance on conduct gave rise to some concern in Parliament during the consideration of the Bill which became the Family Law Act 1996.<sup>844</sup> The Act, when fully operational, will therefore make an amendment to paragraph 25 (2)(g) of the 1973 Act by the addition of the following “*whatever the nature of the conduct and whether it occurred during the marriage or after the separation of the parties or (as the case may be) dissolution or annulment of the marriage*”. The reason given for this amendment is said “*to emphasise that conduct of the parties of whatever nature, should it be inequitable to disregard it, has to be taken into account and that it is not only conduct in the course of ancillary relief proceedings that has to be considered*”.<sup>845</sup> The view has been expressed that it is difficult to predict what the effect of the amendment will be on the outcome of future cases but it could be implied from the quoted words that in future the courts will give greater prominence to conduct.<sup>846</sup>

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<sup>843</sup> See Cretney & Masson *op. cit.*, at p. 450.

<sup>844</sup> See Cretney & Masson *op. cit.*, at p. 452.

<sup>845</sup> See Jonathan Evans, Standing Committee E, *Official Report*, May 16, 1996, col. 371 cited by Cretney & Masson *op. cit.*, at pp. 452-453

<sup>846</sup> See Cretney & Masson *op. cit.*, at p. 453. See also Bird et al *Divorce - The New Law* Jordans, Bristol, 1996 at p. 73.

The procrastination of the relevant authority to bring the 1996 Act fully into force coupled with its disfigurement by numerous amendments and repeals<sup>847</sup> make the likelihood of the coming into effect of the proposed amendment to s. 25(2)(g) doubtful.

**(viii) S. 25(2)(h) MCA 1973**

Job-related and insurance benefits have become increasingly important in financial settlement after divorce because a greater part of the wealth of married couples may be in the form of rights to receive pensions and other benefits such as insurance benefits.<sup>848</sup> Women are especially disadvantaged in relation to this form of property since pension entitlement depends on a steady record of contributions from earnings either to the State or a private pension scheme. Women who have given up work to care for children may not have made sufficient contributions to qualify.<sup>849</sup> Thus, for many women pension entitlement and other job-

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<sup>847</sup> See note 734 *supra*.

<sup>848</sup> See pp. 191-194 *supra*.

<sup>849</sup> See generally H. Joshi and H. Davies *The Pension Consequences of Divorce* Centre for Economic Policy Research Discussion paper No. 550, London, 1991 and "Pensions, divorce and wives' double burden" (1992) 6

related benefits, such as group life insurance schemes, would depend on a husband and divorce would remove even these forms of entitlement.<sup>850</sup>

## Pensions

S. 25(2)(h) together with subsections 2(a) and (b) direct the court's attention to job-related benefits, especially pensions, in determining post-divorce financial provision. Under these provisions, the court can make adjustments to other matrimonial assets to compensate for lost pension entitlement. The court may also delay or refuse to grant a divorce under ss. 5 and 10 of the MCA 1973 in a two-year or five-year separation case, so that the petitioner may make provision for the respondent's lost pension entitlements.<sup>851</sup>

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*International Journal of Law and the Family* 289. See also A. Martin "Pensions and Divorce" [1996] *Fam. Law* 432 and J. Masson "Rights to divorce and pension rights" in *Divorce: Where Next?* M. Freeman (ed.) Aldershot, Dartmouth Publishing Co., 1996 at p. 107.

<sup>850</sup> See Dewar *op. cit.*, at p. 323 and Joshi and Davies *op. cit.*, at Ch. 2.

<sup>851</sup> See *K. v. K. (Financing Relief: Widow's Pension)* [1997] 1 F.L.R. 35.

Prior to the enactment of the Pensions Act 1995,<sup>852</sup> subsequently amended by the Welfare Reform and Pensions Act 1999,<sup>853</sup> (WRPA 1999) the courts were unable to make orders directly affecting pension entitlements mainly because the beneficiaries' rights are usually discretionary, and assignment or commutation of benefits is often prohibited either by statute<sup>854</sup> or the terms of the particular scheme.<sup>855</sup> However, it was sometimes possible to take pension benefits into account where, for example, the benefit was due in a comparatively short time such as two or three years. Thus, in *Richardson v. Richardson*<sup>856</sup> the husband would be entitled on retirement some three years after the divorce to a civil service pension and a lump sum of £9,000. If the marriage had survived,

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<sup>852</sup> S. 166(1) of the Act amended the MCA 1973 by introducing new ss. 25B-25D which sections have been amended by sched 4 to the WRPA 1999. The schedule came into effect on 1<sup>st</sup> December 2000. See the Welfare Reform and Pensions Act 1999 (Commencement No. 5) Order 2000 (S.I. No. 1116 (C. 35)).

<sup>853</sup> See s. 19 and sched. 4 to the Act which came into effect on the 1<sup>st</sup> December 2000. See note 852 *supra*.

<sup>854</sup> See, for example, s. 203 of the Army Act 1955.

<sup>855</sup> See *Walker v. Walker* [1983] Fam. 68 and *Roberts v. Roberts* [1986] 2 All E.R. 483.

<sup>856</sup> [1978] *Fam. Law* 86. See also *Morris v. Morris* [1977] *Fam. Law* 224.

the wife would have been entitled to a widow's pension. There was other capital available and the court ordered the husband to pay the wife an enhanced lump sum to take account of her loss of these expectations.<sup>857</sup> In *Brooks v. Brooks*<sup>858</sup> the House of Lords held that the court had jurisdiction to vary the terms of a pension scheme, as the particular pension arrangement could be construed as a post-nuptial settlement and therefore was capable of adjustment under s. 24(1)(c) of the 1973 Act.<sup>859</sup> The pension scheme in that case was a small, company-run scheme where the husband was marginally the majority shareholder. This decision had a limited impact on the court's ability to deal with pension entitlements although it brought into a sharp focus the need for reform.

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<sup>857</sup> Cf. *Roberts v. Roberts* [1986] 2 All E.R. 483 where the court was not prepared to take pension payments which were not due until 2003, into account.

<sup>858</sup> [1995] 2 F.L.R. 13. See D. Chatterton "Pension rights on divorce: The implications of *Brooks v. Brooks*" [1993] *Fam. Law* 423 and D. Slater "Pension after *Brooks*" [1994] *Fam. Law* 520. In the light of the new s. 24B of the MCA1973, inserted by sched. 3 para. 4 of the WSPA 1999, *Brooks v. Brooks* style variation will no longer be available to the court. S. 24B allows the court on the grant of a divorce decree to make one or more pension-sharing orders.

<sup>859</sup> This subsection allows the court to vary for the benefit of the parties and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement made on the parties to the marriage. See pp. 388-390 *infra*.

The requisite reform was brought about by the Pension Act 1995, as amended.<sup>860</sup> The 1995 Act gives the court jurisdiction to “earmark” pensions on divorce so as to enable income to be paid to a divorced spouse at the time of retirement.<sup>861</sup> In *T. v. T.*<sup>862</sup> it was held that the statutory provisions do not compel the court to compensate for pension loss. The court’s obligations are limited to considering whether orders for periodical payments, secured provision or lump sum are appropriate and then to examine how pension considerations should affect the terms of the

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<sup>860</sup> Under s. 27 of the WRPA 1999, a person’s shareable rights under any pension arrangement other than an excepted public service pension scheme are susceptible to a pension sharing order. By s. 27(2) of the 1999 Act a person’s shareable rights under a pension arrangement are any rights of his under the arrangement, other than rights of a description specified by regulation made by the Secretary of State. S. 27 came into operation on 1<sup>st</sup> December 2000. See the Welfare Reform and Pensions Act 1999 (Commencement No. 4) Order 2000 S.I. No. 1047 (C. 29) of 2000.

<sup>861</sup> The “earmarking” of pension rights to allow payment at retirement has been criticized as not being an ideal solution. The reasons given for this criticism are that there may be many uncertainties, such as, the husband becoming ill or being made redundant, which may affect such rights. See *Burrow v. Burrow* [1999] 1 F.L.R. 508 and *Standley op. cit.*, at p. 180. The provisions of s. 16 of the Family Law Act 1996, which was designed to answer this criticism by empowering the court to split pension rights on divorce, has been repealed with effect from 1<sup>st</sup> December 2000. See Sched. 13 Part II to the WRPA 1999. See however, S.I. No. 1116 (C. 35) of 2000 note 852 *supra* and note 863 *infra*.

<sup>862</sup> [1998] 1 F.L.R. 1072.

orders to be made. The court may make a pension-sharing order in which a designated percentage value of a spouse's pension benefit will be transferred to the other spouse.<sup>863</sup> It can even order persons responsible for the pension arrangement<sup>864</sup> to pay the sums involved direct to the spouse concerned.<sup>865</sup> Regulations have been made imposing on persons responsible for a pension arrangement<sup>866</sup> (on notification that a pension sharing order or provision is likely to be made by the court) to supply information about the relevant pension arrangement, not only to the court

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<sup>863</sup> See s. 21A MCA 1973 inserted by sched. 3 to the WRPA 1999, s. 25B(5) inserted by sched. 4 to the WRPA 1999 and s. 19 of the 1999 Act. These sections came into operation on 1<sup>st</sup> December 2000. See S.I. No. 1116 (C.35) of 2000. Pension-sharing orders are therefore available only on or after from 1<sup>st</sup> December 2000.

<sup>864</sup> The term "pension arrangement" has now replaced "pension scheme" in the Act. The meaning of the two terms are the same. See s. 25B(1), (3) and (4) of the MCA 1973 as amended by sched. 4 to WRPA 1999 para. 1.

<sup>865</sup> See s. 25B(4) of the MCA 1973 as amended by sched. 4 to the WRPA 1999. See also note 852 *supra*.

<sup>866</sup> The term "person responsible for the arrangement" is now used instead of "trustees or managers" in the Act. See s. 25B(6) of the MCA 1973 as amended by sched. 4 to the WRPA 1999 para. 1(7). See also note 864 *supra*.

but also to the spouses or former spouses.<sup>867</sup> The Act allows the court to deal with pension rights notwithstanding any statutory provision prohibiting assignment of attachment of such rights.<sup>868</sup>

The provisions of the Act have been said to be an incentive for the court to modify its reluctance to make orders deferred for more than a comparatively short period - a reluctance founded on the belief that any substantial deferral would be inconsistent with the “clean break” policy whereby financial matters were adjusted once and for all on divorce.<sup>869</sup>

### **(b) Orders that a court can make**

The MCA 1973 distinguishes between “financial provision orders” (that is, periodical payment orders and lump-sum orders) on the one hand, and “property adjustment orders” (that is, transfers and settlements of property

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<sup>867</sup> See s. 23 of the WRPA 1999 and The Pensions on Divorce etc. (Provision of Information) Regulations 2000 (S.I. No. 1048) of 2000. Both s. 23 of the 1999 Act and the Regulations came into operation on 1<sup>st</sup> December 2000. See S.I. No. 1047 (C. 29)) and S.I. No. 1048 respectively.

<sup>868</sup> See s. 166(5) of the 1995 Act.

<sup>869</sup> Cretney & Masson *op. cit.*, p. 496.

and variations of settlements) on the other.<sup>870</sup> These orders may be made against either party to a marriage on or after the decree *nisi* of divorce.<sup>871</sup> Thus it has been said that husbands and wives come to the judgement seat “...upon the basis of complete equality.”<sup>872</sup> However, the realisation that women have, in most cases, inferior economic power has made orders against them an exception rather than the rule.<sup>873</sup> The court may, in the exercise of its power, make only one order or a combination of orders as the circumstances of a particular case warrant. These orders are:

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<sup>870</sup> See s. 21 of the Act. This section has been redrafted by sched. 2 para. 2 of the Family Law Act 1996 but the nature of the orders remain basically the same. The schedule is yet to come into operation. See pp. 364-365 and note 734 *supra*.

<sup>871</sup> Sched 2 to the Family Law Act 1996 will amend this by allowing the spouses' financial affairs to be settled before divorce is granted. See s. 15(1) and (2) of the Act. The said schedule and sections are yet to come into operation. See pp. 364-365 and note 734 *supra*.

<sup>872</sup> *Per* Scarman L.J. in *Calderbank v. Calderbank* [1976] Fam. 93 at p. 103.

<sup>873</sup> For examples of the exercise of the court's powers in favour of a husband, see *Griffiths v. Griffiths* [1973] 1 W.L.R. 1454 (£7,000 lump sum), *B. v. B. (Financial Provision)* [1982] 3 F.L.R. 298 (£50, 000) and *Beach v. Beach* [1995] 2 F.L.R. 160 (£60,000).

(a) periodical payments (secured or unsecured) and/or the payment of a lump sum to the other party to the marriage,<sup>874</sup>

(b) periodical payments (secured or unsecured) and/or payment of a lump sum to or for the benefit of a child of the family,<sup>875</sup>

(c) a transfer of property to the other party and/or to or for the benefit of a child of the family,<sup>876</sup>

(d) a settlement of property for the benefit of the other party and/or the benefit of the children,<sup>877</sup>

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<sup>874</sup> See ss. 22A and 23 MCA 1973. Under sched. 2 of the Family Law Act 1996 these orders will be called, "periodical payments order", "secured periodical payments order" and "order for the payment of a lump sum" respectively. The said schedule is yet to come into operation. See pp. 364-365 and note 734 *supra*.

<sup>875</sup> See note 874 *supra*.

<sup>876</sup> Ss. 23A-B and 24 MCA 1973. S. 23A has substituted s. 24 insofar as it dealt with property adjustment orders on divorce. See note 734 *supra*.

<sup>877</sup> S. 21(2)(b) MCA 1973. See note 734 *supra*.

(e) a variation of any ante-nuptial or post-nuptial settlement for the benefit of one or both of the parties and/or any child of the family, or an order extinguishing or reducing the interest of either party under such settlement,<sup>878</sup>

(f) an order for sale of property.<sup>879</sup>

In the context of the thesis particular aspects of the orders for the payment of a lump sum and property adjustment will be highlighted below. This is because they are the usual orders which the court makes in giving effect to whatever rights have been determined to belong to a spouse in the matrimonial property. Orders for periodical payment are usually made for financial provision such as maintenance which is not dependent on the acquisition of rights in the matrimonial property but is by virtue of the marital relationship.<sup>880</sup>

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<sup>878</sup> S. 21(2)(c) MCA 1973. See note 734 *supra*.

<sup>879</sup> S. 24A MCA 1973 as amended by para. 8 of sched. 8 of the Family Law Act 1996. See note 734 *supra*.

<sup>880</sup> English common law imposed on a husband a duty to maintain his wife in accordance with his means, but imposed no corresponding duty on a wife to maintain her husband. See *National Provincial Bank Ltd. v. Ainsworth* [1965] A.C. 1175 at p. 1219 *per* Lord Hodson and at p. 1229 *per* Lord

**(i) Lump sum**

The court may order that one spouse to a marriage pay a lump sum of money to the other spouse.<sup>881</sup> Such a lump sum may be ordered to be paid by instalments and secured to the satisfaction of the court.<sup>882</sup> The security

Upjohn. However, statutory provision now accepts equality between husband and wife and consequently, either of them may apply for an order for maintenance in the Magistrates' Court under the Domestic Proceedings and Magistrates' Courts Act 1978 and in the High Court during divorce proceedings under s. 23 of the MCA 1973.

<sup>881</sup> S. 23(1)(c) MCA 1973, as substituted by sched. 2 to the Family Law Act 1996. The new section 23(1)(c) has a similar provision to the one it substituted. The said schedule is yet to come into operation. See note 734 *supra*. Under the old s. 23(1)(c), it was held in *Coleman v. Coleman* [1973] Fam. 10 that only one lump-sum order can be made and that the plural reference to "lump sums" in the subsection is to allow the court to award one or more sums within the ambit of a single application. There could be an order for an immediate lump sum and another payable by instalments. See also *de Lasala v. de Lasala* [1980] A.C. 546. S. 23(1)(c) will be substituted by a s. 21(1)(c) of the Family Law Act which provides that the court may make an order that a party must make a payment in favour of another person of such lump sum or sums as may be specified. The new section is yet to come into operation. See note 734 *supra*.

<sup>882</sup> This is possible under s. 23(3)(c) of the MCA 1973 as substituted by s. 22A(5) of the Family Law Act 1996. This subsection is yet to come into effect because schedule 2 of the 1996 Act which inserted it is not yet operational. See note 734 *supra*. See also *Penrose v. Penrose* [1994] 2 F.L.R. 621 where a lump sum of £50,000 was ordered to be paid by instalments.

for the instalments is usually the matrimonial home<sup>883</sup> but the court is not restricted in the kind of property it can direct to provide the security. What it is not permitted to do is to order the security over all the assets of the person paying the instalments.<sup>884</sup> The court must specify the particular assets over which the security is to operate.<sup>885</sup> A necessary precondition for such an order is that the parties should be relatively wealthy,<sup>886</sup> in which case it might be used to compensate for a property transfer, for example, of the matrimonial home.<sup>887</sup> But the making of the order should not cripple the earning capacity of the spouse against whom it is made.<sup>888</sup>

The general characteristics of the order are that:

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<sup>883</sup> See *Foard v. Foard* [1967] 2 All E.R. 660.

<sup>884</sup> See *Baker v. Baker* [1952] P. 184 at p. 190 *per Jenkins L.J.*

<sup>885</sup> *Ibid.*

<sup>886</sup> See *Potter v. Potter* [1982] 3 All E.R. 321, *Preston v. Preston supra*, *Leadbeater v. Leadbeater supra*, *Gojkovic v. Gojkovic supra*, *R. v. R. (Financial Provision: Reasonable Needs) supra* and *Dart v. Dart supra*.

<sup>887</sup> See *Wachtel v. Wachtel supra* at p. 841, *Smith v. Smith* [1970] 1 All E.R. 244, *Hector v. Hector* [1973] 3 All E.R. 1070, *Backhouse v. Backhouse* [1978] 1 W.L.R. 243 and *Mortimer v. Mortimer-Griffin supra*.

<sup>888</sup> See *Wachtel v. Wachtel supra* at p. 841.

1. The payment is made “once and for all”.<sup>889</sup> Only one such order can be made and the recipient cannot come back for more, at any rate in the absence of fraud or non-disclosure of assets by the person against whom it was made.<sup>890</sup> In order to avoid possible injustice caused by the finality of the lump sum order, the court has a discretion to adjourn the proceedings but usually not for more than four or five years.<sup>891</sup>
  
2. The order cannot be varied if circumstances change.<sup>892</sup> For example, the lump sum is not returnable if the recipient remarries after receiving it, or on any contingency, at least in the absence of the conditions included

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<sup>889</sup> See *Coleman v. Coleman supra* at p. 17.

<sup>890</sup> *Coleman v. Coleman supra* and *Vicary v. Vicary* [1992] 2 F.L.R. 271.

<sup>891</sup> See *Davies v. Davies* [1986] 1 F.L.R. 497 and *MT. v. MT. (Financial Provision: Lump Sum) supra*.

<sup>892</sup> The power given to the court by s. 31 of the MCA 1973 to vary certain orders made under the Act does not apply to lump sums. However, s.31A of the 1973 Act, inserted by sched. 2 para. 8 of the Family Law 1996 Act, gives the court the power to vary or discharge lump sum or property adjustment orders on the application of the parties made before the grant of a divorce order. S. 31A is yet to come into operation. See note 734 *supra*.

in the original order.<sup>893</sup> However, if the lump sum is ordered to be paid by instalments, such instalments may be varied.<sup>894</sup>

Since the decision in *Wachtel v. Wachtel*<sup>895</sup> lump sum payment has become an important method for reallocating matrimonial assets on divorce. In *Wachtel's* case the wife was awarded a £6,000 lump sum as her share in the matrimonial home. In *O'D. v. O'D.*<sup>896</sup> a wife was awarded a £70,000 lump sum for her indirect contribution towards the success of her husband's business. In *Preston v. Preston*<sup>897</sup> a lump-sum award of £600,000 was made to a wife as her "reasonable requirements" in terms of need and in *Gojkovic v. Gojkovic*<sup>898</sup> a lump sum of £1.3 million was awarded to a wife to enable her to acquire a hotel which would provide her with a livelihood.

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<sup>893</sup> See *Coleman v. Coleman supra*.

<sup>894</sup> See *Penrose v. Penrose supra* and *Tilley v Tilley* (1979) 10 *Fam. Law* 89.

<sup>895</sup> *Supra*.

<sup>896</sup> *Supra*.

<sup>897</sup> *Supra*.

<sup>898</sup> *Supra*.

A lump sum may, in a rare circumstance, be made for investment purposes where the parties have substantial property. If it is made, the recipient of the award is expected to expend it, or so much of it as is needed to meet future income needs, by drawing both upon the capital and the income it can produce.<sup>899</sup>

Under the Pension Act 1995, the court may order persons responsible for a pension arrangement to pay a lump sum from a pension right of one spouse to the other.<sup>900</sup> The amount so ordered must not exceed the amount of the payment due at the time of payment to the pensioner.<sup>901</sup> In effect the court will have power to divert payments of all or part of the lump sums which are often paid under pension schemes on retirement or death in service from the pensioner (or his estate) to the pensioner's spouse.<sup>902</sup>

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<sup>899</sup> See *B. v. B.* [1990] 1 F.L.R. 20 at p. 24 *per* Ward J. See also *Preston v. Preston supra* and *Gojkovic v. Gojkovic supra*.

<sup>900</sup> See notes 864, 866 and pp. 364-365 *supra*.

<sup>901</sup> S. 25B(4), (5) and 25C of the MCA 1973 as amended by sched. 4 to the WRPA 1999 paras. 1 and 2. See note 863 *supra*.

<sup>902</sup> See s. 25C of the MCA 1973 as amended by para. 2 of sched. 4 to the WRPA 1999. See also note 852 *supra*. S. 25C gives the court a number of ancillary powers relating to death benefits.

Research has shown that lump-sum orders are not made frequently.<sup>903</sup> This is so because regard must be had to the effect which the lump-sum payment will have on the paying party and his ability to pay.

## (ii) Property transfer

The court is empowered to order that a party to the marriage shall transfer to the other party such property as may be specified to which the first-mentioned party is entitled either in possession or reversion.<sup>904</sup> Any property, such as a car, furniture or stocks and shares, can be transferred but, as will be seen below, the order is commonly used to transfer the matrimonial home from one party to the other. The transferee may be given a charge over the house for a fixed amount or a percentage of the value, which is realisable at a later date, for example, when the house is

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<sup>903</sup> See J. Eekelaar *Regulating Divorce op. cit.*, at p. 70 and B. Baker *et al The Matrimonial Jurisdiction of Registrars etc. op. cit.*, at paras. 3.7-3.10.

<sup>904</sup> S. 24(1)(a) of the MCA 1973. This subsection will be replaced by a new s. 21(2)(a) inserted by sched. 2 to the Family Law Act 1996. The provision in the new s. 21(2)(a) is similar to that of s. 24(1)(a). The said schedule is yet to come into operation. See note 734 *supra*.

sold.<sup>905</sup> Alternatively, the transferee may be ordered to pay the transferor a lump sum representing the latter's share in the property concerned<sup>906</sup> or an absolute transfer may be ordered without any lump sum payment *in lieu* of the share transferred.<sup>907</sup>

There is no clarity about the question whether the party in whose favour an order of transfer has been made can obtain a further order in respect of a different item of property. This would be important for instance, where further assets are acquired by the other party. The point was left open in *Carson v. Carson*,<sup>908</sup> a case which concerned a settlement of property. It is submitted that if further assets are acquired by one party after the divorce and if no application has previously been made by the other party then, subject to a bar if he or she has remarried, an application can be

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<sup>905</sup> See *Knibb v. Knibb* [1987] 2 F.L.R. 396, *Hector v. Hector supra*, *Browne (formerly Pritchard) v. Pritchard* [1975] 3 All E.R. 721, *Teschner v. Teschner* [1985] F.L.R. 627 and *Clutton v. Clutton supra*.

<sup>906</sup> See *Wachtel v. Wachtel supra*, *Mortimer v. Mortimer-Griffin supra*, *Backhouse v. Backhouse supra* and *Dopson v. Cherry* (1975) 5 Fam. Law 57.

<sup>907</sup> See *Cuzner v. Underdown supra*, *Jones v. Jones supra*, *Smith v. Smith* [1975] 2 All E.R. 19 and *Martin v. Martin supra*.

<sup>908</sup> [1981] 2 F.L.R. 352.

made if leave is first obtained from the court.<sup>909</sup> Furthermore, it has not been settled whether if an application was made but was dismissed, a further application will be entertained. By analogy with applications for a lump sum, one may conclude that once an application has been made and dismissed, for example, because the financial circumstances of the other spouse did not justify an order, no further application will be entertained.<sup>910</sup> However, the burden of establishing that there was a final and unequivocal dismissal of the claim is on the party asserting it and it has been held that the court must be slow to imply such dismissal when none is expressed.<sup>911</sup>

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909 See s. 26 of the MCA 1973 which deals with commencement of proceedings for ancillary relief. See also r. 2.53(1) and (2) of the Family Proceedings Rules 1991.

910 See Miller *op. cit.* at p. 258. On the making of a lump-sum order, see *Coleman v. Coleman supra*.

911 See *Brown v. Kिरrage* (1981) 11 *Fam. Law* 141 where the Court of Appeal held that a property adjustment order dealing with the principal asset of the marriage (the home) did not implicitly debar a later lump-sum application by the wife, on the ground that the husband had not discharged the heavy burden, which lay on him, of showing a dismissal.

The characteristics of this order are similar to those of the power to award a lump sum.<sup>912</sup> Thus, a property transfer order is made “once and for all” and the beneficiary cannot come back for another order. Secondly, an order for property transfer cannot be varied if circumstances change.<sup>913</sup> Thus, the transfer of such property will not be affected by remarriage of the recipient. But if material facts relevant to the making of the order are not disclosed or are withheld from the court and the other party, the order may be revisited. Thus, in *Livesey (formerly Jenkins) v. Livesey*,<sup>914</sup> the House of Lords set aside an order for the transfer of the matrimonial home when the wife failed to disclose her intention to remarry.

The most important use of this order has been in relation to the matrimonial home. Where the former matrimonial home is to be vested in one spouse who is in occupation then this will be achieved by an order that the other spouse transfer his or her interest in the home to the

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<sup>912</sup> See pp. 375-379 *supra* and Miller *op. cit.*, at p. 257.

<sup>913</sup> The court's power under s. 31 of the MCA 1973 to vary certain orders made under the Act does not apply to property transfer orders. See note 892 *supra*.

<sup>914</sup> [1985] A.C. 424.

occupying spouse.<sup>915</sup> Such an order may be accompanied by a reduction or refusal of other payments to the resident spouse,<sup>916</sup> the payment by the resident spouse of an immediate lump sum, possibly raised by mortgage on the property itself,<sup>917</sup> the execution of a charge of a fixed or proportionate amount of the value of the house enforceable on the death or remarriage of the resident spouse, or on the children, if any, reaching a certain age, or on the sale of the property.<sup>918</sup> Where the non-occupying spouse is to become a beneficiary of a transfer order, the court will have to take the respective needs for accommodation by the occupying spouse as well as the non-occupying spouse into consideration. The non-

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<sup>915</sup> See *Wachtel v. Wachtel supra* at pp. 840-841. For examples of cases in which such an order was made, see *Hanlon v. Hanlon supra*, *Mortimer v. Mortimer-Griffith supra*. and *Cuzner v. Underdown supra*.

<sup>916</sup> See *Hanlon v. Hanlon supra*.

<sup>917</sup> *Backhouse v. Backhouse supra* and *Scipio v. Scipio* [1983] 4 F.L.R. 654. It must be noted that where resources are limited, and this is usually the case, the court has stressed that a lump-sum payment should not cripple the party against whom it is made. See Lord Denning's *dictum* in *Wachtel v. Wachtel supra* at p. 841.

<sup>918</sup> See *Hector v. Hector supra*, *Dunford v. Dunford* [1980] 1 All E.R. 122 and *Simmons v. Simmons* [1984] 1 All E.R. 83. On the advantages of imposing a charge on the home in favour of the non-resident spouse, see M. Hayes and G. Buttersby "Property adjustments: Further thoughts on charge orders" [1985] *Family Law* 142.

occupying spouse could, for example, be provided with a lump sum to be able to buy a house or flat or at least to pay a deposit for one.<sup>919</sup>

The type of order adopted by the court will be determined by the other factors mentioned in s. 25 of the 1973 Act, such as contribution made by the applicant spouse or the conduct of the parties. Thus, in *Poulter v. Poulter*<sup>920</sup> the wife was a wealthy woman due to the generosity of her father. The former matrimonial home, which was vested in the spouses' joint names, had been purchased with funds provided by the wife's father. Although the marriage had lasted for nine years, the court held that the husband had put nothing into the house and could have nothing out of it. In other words, the husband had made no contribution in terms of s. 25(2)(f). Also in *Cuzner v. Underdown*,<sup>921</sup> the wife's interest was transferred to the husband because at the time of the acquisition of the property in their joint names, the wife was committing adultery. A few weeks later she left the husband to live with the co-respondent. The Court of Appeal, in affirming the trial judge's order, took the view that

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<sup>919</sup> See *Wachtel v. Wachtel supra*.

<sup>920</sup> [1974] 4 *Fam. Law* 86.

<sup>921</sup> *Supra*.

the wife's conduct in accepting a half share in the matrimonial home while committing adultery was "obvious and gross" misconduct necessitating it being taken into account in terms of s. 25(2)(g).

An outright transfer has an advantage of crystallising the parties' interests in the home at an early time and may thus be preferable if the court is willing to apply the "clean break" principle<sup>922</sup> in a particular case.<sup>923</sup> It may also be appropriate where the sale of the house and the division of the proceeds at some point in the future will yield an insufficient amount to rehouse the resident spouse<sup>924</sup> or where the non-resident spouse is adequately provided for elsewhere.<sup>925</sup>

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<sup>922</sup> See *infra* p. 398.

<sup>923</sup> See *Scipio v. Scipio supra*.

<sup>924</sup> See *Hanlon v. Hanlon supra*.

<sup>925</sup> See *Backhouse v. Backhouse supra*.

**(iii) Settlement of property**<sup>926</sup>

The court may direct that property to which a party to the marriage is entitled be settled for the benefit of the other spouse and/or children of the family.<sup>927</sup> The power is usually exercised in relation to the matrimonial home in order that it may continue to be used as a home for dependent children whilst preserving the financial interests of the spouses in it. This is the basis of the *Mesher* and *Martin* orders discussed above.<sup>928</sup>

The power to order a settlement is said to have several advantages over the other types of powers exercisable under the 1973 Act.<sup>929</sup> For example, it can be used as a means of providing members of the family with greater

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<sup>926</sup> A settlement is a disposition of land or other property, made by deed or will, under which trusts are created by the settlor designating the beneficiaries and the terms under which they are to take the property.

<sup>927</sup> See s. 24(1)(b) MCA 1973. This subsection will be substituted by a new s. 21(2)(b) inserted by sched. 2 to the Family Law Act 1996. The new s. 21(1)(b) makes a similar provision to that of s. 24(1)(b). The said schedule is yet to come into operation. See p. 364-365 and note 734 *supra*.

<sup>928</sup> See pp. 345-348 *supra*.

<sup>929</sup> See Miller *op. cit.*, at p. 260.

flexibility than an order for secured provision<sup>930</sup> or it can be used to enable a party to have the use of property for a specified term without going to the length of an out-and-out transfer of the property to that person.<sup>931</sup>

#### (iv) Variation of settlements

The court may make an order varying for the benefit of the parties and/or the children of the family any “*ante-nuptial or post-nuptial*”<sup>932</sup> settlement made on the parties to the marriage.<sup>933</sup> To constitute an “ante-nuptial or

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<sup>930</sup> This order requires the person against whom it is made to provide assets which will secure the specified payments ordered by the court. The normal practice is to order a spouse to transfer specified assets to trustees to hold them on trust to pay the sum ordered to the spouse entitled and the balance to the spouse against whom the order is made. For examples of cases in which such an order was made see *Foard v. Foard supra* and *Aggett v. Aggett* [1962] 1 All E.R. 190.

<sup>931</sup> *Ibid.* See *S. v. S.* [1977] 1 All E.R. 56.

<sup>932</sup> These terms were described as archaic in *Brooks v. Brooks* [1995] 2 F.L.R. 13 at p. 19 *per* Lord Nicholls.

<sup>933</sup> See s. 24(1)(c) and (d) MCA 1973. These subsections will be substituted by a new s. 21(2)(b) and (c) inserted by sched. 2 to the Family Law Act 1996. The new s. 21(2)(b) and (c) are similar to s. 24(1)(c) and (d). The said schedule is however, not in operation. See p. 364-365 and note 734 *supra*.

post-nuptial settlement” two conditions must be satisfied, namely, there must be a “settlement”<sup>934</sup> and the settlement must have the requisite nuptial element, that is to say, it must have been made “*in contemplation of or because of marriage and with reference to the interests of married people or their children.*”<sup>935</sup> The only restriction on the court’s power to vary the settlement is that it must be “*for the benefit*” of the parties or their children and in this regard the court’s power is not confined to varying the interests of the parties to the marriage, but extends to varying the interests of the children and other beneficiaries under the settlement.<sup>936</sup>

Because the court has the power to transfer property, it is now unnecessary to resort to the power of variation as often as in the past.<sup>937</sup> In any event, the popularity of the traditional marriage settlement, designed to protect a wife from the harsh common-law rule whereby her property and earnings passed to her husband, has waned and seems to

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<sup>934</sup> See *Prinsep v. Prinsep* [1929] P. 225 at p. 232 and note 926 *supra*.

<sup>935</sup> *Per* Hill J. in *Hargreaves v. Hargreaves* [1926] P. 42 at p. 45.

<sup>936</sup> See *Brooks v. Brooks supra* at p. 20 *per* Lord Nicholls.

<sup>937</sup> See *Miller op. cit.*, at p. 194.

belong to the “*stuff of legal history*”.<sup>938</sup> However, the decision in *Brooks v. Brooks*,<sup>939</sup> has given the power to vary settlements some contemporary relevance in so far as it held that in some circumstances a pension scheme will fall within the definition of a nuptial settlement, and that the court may accordingly vary the terms of the settlement for the benefit of the wife or children.<sup>940</sup>

#### (v) Sale of property

The court is empowered, on making an order for financial relief in divorce, nullity or separation proceedings or at anytime thereafter, to make an order for sale of any property in which, or in the proceeds of sale of which, either or both of the parties have or have a beneficial interest, either in possession or reversion.<sup>941</sup> The order may be made

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<sup>938</sup> See *Cretney & Masson op. cit.*, at p. 417. Despite its contemporary rarity it is still a suitable device, in appropriate circumstances, for making provision for one’s children. See *E. v. E. (Financial Provision)* [1990] 2 F.L.R. 223.

<sup>939</sup> See p. 368 *supra*.

<sup>940</sup> See *Cretney & Masson op. cit.*, at pp. 417-418.

<sup>941</sup> S. 24A(1) of the MCA 1973 as inserted by ss. 7 and 8 of the Matrimonial Homes and Property Act 1981 and amended by Sched. 8 Part I para. 8 of the Family Law Act 1996. Part I of the said schedule is yet to come into

notwithstanding that a third party also has an interest in the property. However, in such a case the third party must be given an opportunity to make representation to the court and the court must take that representation into account before making an order.<sup>942</sup>

The court may vary the order for sale<sup>943</sup> but this should be done only in exceptional circumstances so as to be consistent with the policy of the Act that property adjustment orders should not be varied.<sup>944</sup>

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operation (paragraph 39 dealing with aspects of legal aid has been repealed) but Parts II and III have been repealed by sched. 15 to the Access to Justice Act 1999. See p. 364-365, note 734 *supra* and the Access to Justice Act 1999 (Commencement No. 4 and Transitional Provisions) Order 2000 (S.I. No. 1920 of 2000) which came into operation on 31<sup>st</sup> July 2000. For a discussion of the background to the 1981 Act see the Law Commission's Report *Orders for Sale of Property under the Matrimonial Causes Act 1973* Law Com. No. 99 (1980). It must be noted that a reversion in the context of s. 24A of the 1973 Act means the residue of an owner's interest in land after he has granted some lesser interest in possession to some other person. For example, if A grants land to B for life, A has an interest in reversion, since the land reverts to him on B's death.

<sup>942</sup> S. 25(4) of the MCA 1973 as inserted by s. 8(1) of the Matrimonial Homes and Property Act 1981. See *Levermore v. Levermore* [1979] 1 W.L.R. 1277.

<sup>943</sup> See s. 31(2)(f) of the MCA 1973 inserted by s. 8(2) of the Matrimonial Homes and Property Act 1981.

<sup>944</sup> See *Powys v. Powys* [1971] P. 340 at p. 355. Cf. *Chaterjee v. Chaterjee* [1976] Fam. 199 at p. 207 *per* Ormrod L.J.

**(c) Application of the “one-third rule”<sup>945</sup>**

The so-called one-third rule is a method used by the court as a starting point for assessing the spouses' income and capital needs. Under this method the assets of both spouses are added and divided by three and the resulting amount is used as the starting point in determining what the husband should pay to his wife as maintenance. The rule originated from the practice by which ecclesiastical courts, in divorce proceedings, awarded an innocent wife a sum equal to one-third of the joint income of the spouses. After the introduction of judicial divorce in 1857,<sup>946</sup> the same practice was followed by the Divorce Court. It was found to be

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<sup>945</sup> For a general discussion of the rule, see Gray *op. cit.*, at pp. 308-310, Miller *op. cit.*, at pp. 222-226 and Cretney *op. cit.*, (4<sup>th</sup> ed.) at pp. 827-833.

<sup>946</sup> This was brought about by the Matrimonial Causes Act 1857.

a “guide, a sound working rule...yet not an absolute rule”.<sup>947</sup> Although it met with some criticism,<sup>948</sup> it continued to be used in practice.<sup>949</sup>

This rule was given a boost by Lord Denning in *Wachtel v. Wachtel*<sup>950</sup> as a starting point in ascertaining a spouse’s share in the joint gross income of the parties as well as their matrimonial assets. It regards an applicant spouse as entitled to one third of such resources. Lord Denning explained, however, that:

“...this so-called rule is not a rule and must never be so regarded. In any calculation the court has to have a starting point. If it is not to be a third, should it be one half or one quarter? A starting point of one third of the combined resources of the parties is as good and rational a starting point as any other, remembering that

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<sup>947</sup> Per Lord Hanworth M.R. in *Stibbe v. Stibbe* [1931] P. 105 at p. 110. See also *Williams v. Williams* [1965] P. 125 at p. 136 per Pearson L.J.

<sup>948</sup> See for example, Sir Jocelyn Simon P. in *Kershaw v. Kershaw* [1964] 3 All E.R. 635 at p. 637 and Scarman J. in *Kirke v. Kirke* [1961] 1 W.L.R. 1411 at p. 1412.

<sup>949</sup> See *Sansom v. Sansom* [1966] P. 52, *Brister v. Brister* [1970] 1 W.L.R. 644 and *Potter v. Potter supra*.

<sup>950</sup> *Supra* at pp. 839-840.

*the essence of the legislation is to secure flexibility to meet the justice of particular cases, and not rigidity, forcing particular cases to be fitted into some so-called principle within which they do not easily lie. There may be cases where more than one third is right. There are likely to be many others where less than one third is the only practicable solution. But one third as a flexible starting point is in general more likely to lead to the correct final result than a starting point of equality, or a quarter."*

The practical usefulness of the rule is to provide practitioners with an indication of the likely level of awards. Empirical evidence indicates that it is useful as a starting point only in the middle wealth range of cases which will be departed from according to the facts of the case.<sup>951</sup> Since divorce is most likely to occur amongst low income groups,<sup>952</sup> the rule is unlikely to be helpful in many of such cases. It is however, intended to do justice, in the words of Ormrod L.J. in *S. v. S.*,<sup>953</sup> in "*what one might call the average run of cases.*" These, in practice, will be cases where the

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<sup>951</sup> See B. Baker *et al* para. 3.22-3.29 and *Slater v. Slater* [1982] 3 F.L.R. 364.

<sup>952</sup> See J. Haskey "Social class and socio-economic differentials in divorce in England and Wales" in (1984) 38 *Population Studies* 419 at p. 427.

<sup>953</sup> *Op. cit.*, at p. 57.

parties were neither very wealthy nor very poor<sup>954</sup> and in exercising its discretion the court has tended to emphasise the needs approach, that is, satisfying the reasonable needs of the spouses in the light of the post-divorce reality where the resources available to the parties may not be sufficient to meet the reasonable needs of both parties after the divorce.<sup>955</sup> In this regard the one-third rule has become little more than a check on the tentative figure which emerges from the application of the statutory guidelines in s. 25 of the MCA 1973, and then usually only in cases in which neither very large nor very small sums of money are involved and where the court is solely concern with a husband's income liability to his former wife.<sup>956</sup>

The application of the one-third rule may not be appropriate in particular cases. In *Cann v. Cann*<sup>957</sup> it was held that the one-third rule was

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<sup>954</sup> See B. Baker *et al op. cit.*, at para. 3.25-3.26.

<sup>955</sup> See pp. 341-344 *supra*, *Stockford v. Stockford* [1981] 3 F.L.R. 58 and *S. v. S. supra*.

<sup>956</sup> See *O'D v. O'D supra* at pp. 88-89, *Potter v. Potter supra* at p. 324 and *Preston v. Preston supra* at p. 48.

<sup>957</sup> [1977] 1 W.L.R. 938.

inappropriate where the parties were of small means. In *Scott v. Scott*<sup>958</sup> the court was of the view that the rule was of no assistance where the dominant feature of the family finances was to provide for three young children. It has also been held in *Potter v. Potter*<sup>959</sup> that where there were substantial capital assets or capital assets tied up in business the rule was inappropriate, especially where it would yield too high a figure and possibly force a spouse to sell assets that might put a business at risk.<sup>960</sup> In *Dart v. Dart*<sup>961</sup> the Court of Appeal held that it was wrong in principle to adopt a purely arithmetical approach when trying to ascertain the proportion of the total assets to allocate to a spouse in a case involving large sums of money. The proper approach, in the court's view, was to assess the applicant's reasonable needs in the light of the other criteria set out in s. 25 of the MCA 1973.

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<sup>958</sup> [1978] 1 W.L.R. 723 at 728.

<sup>959</sup> *Supra.* See also *O'D v. O'D supra.* at p. 91.

<sup>960</sup> See *Preston v. Preston supra.* and *Dew v. Dew* (1986) 2 F.L.R. 341. In *Bullock v. Bullock* [1986] 1 F.L.R. 372 the one-third rule was applied to a capital award in a case involving substantial assets.

<sup>961</sup> *Supra.*

It must be noted that the popularity of the rule has waned because since the decision in *Wachtel v. Wachtel* the divorce courts have gained a great deal of experience in the working of the guidelines given in the MCA 1973. This experience notwithstanding, the one-third rule is still a useful tool in the process of working through the guidelines provided by the Act in working out what the needs of the spouses are.<sup>962</sup> It must however, be borne in mind that the rule should be viewed and only applied in accordance with the provisions of s. 25 of the MCA 1973 which, while requiring the court to take into account all the circumstances of the case with particular reference to the matters stated therein, makes the welfare of children the first consideration.

Finally, in *White v. White*<sup>963</sup> the House of Lords rejected any presumption of equal division of assets when the court is considering redistribution of assets on divorce. The House however expressed the view that a judge exercising his statutory discretion pursuant to s. 25 of the MCA 1973 should, before making his final decision, check his tentative views against the yardstick of equality of division and depart from equality only if, and

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<sup>962</sup> See *Foley v. Foley* [1981] Fam. 160 at p. 168 and *Preston v. Preston supra* at p. 47. See also *Bullock v. Bullock supra* and *Dew v. Dew supra*.

<sup>963</sup> *Supra* at p. 1579.

to the extent that, there is good reason for doing so. Had the principle of equality been upheld, the scope for the exercise of judicial discretion may have been eroded to the point of possible extinction.

**(d) The application of the clean break principle<sup>964</sup>**

As indicated above,<sup>965</sup> the powers given to the court under the MCA 1973 to make financial orders upon divorce may be divided into those dealing with the provision of income (maintenance) and those dealing with the transfer of property or capital assets. These powers are utilised to order a spouse to make financial provision for the other spouse by way of periodical payments, a lump sum, a transfer or settlement of property, or by variations of settlement.<sup>966</sup> Thus, despite the distinction between powers to award maintenance and those to transfer property rights, both

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<sup>964</sup> See note 477 *supra* for the various meanings which may be assigned to the term. See also *Clutton v. Clutton op. cit.*, at p. 362, *Cretney & Masson op. cit.*, at p. 454-467 and *Dewar op. cit.*, at pp. 325-329.

<sup>965</sup> See pp. 371-372 *supra*.

<sup>966</sup> See pp. 373-374 *supra*.

powers are interrelated and complimentary.<sup>967</sup> An award, for example, of a larger proportion of the capital assets to the wife may result in a diminution in her periodical payments, and vice versa.<sup>968</sup> Also when secured provision is ordered, maintenance is clearly linked with property although the owner of the property providing the security is not deprived of it but is merely made to secure his payment on it. Prior to 1984, the objective of the law was that the financial position of the parties should so far as possible be unaffected by their divorce.<sup>969</sup> Consequently, the court endeavoured to provide maintenance for a spouse (usually the wife) whilst in appropriate cases a lump sum was also awarded in order to compensate for a loss, for example, of a share in the matrimonial home.<sup>970</sup>

One of the objectives of the Matrimonial and Family Proceedings Act 1984 was to introduce the principle that divorced spouses should not

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<sup>967</sup> See the comments of Lord Denning in *Button v. Button op. cit.*, at p. 462, *Baynham v. Baynham* [1968] 1 W.L.R. 1890 at p. 1894, and *Gissing v. Gissing* [1969] 2 Ch. 85 at p. 92. See also Miller "Maintenance and property" *op. cit.* at p. 67 and pp. 111-116 *supra*.

<sup>968</sup> See *Wachtel v. Wachtel supra* at p. 841.

<sup>969</sup> See pp. 324-325 *supra*.

<sup>970</sup> See *Wachtel v. Wachtel supra.*, *Hector v. Hector supra* and *Backhouse v. Backhouse supra*.

remain under a long-term obligation to one another after divorce. In the words of Waite J. in *Tandy v. Tandy*:<sup>971</sup>

*“[T]he legislative purpose...is to enable the parties to a failed marriage, wherever fairness allows, to go their separate ways without the running irritant of financial interdependence or dispute.”*

Thus, s. 25A(1) of the MCA 1973 provides that:

*“Where on or after the grant of a decree of divorce...the court decides to exercise its powers under section 23(1)(a), (b), or (c),”*<sup>972</sup>

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<sup>971</sup> Unreported (24<sup>th</sup> October 1986, CA) cited by Balcombe L.J. in his dissenting judgment in *Whiting v. Whiting supra* at p. 574. See also *Minton v. Minton* [1979] A.C. 593 at p. 608 *per* Lord Scarman.

<sup>972</sup> These subsections deal with secured and unsecured periodical payments which the court may order on a grant of divorce, nullity or judicial separation. Sched. 2 of the Family Law Act 1996 has substituted this section with a new s. 22A(3) which deals with types of financial provision orders a court can make on divorce. Sched. 2 has not yet come into operation. See note 734 *supra*.

*24 or 24A<sup>973</sup> ...in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.”<sup>974</sup>*

This section places a duty on the court in all cases in which the court decides to exercise its financial powers, that is, to make financial provision, property adjustment, and/or sale orders.<sup>975</sup> But this duty is only to “consider” whether there should be a severance at some time of the reciprocal financial obligations of the parties; it is not a requirement to

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<sup>973</sup> These sections deal with transfer/settlement of property and the power to order a sale. Sched 2 of the Family Law Act 1996 has substituted a new s. 23A to replace s. 24 insofar as it dealt with property adjustment orders on divorce. Sched. 2 is yet to be operational. See note 734 *supra*.

<sup>974</sup> This section was inserted by s. 3 of the 1984 Act. This provision may be new to the statute books but it is thought to be a codification of a policy that had been developing in the case law from the late 1970s onwards. See *Minton v. Minton op. cit.*, at p. 608 *per* Lord Scarman and at p. 601 *per* Viscount Dilhorne. *Cf. Dipper v. Dipper* [1981] Fam. 31 where the court held that it had no power to impose a “clean break” by dismissing a wife’s claim for periodical payments, unless she agreed to that being done.

<sup>975</sup> This provision does not apply if the court’s powers are only exercised to make orders for children of the family. See *Crozier v. Crozier* [1994] Fam. 114 at p. 122 *per* Booth J.

terminate those obligations.<sup>976</sup> For, as was said by Lloyd L.J. in *Clutton v. Clutton*,<sup>977</sup> there is perhaps a danger in referring to the clean break as a “principle”, since it might lead courts to strive for a clean break, regardless of all other considerations. This, in his view, is not what s. 25A of MCA 1973 requires. It is submitted that this view is in consonance with the policy that shaped s. 25A. For, as was noted by the Law Commission,<sup>978</sup> the occasions on which it will be possible to arrive at a final, once and for all settlement between the parties on divorce will be comparatively few. It will be almost non-existent where there are young children. The duty imposed on the court to consider a clean break is therefore to be utilised wherever possible, for example, where there is adequate measure of capital available for division.

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<sup>976</sup> See the then Solicitor-General’s memorandum to the House of Commons Special Standing Committee on the Matrimonial and Family Proceedings Bill - Official Report, March 20<sup>th</sup> 1984 col. 10 cited by Cretny (4<sup>th</sup> ed.) *op. cit.*, at p. 823. See also the Law Commission’s Report - *The Financial Consequences of Divorce, The Response to the Law Commission’s Discussion Paper, and Recommendation on the Policy of the Law* (Law Com. No. 112, 1981) para. 28.

<sup>977</sup> *Supra* at p. 362.

<sup>978</sup> See its Report on *Family Law, Financial Consequences of Divorce* (Law Com. No. 112) para. 28.

There is no clear indication from the case law when a “clean break” will be considered, in the words of the section, “*just and equitable*”. An example of judicial disagreement as to when a clean break will be just and equitable is to be found in the decision of the Court of Appeal in *Whiting v. Whiting*.<sup>979</sup> In that case, a consent order was made on divorce in which the wife was granted, *inter alia*, nominal maintenance of 5p per annum. Later, after the husband’s earnings had dropped significantly, he applied, *inter alia*, under s. 31(7) of the MCA 1973<sup>980</sup> to have the nominal maintenance order discharged, with a direction that his wife should not be entitled to make any further application for maintenance. Their three children were financially independent. The wife’s earnings were £10,500 per annum. The husband’s were £4,358 per annum. The trial judge dismissed the husband’s application on the ground that the nominal maintenance order should continue as a “*last backstop*” for the wife. The

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<sup>979</sup> *Supra.*

<sup>980</sup> This subsection allows the court to have regard to all the circumstances of the case, first consideration being given to the welfare of any child under 18 years, when considering a variation of an order made in terms of s. 31 of the MCA 1973. S. 31 gives the court jurisdiction to vary an order for maintenance pending suit, any interim maintenance order, any periodical payments order, and an order for the sale of property. Orders for lump-sum payment (except where such lump sum is permitted to be paid by instalments) and property adjustment orders may not be varied. See notes 892 and 913 *supra*.

husband appealed. The Court of Appeal, by a majority, held that as the court had a discretion under s. 31(7) of the MCA 1973 to direct that the original order continue on a nominal basis as a backstop for the payee, the judge had been entitled on the facts to take the view that the nominal maintenance order should be kept alive lest unforeseen circumstances (e.g. illness or redundancy) would deprive the wife of her ability to provide for herself.

In a dissenting judgment, Balcombe L.J., after tracing the history and policy reasons behind the 1984 Act, held<sup>981</sup> that to make mutual orders for periodical payments in nominal amounts just in case something should happen to either party or as the trial judge put it as “*a last backstop*” was to negate the entirely the principle of the “clean break”. In his view the husband’s position was such that “*short of his winning the pools*”, he was not likely to be in a position to support the ex-wife in the future. Consequently, he would discharge the nominal maintenance order.<sup>982</sup>

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<sup>981</sup> At pp. 576-577.

<sup>982</sup> For commentaries on the case, see B. Walsh “*Whiting v. Whiting: Whither the clean break principle?*” [1989] *Fam. Law* 157 and M. Mears “*The clean break v. the courts: The illogical backstop*” [1989] *Fam. Law* 398.

It must be pointed out that this difference of opinion is to be expected because of the unfettered discretion given to the courts to determine when to apply the “clean break”. Much leeway is given to trial judges when they are exercising the discretion and unless such exercise “*exceeds the generous ambit within which reasonable disagreement is possible, and is, plainly wrong*”,<sup>983</sup> an appellate court is unlikely to interfere. Furthermore, as demonstrated by *Whiting’s* case itself, the term may mean different things to different people and this again leaves room for differences of opinion as to when to apply it. Thus, in *Clutton v. Clutton*,<sup>984</sup> the trial judge apparently refused to make a *Martin* order,<sup>985</sup> under which the former matrimonial home would have been settled on trust for the wife until her death, remarriage or cohabitation with another man, on the basis that such an order would offend against the clean break principle. The Court of Appeal however held that a provision under which the husband’s interest could not be realised except on the wife’s

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<sup>983</sup> Per Asquith L.J. in *Bellenden (formerly Satterthwaite) v. Satterthwaite* [1948] 1 All E.R. 343 at p. 345 cited with approval by Lord Fraser in *G. v. G. (Minors: Custody Appeal)* [1985] 1 W.L.R. 647 at pp. 651-652. See also *B. v. W. (Wardship: Appeal)* [1979] 1 W.L.R. 1041 at p. 1055.

<sup>984</sup> *Supra.*

<sup>985</sup> See pp. 347-348 *supra.*

death or remarriage “*could only be said to offend against the clean break principle in the most extended sense of that term.*”<sup>986</sup>

Despite this lack of unanimity as to what the clean break principle is and when a “clean break” will be considered “just and equitable”, there are pointers in the case law as to circumstances in which it will be considered appropriate/inappropriate to apply it. In *Ashley v. Blackman*,<sup>987</sup> for example, it was held that a classic instance for applying the clean break principle was where the parties had only small incomes and some degree of reliance on welfare benefits was inevitable. In the court’s opinion:

*“[N]o humane society could tolerate - even in the interest of saving its public purse - the prospect of a divorced couple of acutely limited means remaining manacled to each other indefinitely by the necessity to return at regular intervals to court for no other purpose than to thrash out at public expense the precise figure, which the one should pay the other, not for any benefit to either of them, but solely for the relief of the tax-paying*

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<sup>986</sup> *Per Lloyd L.J.* at p. 363.

<sup>987</sup> [1988] Fam. 85.

*section of the community, to which neither of them has sufficient means to belong.*<sup>988</sup>

In *B. v. B.*<sup>989</sup> the application of the clean break was thought to be appropriate where the parties had significant means and it was possible to meet the applicant's future needs by means of a lump sum arrived at according to the "*Duxbury* calculation."<sup>990</sup> Such a lump sum may represent "capitalised maintenance" which can be invested to provide the recipient with an income.<sup>991</sup> However, in *M. v. M. (Property Adjustment: Impaired Life Expectancy)*<sup>992</sup> the existence of significant means did not influence the court to impose a clean break. In that case the husband had

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<sup>988</sup> At pp. 92-93 *per* Waite J.

<sup>989</sup> [1990] 2 F.L.R. 180.

<sup>990</sup> Derived from *Duxbury v. Duxbury supra*. The calculation produces a figure which, if invested on the assumptions as to life expectancy, rates of inflation, return on investments, growth of capital, and incidence of income tax, will produce enough to meet the recipient's needs for the future. In *Gojkovic v. Gojkovic op. cit.*, at p. 88 it was said that such a calculation provides a useful reference base but cannot be anything other than a guide to the court. See also *B. v. B. (Financial Provision)* [1990] F.L.R. 20 and *F. v. F. (Duxbury Calculation: Rate of Return)* [1996] 1 F.L.R. 833.

<sup>991</sup> See *Preston v. Preston supra*, *Gojkovic v. Gojkovic supra* and *B. v. B. supra*.

<sup>992</sup> [1993] 2 F.L.R. 723.

earnings of some £54,000 per annum; the former matrimonial home was valued at £180,000; and there were insurance policies worth over £80,000. The wife had cancer and a life expectancy of only five to ten years. She had a limited earning capacity which would get less over the years. The wife's circumstances, in the view of the trial judge, made it inappropriate to terminate the financial obligations between the spouses. The Court of Appeal upheld the trial judge's order of substantial periodical payments instead of ordering a clean break. In *Seaton v. Seaton*<sup>993</sup> it was held that where, owing to a serious physical disability, periodical payments could do little to enhance the quality of the life of the recipient, the clean break principle should apply.

One would have thought that the availability of the power to order a lump sum or to transfer property from one spouse to the other would have reduced or avoided reliance on periodic maintenance, especially in the light of the statutory injunction to consider terminating the financial obligation between the parties. The case law does not show a willingness

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<sup>993</sup> [1986] 2 F.L.R. 398. See also *C. v. C.* [1989] 1 F.L.R. 11 where, because of considerable bitterness between the parties, the clean break principle was thought appropriate.

on the part of the court to abandon the award of periodic maintenance.<sup>994</sup> This may be attributable to the fact that the application of the clean break principle is enmeshed in judicial discretion. Consequently, the decided cases only serve as particular examples of its application which may serve as guidelines for predicting what the court may do in a future case. Its impact, it has been said,<sup>995</sup> has been blunted by the courts. For example, it has been held that the duty imposed on the courts by s. 25A(2) of the MCA 1973 to consider whether to impose a fixed term on an order for periodical payments, does not amount to a presumption in favour of imposing such a limit. It is only one of the factors among others to be considered and does not limit the court's discretion.<sup>996</sup> Even if the court decides to impose a time limit, this should be done only if such a time limited order would enable a party to adjust "*without undue hardship*"<sup>997</sup>

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<sup>994</sup> See *Wachtel v. Wachtel supra*, *Waterman v. Waterman* [1989] 1 F.L.R. 380 and *Richardson v. Richardson* (No. 2) [1994] 2 F.L.R. 1051.

<sup>995</sup> See Dewar *op. cit.*, at p. 327.

<sup>996</sup> See *Barrett v. Barrett* [1988] 2 F.L.R. 516 and *Fisher v. Fisher* [1989] 1 F.L.R. 423.

<sup>997</sup> The words "undue hardship" was held in *Boylan v. Boylan* [1988] 1 F.L.R. 282 at p. 289 *per* Booth J. to extend beyond the needs of the spouse concerned. He held that it was relevant to take account of the fact that the applicant was a former wife of a man of substantial wealth and it was by that standard that her reasonable requirements should be judged and an

to the termination of payments.<sup>998</sup> Furthermore, it has been held in *Waterman v. Waterman*<sup>999</sup> that the power given to the court by s. 28(1A) of the 1973 Act to prevent a spouse applying for an extension of an order for periodical payments should not be used where there is “*a real uncertainty*” about the wife’s future, especially where she is caring for a young child and notwithstanding that a separate order has been made for the child. Also, as pointed out above, in *Clutton’s case*,<sup>1000</sup> it was held that the clean break should not be regarded as a “principle” requiring the court to strive to achieve regardless of all other considerations. All these prove the point that has been made by commentators that the legislative structure is complex and requires careful analysis.<sup>1001</sup>

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assessment made as to whether she would suffer undue hardship on the termination of periodical payments.

<sup>998</sup> See MCA 1973 ss. 25A(2) (on an original application) and 31(7) (on a variation application).

<sup>999</sup> *Supra.*

<sup>1000</sup> At p. 330.

<sup>1001</sup> See Cretney & Masson *op. cit.*, at p. 456.



The above misgivings notwithstanding, it has been judicially claimed,<sup>1002</sup> and this is supported by empirical evidence,<sup>1003</sup> that the modern practice in adjusting the financial and property rights of spouses on divorce favours a clean break wherever possible, and that self-sufficiency is now the court's primary objective.<sup>1004</sup> It is submitted that whilst this objective is in consonance with the legislative intent,<sup>1005</sup> it is more likely to benefit wealthy and/or short childless marriages when the wife has some earning capacity rather than low-income marriages where the wife has no earning capacity. Given that the latter group are more prone to divorce than the former,<sup>1006</sup> the said objective is not likely to do justice to a majority of married couples whose marriages come to an end.

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<sup>1002</sup> See *Harman v. Glencross* [1986] Fam. 81 at p. 96 *per* Balcombe L.J.

<sup>1003</sup> See the 1999 *Judicial Statistics Annual Report*. Table 5.7 of this Report shows that 9,557 applications for periodical payments were dismissed. This may have been done presumably in most cases as a step in a clean break settlement. 4678 orders were made for a fixed term. These figures give credence to the view that there is an increasing trend in favour of clean break orders. See also Cretney & Masson *op. cit.* p. 456 note 43 commenting on the 1993 *Judicial Statistics Annual Report*.

<sup>1004</sup> See *B. v. B. (Financial Provision)* *supra* at p. 26 *per* Ward J.

<sup>1005</sup> See *Tandy v. Tandy* *supra*.

<sup>1006</sup> See note 952 *supra*.

**(e) Private agreement relating to financial matters**

The discussions above give the impression that most financial matters on divorce are litigated upon in the courts. However, there is evidence that a “*settlement culture*”<sup>1007</sup> has taken roots in divorce cases whereby many divorcing couples reach some form of agreement about the financial terms of their divorce. Judicial statistics in 1999 for example, reveal that about 45,388 ancillary relief orders were made by consent.<sup>1008</sup> In fact there is now an official policy to encourage private agreement between the parties in all aspects of the divorce process. Thus, when the Family Law Act 1996 becomes fully operational, s. 3(1) will provide that a divorce order

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<sup>1007</sup> See G. Davis *et al Simple Quarrels, Negotiating Money and Property Disputes on Divorce*, Clarendon Press, Oxford, 1994 at p. 211.

<sup>1008</sup> See *Judicial Statistics, Annual Report 1999*, Table 5.7. Consent orders are made by the court in pursuance of an application by the parties to make the terms of their agreement an order of the court. See s. 33A of the MCA 1973 inserted by s. 7 of the Matrimonial and Family Proceedings Act 1984. The order may be made provided the parties have furnished the court with the information prescribed by r. 2.61 of the Family Proceedings Rules 1991, that is, the duration of the marriage, the age of the parties and any minor or dependent children, an estimate of the approximate value of the capital resources and the net income of each party and any minor child, the intended arrangements for accommodation for the parties and minor children, whether either party has remarried or has any intention to marry or cohabit, and any other especially significant matter. For an example of such a consent order, see *Crozier v. Crozier supra.*, at pp. 118-119.

shall only be made if the parties, *inter alia*, have met the requirements of s. 9 of the Act with regard to arrangements for their future.<sup>1009</sup> Despite this encouragement to spouses to make private arrangements for their post-divorce financial matters, the courts have held<sup>1010</sup> and a statute has provided<sup>1011</sup> that any provision in such an agreement which purports to restrict a spouse's right to apply to the court for an order for financial

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<sup>1009</sup> S. 9(2) of the 1996 Act provides that one of the following must be produced to the court as proof that the parties have made arrangements for their future: (a) a court order (made by consent or otherwise) dealing with their financial arrangements, (b) a negotiated agreement as to their financial arrangements, (c) a declaration by both parties that they have made their financial arrangements, (d) a declaration by one of the parties (to which no objection has been notified to the court by the other party) that: (i) he has no significant assets and does not intend to make an application for financial provision, (ii) he believes that the other party has no significant assets and does not intend to make an application for financial provision, and (iii) there are therefore no financial arrangements to be made. These sections which are in Part I of the Act have not yet come into operation. See pp. 364-365 and note 734 *supra*.

<sup>1010</sup> See *Hyman v. Hyman* [1929] A.C. 601 at p. 629 and *Pounds v. Pounds* [1994] 1 F.L.R.775 at p. 776.

<sup>1011</sup> See s. 34(1) of the MCA 1973 which provides: "If a maintenance agreement includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements, then - (a) that provision shall be void..." See also *Jessel v. Jessel* [1979] 1 W.L.R. 1148 at p. 1152.

relief will be void.<sup>1012</sup> Thus, any private arrangement made by the spouses is not conclusive. It may subsequently be reopened by a spouse dissatisfied with the agreement.<sup>1013</sup> This situation is unlikely to change much under the Family Law Act 1996 despite the Act's avowed intention to encourage couples to co-operate in making financial arrangement before divorce and to minimise cost.<sup>1014</sup> Where substantial assets are involved, couples may seek to squeeze whatever advantage they can from an existing agreement and if this involves finding a way to reopen an otherwise concluded and binding agreement they are likely to take that option.

The usual way in which a private agreement may be subject to the concurrence of the court is for the spouses to apply to the court to make

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<sup>1012</sup> There seems to be no definitive perimeters for this principle. *Cf. Sutton v. Sutton* [1984] Ch. 184 where an agreement which purported to deal with all the financial consequences of the divorce was held to be unenforceable and *Amey v. Amey* [1992] 2 F.L.R. 89 where an agreement dealing with all the financial consequences of the divorce was held enforceable because it did not contain a provision prohibiting access to the court.

<sup>1013</sup> See *Pounds v. Pounds supra* at p. 776.

<sup>1014</sup> See Part I of the Act in force since 21<sup>st</sup> March 1997 (S.I. No. 1077 (C. 38) of 1997) and Part II yet to come into operation. See also pp. 364-365 and note 734 *supra*.

it a consent order as part of the divorce proceedings.<sup>1015</sup> Such an order will only be made on the basis of the statutorily prescribed information furnished with the application and complying with the rules of court.<sup>1016</sup> The effect of these provisions, in the words of Waite L.J.,<sup>1017</sup> is:

*“to confine the paternal function of the court when approving financial consent orders to a broad appraisal of the parties’ financial circumstances as disclosed to it in summary form, without descent into the valley of details...only if that survey puts the court on inquiry as to whether there are other circumstances into which it ought to probe more deeply than any further investigation is required of the judge before approving the bargain that the spouses have made themselves.”*

How the court manages to balance the role of rubber stamping what the spouses have agreed to and becoming what has been described as

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<sup>1015</sup> See s. 33A(1) of the MCA 1973.

<sup>1016</sup> *Ibid.* See also r. 2.61 of the Family Proceedings Rules 1991.

<sup>1017</sup> In *Pounds v. Pounds supra* at p. 780.

“forensic ferret”<sup>1018</sup> is a difficult question to answer. In practice judges may not scrutinise the agreement closely if told that the parties were legally represented in the negotiations but even in that circumstance the court may still refuse to make the order if convinced that the information put before it is insufficient to enable it to assess the sufficiency or propriety of the agreement made between the parties.<sup>1019</sup>

As legal effect of a consent order is derived from the court order itself and not from the agreement, the order must be treated at par with non-consensual orders.<sup>1020</sup> It follows from this that the court’s power to vary or discharge orders for periodical payments or secured periodical payments under s. 31 of the MCA 1973 extends to orders made by consent.<sup>1021</sup> However, lump-sum orders (except the instalments, if any) and property adjustment orders may not be varied.<sup>1022</sup>

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<sup>1018</sup> Per Ward J. in *B-T v. B-T (Divorce: Procedure)* [1990] 2 F.L.R. 1 at p. 17. See also *Davis et al Simple Quarrels op. cit.*, at pp. 261-263.

<sup>1019</sup> See *B v. Miller & Co.* [1996] 2 F.L.R. 22.

<sup>1020</sup> See *de Lasala v. de Lasala op. cit.*, at p. 560 per Lord Diplock and *Thwaite v. Thwaite* [1982] Fam. 1 at p. 8 per Ormrod L.J.

<sup>1021</sup> See *Brister v. Brister* [1968] 1 W.L.R. 390 and *Whiting v. Whiting supra*.

<sup>1022</sup> See notes 892 and 913 *supra*.

The consent order may be set aside on a variety of grounds.<sup>1023</sup> In *Livesey v. Jenkins*,<sup>1024</sup> for example, a consent order was set aside on the ground that the wife had failed to reveal that she was engaged to be remarried.<sup>1025</sup> In *Allsop v. Allsop*<sup>1026</sup> a consent order was set aside for fraudulent misrepresentation, in *Brister v. Brister*<sup>1027</sup> it was set aside on the ground of mistake of fact and in *Edgar v. Edgar*<sup>1028</sup> disparity of bargaining power was the basis for setting aside the order.

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<sup>1023</sup> See *B-T v. B-T supra* and T. Scott & F. White "Setting aside for non-disclosure: Practice and procedure" (1990) *Family Law* 326.

<sup>1024</sup> [1985] A.C. 424.

<sup>1025</sup> It was held in *Wales v. Wadham* [1977] 1 W.L.R. 199 at p. 211 that an agreement entered into by the spouses to deal with their financial arrangements is not a contract *uberrimae fidei* so that a spouse was not under a duty to disclose his intention to remarry. This ruling may not fit comfortably within the Family Proceedings Rules 1991 (r. 2.61) which make provision for all the relevant information to be given before the agreement can be made the subject of a consent order.

<sup>1026</sup> (1981) 11 *Fam. Law* 18.

<sup>1027</sup> *Supra*.

<sup>1028</sup> [1980] 1 W.L.R. 1410 at p. 1417.

## 5. CONCLUSION

From the above discussions it can be seen that although numerous inroads have been made into the separation of property concept, it still forms the basis of matrimonial property in England. The various attempts that have been made over the years to reform the separate property concept have not been successful although the patchwork of rules has produced certain important consequences, particularly as regards awards on a dissolution of a marriage. The courts now have an almost limitless discretionary power to redistribute the assets of spouses on divorce but the economic realities of most marriages severely restrict the exercise of the discretion. Where the parties are wealthy, orders of vast sums of money are made<sup>1029</sup> but where they are not wealthy, the court may have to consider financial provision and property issues in the context of State benefits. In such cases, the assessment of the needs of the parties will lean heavily in favour of the children and the parent with whom they live.<sup>1030</sup>

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<sup>1029</sup> See *Preston v. Preston supra*, *Dart v. Dart supra*, *R. v. R. (Financial Provision: Reasonable Needs) supra* and *F. v. F. (Ancillary Relief: Substantial Assets) supra*.

<sup>1030</sup> See *Dart v. Dart supra* at p. 303 *per* Butler-Sloss L.J.

Furthermore, the emphasis on the interest of children brought about by the Matrimonial and Family Proceedings Act 1984 and the priority given to child support by the Child Support Act 1991, means that in many cases the bulk of the resources of the marriage will be taken up by the children. This situation will leave the court with little or nothing to redistribute.

The recognition of the value of domestic work as a factor to be considered by the court in redistribution of assets on divorce is progressive. This has greatly enhanced the housewife's right to share in any property acquired by her husband during the marriage.

The discretionary model of allocating property on divorce has however, been questioned by commentators<sup>1031</sup> despite the fact that it embodies sufficient flexibility to deal with the circumstances of each case. Alternative models, such as marriage contracts,<sup>1032</sup> and community of

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<sup>1031</sup> See for example, Davis et al *Simple Quarrels op. cit.*, at pp. 255-256.

<sup>1032</sup> Suggested by the Law Society - *Memorandum: Maintenance and Capital Provision on Divorce - Recommendations for Reform of the Law and Procedure made by the Family Law Committee*, 1991 para. 3.33.

property<sup>1033</sup> have been suggested but none of these has gathered enough support to be a subject of law reform. It is submitted that in the context of the social circumstances of England, the discretionary model, with its shortcomings, has served the needs of married couples to a large extent.

The present position of English matrimonial law is aptly summed up by Cretney and Masson<sup>1034</sup> as follows:

*“The debates on matrimonial property of the last quarter of a century have failed to produce any consensus in favour of a particular reform. Indeed, it is noteworthy that in 1984 the Scottish Law Commission’s extensive consultation and sounding of opinion revealed ‘very little support’ for major reform. The Scottish Law Commission concluded that the principles of the present law - that is, that each spouse continues to own his or her*

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<sup>1033</sup> *Ibid.* para. 2. See also J. Freedman et al *Property and Marriage: An Integrated Approach*, Institute of Fiscal Studies Report No. 29, 1988 at pp. 25-26 and Freeman “Towards a rational reconstruction of family property law” *op. cit.* For a discussion of the pros and cons of introducing a community of property regime into English law, see the Law Commission’s *First Report on Family Property: A New Approach* (Law Com. No. 52) 1973.

<sup>1034</sup> *Op. cit.*, at pp. 230-231.

*own property after marriage, with provision to protect a spouse during marriage and to ensure an equitable division on death and divorce - are sound. But...this view is over-complacent. First, the effectiveness of the measures - resulting from case law development rather than legislation - intended to protect spouses cannot yet be fully assessed; whilst it remains an astonishing feature of English family property law that spouses have no right during marriage to know the extent of each other's assets. Ignorance may sometimes be bliss, but sadly this is not always the case."*

**CHAPTER SIX**  
**AN OVERVIEW OF THE MATRIMONIAL PROPERTY**  
**REGIMES IN GHANA**

**1. INTRODUCTION**

There are two matrimonial regimes in Ghana, namely, that pertaining to marriage under customary law (including Mohammedan (Islamic) law)<sup>1035</sup> and that pertaining to marriage under the Marriage Ordinance 1884.<sup>1036</sup>

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<sup>1035</sup> Mohammedan law is regarded as a special variety of customary law applied as a concession to those who have embraced the Islamic faith. Thus, in *Kwakye v. Tuba* [1961] G.L.R.(Pt. II) 720 at p. 724, the court was of the view that “*In the eyes of our law, a marriage by a Mohammedan according to Mohammedan law is at its very best a marriage by customary law and does not affect his estate unless the said marriage is registered under the Ordinance.*” The ordinance referred to in the *dictum* is the Marriage of Mohammedans Ordinance [Cap. 129] which provides for the registration of Mohammedan marriages, divorces and the regulation of succession in these marriages. It does not deal with the consequences of divorce. See also *Brimah & Cobsold v. Asana* [1962] 1 G.L.R. 118 and *Hausa v. Hausa* [1963] 2 G.L.R. 212.

<sup>1036</sup> Cap. 127 1951 Rev. For the history of the Ordinance, see S. Zabel “Legislative history of the Gold Coast and Nigerian Marriage Ordinances I & II” (1969) 13 *Journal of African Law* 64-79, 158-178 and “Legislative history of the Gold Coast and Lagos Marriage Ordinance III” (1979) 23 *Journal of African Law* 10. For an examination of the extent to which the Ordinance has produced the intended social effect, see K.O. Adinkrah “Ghana’s Marriage Ordinance: An inquiry into a legal transplant for social

Both regimes have as their fundamental concept, the principle of separate property of the spouses. The position has been stated as follows:

*“As regards the property rights of the parties on marriage, it has long been settled law that marriage has no effect on the property of either spouse whether they are married under customary law or otherwise. This is particularly true of property acquired by a spouse before marriage. During marriage neither spouse has had the right to interfere with the enjoyment and disposal of the property of the other.”*<sup>1037</sup>

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change” (1980) 18 *African Law Studies* 1.

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See W.C.E. Daniels “Marital family law and social policy” in *Essays in Ghanaian Law 1876-1976* (Daniels & Woodman eds.), Legon, Faculty of Law, University of Ghana, 1976 92 at p. 111. See also K. Opoku *The Law of Marriage in Ghana: A Study in Legal Pluralism*, Frankfurt am Main, Alfred Metzner Verlag GmbH, 1976 at p. 70, A.N. Allot *Essays in African Law with special reference to the Law of Ghana*, London, Butterworths, 1960 at p. 226, R.S. Rattray *Ashanti Law and Constitution*, New York, Negro University Press, 1969 at p. 22, Sarbah *op. cit.*, at p. 39, W.C.E. Daniels “The legal position of women under our marriage laws” (1972) 9 *University of Ghana Law Journal* 39 at pp. 50-51, “The ascertainment of property rights between husband and wife” (1978) 10 *Review of Ghana Law* 137, “The basis for award of financial provision” (1989-90) 17 *Review of Ghana Law* 49 at p. 67, A. Kuenyehia “Women and family law in Ghana: An appraisal of property rights of married women” (1986-90) 17 *University of Ghana Law Journal* 72 at p. 79 and G. Woodman “Judicial development of customary law: The case of marriage law in Ghana and Nigeria” (1977)

Thus, the matrimonial regime applicable to both marriages under customary law and those under the Ordinance is that of out of community of property. However, the two types of marriages are distinguishable on the basis that marriages under the Ordinance are monogamous in nature whilst those under customary law are polygynous in nature.<sup>1038</sup> Furthermore, although the legal principles applicable to the determination of matrimonial property during the marriage and on divorce are generally different, customary law, defined as the rules of law which by custom are applicable to particular communities in Ghana,<sup>1039</sup> is the law primarily

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14 *University of Ghana Law Journal* 115 at p. 127. However, J.B. Danquah did state that among the Akim Abuakwa tribe, the husband was entitled to half the earnings of his wife, see *Akan Laws and Customs*, London, Routledge, 1928 at p. 154. This view has been criticized by Kuenyehia "Women and family law in Ghana..." *supra* at p. 79 for being unclear and contradictory to the spirit of customary law.

<sup>1038</sup> See Daniels "Marital family law and social change" *op. cit.*, at pp. 92-93 and 97 and A. Philips (ed.) *Survey of African Marriage and Family Life*, Oxford, OUP, 1953 at pp. xi-xvii. Under Mohammedan law a husband is entitled to marry up to four wives. See the Koran chap. 4:3 - Surah alnisa'i and Opoku *op. cit.*, at p. 39. No such limitation exists in relation to a husband of a customary-law marriage although he is expected to register his wives under the Customary Marriage and Divorce (Registration) Law 1985 (PNDCL 112). The effect on the marriage of non-registration is not stated by the law.

<sup>1039</sup> See Art. 11(3) of the 1992 Constitution. See also S.Y. Bimpong-Buta "Sources of law in Ghana" (1983-86) 15 *Review of Ghana Law* 129 at p. 139.

used in such determination. This is because this law is the personal law of the overwhelming majority of Ghanaians and consequently will be applicable to their marriages, except that when they marry under the Ordinance certain aspects of customary law are abrogated and English common law principles are applied. Thus, it was said in *Coleman v. Shang*:<sup>1040</sup>

*“...that a person subject to customary law who marries under the Marriage Ordinance, does not cease to be a native subject to customary law by reason only of his contracting that marriage.*

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<sup>1040</sup>

[1959] G.L.R. 390 at p. 401 *per* Van Lare J.A. Prior to this decision, the courts took the view that an Ordinance marriage altered the status of the parties and conferred rights and privileges entirely different from, and at variance with those under customary law. See *Ackah v. Arinta* (1893) Sar. F.L.R. 79 and *Cole v. Cole* [1898] 1 N.L.R. 15 at p. 22, a decision of the Full Court of the Gold Coast Colony. One of the most important consequences of marriage under the Ordinance used to be the provision in s. 48. That section provided that on the death intestate of a person married under the Ordinance, two-thirds of his property (whether movable or immovable) shall be distributed in accordance with the English law relating to the distribution of the personal estate of intestates in force on the 19<sup>th</sup> of November 1884 (the date on which the Ordinance came into effect). The remaining one-third was distributed in accordance with the relevant customary law. This section was repealed by s. 19 of the Intestate Succession Law 1985 (PNDCL 111). See G.R. Woodman “Ghana reforms the law of intestate succession” (1985) 29 *Journal of African Law* 118 and E.K. Quansah “Updating family law: Recent developments in Ghana” (1987) 36 *International and Comparative Law Quarterly* 389 at pp. 391-394.

*The customary law will be applied to him in all matters, save and except those specifically excluded by the statute, and any matters which are necessary consequences of the marriage under the Ordinance.*”

A person subject to customary law who had married under that law may marry again under the Ordinance.<sup>1041</sup> This was made clear by Francis Smith A.C.J. in *Ackah v. Arinta*<sup>1042</sup> when he said:

*“...Now the Legislature has provided in clear and unmistakable terms that a person married according to native law can be again married according to English law.”*

This situation had earlier given rise to the following comment by Hutchinson C.J. in *Re Isaac Ammetifi*<sup>1043</sup>:

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<sup>1041</sup> See Cap. 127 s. 14(4).

<sup>1042</sup> *Op. cit.*, at p. 81. See also *Aning v. Kingful* [1980] G.L.R. 404 at p. 410 *per* Amuah A.J.

<sup>1043</sup> (1889) Red. 157 at p. 160.

*“I should have thought that a person already lawfully married could not be married over again. The Ordinance, however, certainly seems to contemplate that in future such persons can be married over again and that the second marriage shall have certain important consequences in the devolution of their property.”*

When this occurs, the customary law will continue to be applied to him in all matters, save and except those matters specifically excluded by the Ordinance and any other matters which are necessary consequences of the said marriage.<sup>1044</sup>

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<sup>1044</sup>

See *Coleman v. Shang supra*. Under the internal conflict rules enacted by s. 49 of the Courts Act 1971 (Act 372) (now repealed and re-enacted under s. 54 of the Courts Act 1993 (Act 459) to determine the applicable law in a particular transaction or situation, the personal law (customary law) to which a person is subject is primarily intended to be applicable to the transaction or situation in question. It has been estimated that about 86% of marriages contracted in Ghana is by customary law. See Adinkrah *op. cit.*, at p. 14 quoting the 1970 population census. This statistical percentage should however, be viewed with caution as the registration of marriage, especially those of the customary type, is haphazard. See E.K. Quansah “Updating family law: Recent developments in Ghana” *op. cit.*, at p. 395 commenting on the registration of customary marriages under the Customary Marriages and Divorce (Registration) Law 1985 (PNDCL 112).

The legal effect of marrying for the second time under the Ordinance is not specified by the Ordinance but it is generally regarded as converting the customary marriage into a monogamous one.<sup>1045</sup> Thus, a person who converts his customary law marriage into an Ordinance marriage will have his obligations, rights and duties in respect of the marriage governed by the Ordinance and not by customary law.<sup>1046</sup>

Because of the application of the separate property concept to both matrimonial regimes, there have been a number of occasions when the courts have been called upon to determine the ownership of property which is in the name of one spouse but to which the other spouse may have contributed either in kind or in money towards the acquisition of the property. These disputes about ownership of property usually occur when

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<sup>1045</sup> See *Graham v. Graham* [1965] G.L.R. 407. See also Daniels "Marital family law and social policy" *op. cit.*, at p. 105, "Towards the integration of the laws relating to husband and wife" in *Integration of Customary and Modern Legal Systems in Africa*, Law Faculty University of Ife, University of Ife Press, 1971 at pp. 359-364 and A. Phillips & H.F. Morris *Marriage Laws in Africa*, Oxford, OUP, 1971 at p. 179. In *Acheampong v. Acheampong* (1967) C.C. 59 and *Afrifa v. Class-Peter* [1975] 1 G.L.R. 359 plaintiff customary-law wives successfully sued for breach of promise by their husbands because the latter had failed to convert their customary-law marriages into Ordinance ones.

<sup>1046</sup> See the remarks of Aitken J. in *Akwapim v. Budu* [1931-37] Div. Ct. 89 at p. 90. See also *Setse v. Setse* [1959] G.L.R. 155.

the marital relationship has broken down and divorce is being sought. Two issues usually arise in the determination of such ownership. The first is to determine disputes between spouses or ex-spouses as to who has a right to a particular property at the time of the breakdown of the marriage. The second relates to whether the court can alter the property rights found to exist in one spouse in favour of the other spouse. In trying to resolve these issues, the type of marriage which the spouses entered into has not played a significant role in deciding which law is applicable to the dispute. The courts have applied principles of English common law and equity where necessary to resolve disputes involving both ordinance and customary marriages. The enactment of the Matrimonial Causes Act 1971<sup>1047</sup> (MCA 1971) has further strengthened the application of uniform provisions for the resolution of disputes involving both marriages. The MCA 1971 applies to all monogamous marriages contracted under the Marriage Ordinance and Church marriages conducted in accordance with the provisions of the said Ordinance<sup>1048</sup> as well as to polygamous marriages, albeit, in the latter cases only on an

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<sup>1047</sup> Act 367. For a commentary on the Act, see W.C.E. Daniels "Ghana's Matrimonial Causes Act" (1971) 3 *Review of Ghana Law* 231 and H.F. Morris "Matrimonial Causes Act 1971" (1972) 16 *Journal of African Law* 71.

<sup>1048</sup> See s. 41(1).

application of a spouse of that marriage.<sup>1049</sup> The manner in which the courts have been able to resolve the conflicting interests of the spouses will be discussed below.

## 2. DETERMINATION OF MATRIMONIAL PROPERTY ON DIVORCE

### (a) Marriage under the Ordinance

Historically, the law of matrimonial causes relating to marriages under the Ordinance has been linked with that of England. This linkage dates back to 1859 when the first Divorce and Matrimonial Causes Ordinance,<sup>1050</sup> which was based on English law, was passed. Subsequently, the jurisdiction conferred on the courts was expressed to be exercised "*in conformity with the law and practice for the time being in force in England.*"<sup>1051</sup> This provision allowed the wholesale importation of

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<sup>1049</sup> See s. 41(2). The application of this subsection will be discussed in detail below.

<sup>1050</sup> Laws of the Gold Coast No. 1 of 1859 repealed by No. 13 of 1877.

<sup>1051</sup> See s. 17 of the Courts Ordinance 1935. This section was saved by s. 154 of the Courts Act 1960 (C.A. 9) when it repealed the 1935 Ordinance. S. 154 was re-enacted as para. 93(2) of the Courts Decree 1966 (NLCD 84). These two latter enactments stated that the provisions relating to matrimonial

English matrimonial law into Ghana. Although the courts were given a discretion in the matter, they invariably determined monogamous marriages in accordance with English law and practice.<sup>1052</sup> In 1971, the MCA<sup>1053</sup> broke the umbilical cord that tied Ghanaian law on matrimonial causes to that of England by providing a “*law of matrimonial causes which is in consonance with Ghanaian circumstances and Ghanaian traditions.*”<sup>1054</sup> Despite this assertion of the Act’s Ghanaian uniqueness, it is really an enactment of the English Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Act 1970. The Ghanaian Act retained the progressive features of the English legislation while adapting

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causes were to continue to apply. See also Daniels “Towards the integration of the laws relating to husband and wife in Ghana” *op. cit.*, at pp. 377-380. There were subsequent developments in the general jurisdiction of the courts under the Constitutions of 1969 and 1979 subject to amendments made by intervening military regimes in 1972, 1979 and 1981. See S.Y. Bimpong-Buta “Sources of law in Ghana” (1983-86) 15 *Review of Ghana Law* 129. The present jurisdictions of the courts are set out generally in chapter 11 of the 1992 Constitution and specifically elaborated under the Courts Act 1993(Act 459).

<sup>1052</sup> See *Ashong v. Ashong* (1968) C.C. 28 (C.A.) and *Crabbe v. Crabbe* [1971] 2 G.L.R. 164.

<sup>1053</sup> See note 1047 *supra*.

<sup>1054</sup> See para. 3 of the Memorandum accompanying the Matrimonial Causes Bill. The Bill was published as a supplement to *Ghana Gazette* No. 28 of 1971 dated the 4<sup>th</sup> day of May, 1971.

them to meet Ghanaian circumstances.<sup>1055</sup> The “breakdown” concept, whereby blame for the failure of the matrimonial relationship is not apportioned, for example, was adopted in s. 1(2)<sup>1056</sup> of the Act and the provisions of the Act was made applicable to customary marriages by s. 41(2). Consequently, English statutes relating to matrimonial causes in force immediately before the commencement of the Act were abolished by s. 44(1) of the Act. However, the case law that has built up under the Act has invariably adopted English legal principles in interpreting its provisions.

S. 19 of the MCA 1971 conferred a discretionary power on the court to make, *inter alia*, financial provision<sup>1057</sup> to either spouse to a marriage “*whenever it thinks just and equitable.*” Ss. 20 and 21 afford the court the machinery, which include the power to adjust matrimonial property rights, to exercise this discretion. But before a look is taken at these sections it

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<sup>1055</sup> See the then Attorney-General’s speech on the Bill in *Parliamentary Debates* (2<sup>nd</sup>. series), vol. 7, No. 5, col. 171, 21<sup>st</sup> June 1971.

<sup>1056</sup> The subsection provides that the sole ground for granting a petition for divorce is that the marriage has broken down beyond reconciliation.

<sup>1057</sup> Under s. 43 of the 1971 Act, “financial provision” includes maintenance and all other forms of financial support provided by one spouse to the other or to any child of the household.

will be instructive to discuss the customary, English common law and equitable principles which the courts have used in resolving property disputes between spouses. This is because in applying the provisions of ss. 20 and 21 the courts invariably rely on these principles.

In *Achiampong v. Achiampong*,<sup>1058</sup> for instance, the Court of Appeal relying on English common law /equitable principles stated that under s. 20(1) of the MCA 1971, property is not ordered to be transferred to a spouse simply because there is a divorce. For such transfer to be ordered there must be an agreement as to the sharing of the beneficial interest, failing which there must be direct or indirect financial contribution which can be regarded as substantial.<sup>1059</sup>

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<sup>1058</sup> [1982-83] G.L.R. 1017.

<sup>1059</sup> *Per* Abban J.A. at p. 1036 relying on *dicta* from *Wachtel v. Wachtel* [1973] 1 All E.R. 829 at p. 837 *per* Lord Denning M.R., *Fribance v. Fribance* (No. 2) [1957] 1 W.L.R. 384 at 387 *per* Denning L.J. (as he then was) and *Gissing v. Gissing* [1971] A.C. 886 at pp. 904-905 *per* Lord Diplock.

**(b) Customary law principles for determining matrimonial property**

The fundamental principle relied upon by the courts for the determination of property acquired during the subsistence of a marriage was stated by Ollennu J. (as he then was) in *Quartey v. Martey*<sup>1060</sup> as follows:

*“...by customary law it is the domestic responsibility of a man's wife and children to assist him in the carrying out of the duties of his station in life, e.g. farming or business. The proceeds of this joint effort of a man and his wife and/or children, ...are by customary law the individual property of the man. It is not the joint property of the man and the wife and/or the children. The right of the wife and the children is a right to maintenance and support from the husband and father.”*<sup>1061</sup>

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<sup>1060</sup> [1959] G.L.R. 377 at p. 380.

<sup>1061</sup> This view was reiterated by the same judge in *Adom v. Kwarley* [1962] 1 G.L.R. 112 at p. 113.

The formulation of this rule has been shown to be based on doubtful authority.<sup>1062</sup> It is based on the premise that the husband is the sole breadwinner and that any property acquired during the marriage belongs to him.<sup>1063</sup> The court purported to be following the West African Court of Appeal's decision in *Okwabi v. Adonu*<sup>1064</sup> which dealt with property rights between a father and a son and not between a husband and wife. The appellate court in that case endorsed the view of the trial judge that whatever proceeds accrued from the joint efforts of father and son was not their joint property but that such property was held in trust by the father for the son. Ollennu J., without any justification, extended this principle relating to children to wives. Furthermore, it has been suggested that the right of maintenance is not conditional upon the rendering of service. One has only to consider the case of babies and young children who are not in a position to render any service to realise the difficulties inherent in Ollennu's proposition.<sup>1065</sup> Despite this shaky foundation of the rule, it has been followed in subsequent cases with little or no discussion of its

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<sup>1062</sup> See Daniels "The ascertainment of property rights between husband and wife" *op. cit.*, at pp. 140-143.

<sup>1063</sup> *Ibid.* at pp. 141-142. See also A. Kuenyehia *op. cit.*, at p. 80.

<sup>1064</sup> [1957] 2 W.A.L.R. 268.

<sup>1065</sup> See Opoku *op. cit.*, at p. 72.

validity. In the words of a learned writer,<sup>1066</sup> “*equity feared to tread in this area where customary law rules dominated*”. For instance, in *Clerk v. Clerk*<sup>1067</sup> the plaintiff, who was subject to customary law and who married under the Marriage Ordinance, brought an action against her husband for an order of a perpetual injunction to restrain him from interfering with her occupation of a dwelling house. Her claim was based, *inter alia*, on the fact that she contributed financially and assisted physically in the construction of the house, thereby acquiring a beneficial interest therein. On the evidence, the court made the following observation:

*“I therefore find that though she in fact assisted the defendant financially from her bakery business and also physically by supervising the workers the extent of her contribution is so indeterminate that I cannot without speculation make any findings as to whether her contribution was sufficiently substantial as to*

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<sup>1066</sup> See Daniels “The legal position of women under our marriage laws” *op. cit.*, at p. 52.

<sup>1067</sup> (1968) C.C. 99.

*raise the equitable interest in the building in her favour and I will make no such finding.*"<sup>1068</sup>

On the basis of insufficient financial contribution towards the building of the house, the case is supportable. However, the court further suggested that even if her contribution had been substantial, her claim would have been dismissed on the ground that according to customary law, which in the court's view governed the case, a wife who assisted her husband in the acquisition of property had no interest in that property.<sup>1069</sup>

**(c) English common law and equitable principles for the determination of matrimonial property**

Clearly the customary principle formulated in *Quartey v. Martey* is not in tune with contemporary economic reality, in that, most married women are engaged in some gainful employment and contribute financially to the

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<sup>1068</sup> Interestingly, the same judge had earlier decided in *United Simpson & Ayitey Co. v. Jeffrey & Anor.* [1962] 1 G.L.R. 279 that there was a presumption that household items used by a married couple in the matrimonial home belonged to them in common.

<sup>1069</sup> The case is criticised by A. Fiadjoe in (1969) 1 *Review of Ghana Law* 66 and by Opoku *op. cit.*, at p. 72. *Quartey v. Martey* was followed in *Adjabeng v. Kwabla* [1960] G.L.R. 37.

running of the household.<sup>1070</sup> Thus, the presumed premise of *Quartey v. Martey* seems to be out of place in the present scheme of things. As put by a learned writer:

*“The view that the proceeds of a joint effort of a husband and wife married under customary law become the individual property of the husband can only have meaning in a legal system (such as the English Common Law before 1870) which regarded the legal existence of a wife to be incorporated into that of her husband, and not in a system such as ours which has recognised the right of a woman to own property separate and apart from her husband since time immemorial.”*<sup>1071</sup>

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<sup>1070</sup> See A. Kuenyehia *op. cit.*, at p. 94.

<sup>1071</sup> Daniels “Ascertainment of property rights between husband and wife” *op. cit.*, at p. 142. The Married Women’s Property Ordinance 1890 conferred on married women (those married under the Marriage Ordinance) the right to own property independently of their husbands. For a commentary on the Ordinance, see W.C.E. Daniels “Married Women’s Property Ordinance” (1974) 6 *Review of Ghana Law* 143-146. The Ordinance was repealed by the Statute Law Revision (No. 2) Decree of 1973 (NRCD 228) without any clear reasons being given. Under customary law married women have always had the legal capacity to acquire property independent of their husbands. See R.S. Rattray *op. cit.*, at p. 22; J.M. Sarbah *Fanti Customary laws* (3<sup>rd</sup> ed.) *op. cit.*, at p. 39; A.N. Allott *Essays in African Law with special reference to the Law of Ghana op. cit.*, at p. 226 and W.C.E. Daniels “Towards the integration of the laws relating to husband and wife in Ghana” (1965) 2

The effect of the decision in *Quartey v. Martey* is discriminatory to wives who are deprived of the fruits of their labour in helping their husbands to acquire property. Faced with the contemporary economic reality that wives contribute, in diverse ways, to the acquisition of property during a marriage, the courts were forced, in the absence of legislative directive, to re-examine the self-imposed customary-law constraints. They embarked upon a progressive alleviation of the hardship that the strict application of customary law imposes on wives. In this process, English common law and equitable principles were freely used. In doing so the courts were simply applying the common law of Ghana. For under Art. 11(2) of the 1992 Constitution, the common law of Ghana is defined as “*the rules of law generally known as the common law, the rules of equity and the rules of customary law including those determined by the Superior Court of Judicature.*” These rules of equity are understood to refer to those developed in England<sup>1072</sup> and it will not be surprising to discover that the Ghanaian courts rely on the English courts’ exposition

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*University of Ghana Law Journal* 20 at p. 38.

<sup>1072</sup>

See *In re Abotsi, Kwao v. Nortey* [1984-86] 1 G.L.R. 144 where the Court of Appeal emphasized this fact when considering the equitable rule that a trustee is in a fiduciary capacity *vis-a-vis* a beneficiary and as such is accountable to him. See also *Amaning alias Angu v. Angu II* [1984-86] 1 G.L.R. 309.

of these equitable rules in trying to do justice to the married woman. Thus, in *Deborah Takyiwa v. Kweku Adu*<sup>1073</sup> a divorced customary law wife successfully claimed one half of a cocoa farm cultivated jointly by her husband and herself on land owned by her. The court observed that it would not have hesitated to invoke the legal maxim "*quicquid plantatur solo solo cedit*"<sup>1074</sup> in its full force by granting to the plaintiff a declaration of title in respect of the whole farm, had it not been for the fact that the plaintiff by her writ of summons asked for an order of partition of the farm. In *Yeboah v. Yeboah*<sup>1075</sup> Hayfron-Benjamin J. (as he then was), doubted whether the position of the married woman was as stated by Sarbah<sup>1076</sup> and others represented the true legal position at customary law. He observed that:

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<sup>1073</sup> Suit No. LC7/66 unreported (18<sup>th</sup> May 1971), High Court, Sunyani cited by A. Kuenyehia, *op. cit.*, at p. 80 and Daniels "Marital family and social policy", *op. cit.*, at p. 54.

<sup>1074</sup> This maxim means "whatever is annexed to the soil is given to the soil." In *Berchie-Badu v. Berchie-Badu* [1987-88] 2 G.L.R. 260 at p. 264 the Court of Appeal, *per* Osei-Hwere J.A., however expressed the view that this maxim had never found a niche in matrimonial relations, particularly in acquisition of a matrimonial home.

<sup>1075</sup> [1974] 2 G.L.R. 114 at p. 121.

<sup>1076</sup> *Op. cit.*

*“There is, however, no positive rule of customary law which prohibited the creation of joint interests in property between persons not connected by blood. Where there is clear evidence that the parties intended to hold the property as joint tenants, the law would give effect to such an intention. In any event, in this case the parties were married under the Marriage Ordinance and the relations between each other are not governed exclusively by customary law. English legal concepts cannot be completely excluded in the determination of this case.”*<sup>1077</sup>

In *Abebreseh v. Kaah*<sup>1078</sup> Sarkodee J. approved of the above *dictum*. He was asked to determine whether the plaintiff, a widow, had any beneficial interest in their matrimonial home which she had financially assisted her late husband to build. The learned judge asked the following questions:

*“...Will it be right to say in the face of all the evidence before me that the intention of the husband and the wife was other than to*

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<sup>1077</sup> See *Coleman v. Shang supra* at p. 401. The view expressed in *Yeboah v. Yeboah supra* was reiterated in *Etu v. Sika Kyere-Abusua* [1982-83] 1 G.L.R. 781.

<sup>1078</sup> [1976] 2 G.L.R. 46.

*create joint interests? Will it be right to say that a wife who had her own property and who made sacrifices and such massive contribution towards the construction of a house is to be deprived of the fruits of her labour, and to stamp what she did as mere assistance to her husband and hold that she has no claim to the building? Surely, good conscience alone will not permit that.*"<sup>1079</sup>

He therefore held that taking the evidence as a whole he was of the view that the part played by the plaintiff in the construction of the house amounted to more than mere assistance given by a wife married under customary law to her husband. Consequently, the rule in *Quartey v. Martey* did not apply.

In *Bulley-Neequaye v. Acolatse*<sup>1080</sup> the evidence adduced pointed to the fact that the wife had provided the money for the purchase of the house which was registered in her husband's name. While the wife was temporarily away from Ghana, her husband sold the house to the plaintiff. On her return, the wife recovered possession of the house and the plaintiff

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<sup>1079</sup> *Ibid.* at pp. 53-54.

<sup>1080</sup> (1969) C.C. 51.

brought the action for recovery of the house. The judge at first instance gave judgment in his favour but on appeal, the Court of Appeal held that where a wife buys property and puts it in the name of her husband, he generally holds it on resulting trust for her. The court relied on the equitable principles laid down in the English case of *Dyer v. Dyer*<sup>1081</sup> where Eyre C.B. said:

*“The clear result of all the cases without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive - results to the man who advances the purchase-money.”*<sup>1082</sup>

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<sup>1081</sup> (1788) 2 Cox Eq. Cas. 92.

<sup>1082</sup> *Ibid.* at p. 93: cited with approval by Lord Upjohn in *Pettitt v. Pettitt* [1970] A.C. 777 at p. 814.

Similarly, in *Reindorf v. Reindorf*<sup>1083</sup> the plaintiff asked for a declaration that she was the sole beneficial owner of two houses, the titles to which were conveyed into the joint names of her and her husband. The plaintiff had provided the purchase money for the acquisition of the houses. The husband denied the wife's claim and contended that the houses had been built by him alone. Hayfron-Benjamin J., (as he then was), found that the wife was financially capable of acquiring the properties without the husband's aid. He accepted the wife's parol evidence to negative an intention to make a gift to her husband and held that the legal interest was held by them jointly on a resulting trust for the wife alone.

In *Quartey v. Armar*<sup>1084</sup> the parties were married in Scotland. On their return to Ghana they bought two houses which were conveyed into the name of the plaintiff wife in the words of the husband, "*to ensure in case of my death intestate that my wife would have possession of the house for my children.*" After the dissolution of the marriage, the wife brought an action for a declaration that she was the sole beneficial owner of the two houses. The wife did not base her claim on the doctrine of presumption

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<sup>1083</sup> [1974] 2 G.L.R. 38. See also *Quist v. George* [1974] 1 G.L.R. 1 and *Yeboa v. Yeboa supra* and *Abebreseh v. Kaah supra*.

<sup>1084</sup> [1971] 2 G.L.R. 231. See also *Domfe v. Adu* [1984-86] 1 G.L.R. 653.

of advancement<sup>1085</sup> but rather on the basis that she had provided the funds for their purchase. There was evidence that the entire purchase money for one of the houses had been provided by the husband. The wife had contributed part of the purchase money for the second house. Based on this evidence, the court held that the wife held the house of which the purchase money had been entirely contributed by the husband, on a resulting trust for the husband. With regards to the other house, the court held that she held it as a trustee on a resulting trust jointly on behalf of herself and her husband.

In *Domfe v. Adu*<sup>1086</sup> the equitable principle of implied/resulting trust was again used to determine a wife's share of matrimonial property because of her "substantial contribution". The couple married under customary law and operated a joint business. The wife, who was illiterate, provided the initial capital and travelled extensively, buying goods for the shop,

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<sup>1085</sup> This doctrine arises where X is the father of Y or stands in *loco parentis* (*patris*) to Y or is the husband of Y. If X were to purchase property in the name of Y, a presumption arises that X meant to make a gift of the property to Y. In *Quist v. George op. cit.*, at p. 11, Abban J. (as he then was), held that equity dislikes and distrusts gifts by a wife to a husband. Therefore no presumption of advancement arises when a wife puts property in the name of her husband.

<sup>1086</sup> *Supra.*

which was kept by the husband. The business proved successful and out of the profits made, they built a house for their child, acquired two other houses and seven cars, built up a substantial inventory for the shop and a large bank balance in their joint account. On an extra-judicial divorce<sup>1087</sup> being obtained by the husband, the wife brought an action in the High Court, claiming an equal share in the properties. The evidence showed that the wife had made a substantial contribution towards the establishment of the business which was being ran as a joint enterprise. Notwithstanding that the business was registered in the name of the

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Judicial dissolution of a customary-law marriage is not obligatory although the spouse may take their case to the Community Tribunals which have jurisdiction in divorce and other matrimonial causes where the applicable law is exclusively customary law (see s. 47(1)(f) Courts Act 1993). Usually though, a spouse who seeks divorce would bring his or her case before representatives of their families or the elders of the community who will attempt to reconcile the parties. If this fails, the matter is then brought before a board of arbitrators consisting of the families of both spouses and other relatives. If the arbitrators fail to achieve a reconciliation, they hear the case on its merits to determine fault. Divorce is then granted to the spouse found not to be responsible for the breakdown of the marriage. See Opoku, *op. cit.*, Chap. 13, Sarbah, *op. cit.*, at p. 53, Daniels "The legal position of women under our marriage laws" *op. cit.* at p. 60 and Danquah *Akan Laws and Customs, op. cit.*, at p. 156.

husband as the sole owner, the court held that he held it on resulting trust for himself and the wife as the real beneficiaries of the business.<sup>1088</sup>

In *Achiampong v. Achiampong*<sup>1089</sup> the wife made what was held to be substantial contribution, that is, channelling all her earnings and resources towards feeding her husband and his relatives and generally for the upkeep of the household. This made it possible for the husband to pay the instalments on the disputed property. She also contributed financially towards the extensions and renovations of the said property which brought considerable improvement to the property. Although the case was decided on the basis that there was actual agreement that the wife should have a beneficial interest in the house, the court held that if there had been no evidence of a specific agreement, it would have given a beneficial interest to the wife on account of her substantial contribution.

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<sup>1088</sup>

See also *Abobor v. Abobor* unreported High Court, Accra cited by U. Wanitzek "Integration of personal laws and the situation of women in Ghana: The Matrimonial Causes Act of 1971 and its application by the courts" (1991) *Third World Legal Studies* 75 at pp. 94-95.

<sup>1089</sup>

*Supra.*

In *Ramia v. Ramia*<sup>1090</sup> an attempt was made to limit the application of the equitable doctrine of advancement exclusively to monogamous marriages in a case where the couple had married first customarily and then under the Marriage of Mohammedans Ordinance. The court held that:

*“The doctrine...is equitable, based not on the type of marriage contracted by the parties but on [a] recognized legal relationship which exists between the person providing the money in acquiring the property and the one in whose name the property is taken. In the instant case between husband and wife whether married customarily, under the Ordinance or otherwise, it is such relationship which forms the essential basis of the doctrine and not the type of marriage as was urged on us by counsel.”*<sup>1091</sup>

In the above cases, it is clear that for a spouse to acquire a share in a property acquired by the other, he must show that he has made substantial

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<sup>1090</sup> [1981] G.L.R. 275 (C.A.). For a commentary on the case, see G.R. Woodman “Purchase by a husband in the name of his wife - deviousness or generosity” (1981 & 1982) 13 & 14 *Review of Ghana Law* 195. See also the English cases of *Tinker v. Tinker* [1970] P. 136 and *Silver v. Silver* [1958] 1 W.L.R. 259.

<sup>1091</sup> At p. 283 *per* Wiredu J.A.

financial contribution to the acquisition of the said property. In the words of Abban J.S.C. in *Achiampong v. Achiampong*:<sup>1092</sup>

*“Divorce per se does not confer on a spouse any interest beneficial or otherwise in property, movable or immovable, of the other spouse... Apart from agreement, direct or indirect financial contribution which can be regarded as substantial is a necessary requirement...”*

The crucial determinant therefore is whether the financial contribution is “substantial”, a word which has not acquired a definite meaning in this context. What is clear though, is that the contribution will be looked at in the context of the facts of the particular case in order to determine whether or not it was “substantial”. Such a determination will enable the court to ascertain the proportion of the property which the claimant spouse is to have. Thus in *Achiampong v. Achiampong*,<sup>1093</sup> for instance, the financial contribution of the wife was found to be substantial and consequently, she was granted a half share in the matrimonial home. On

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<sup>1092</sup> *Op. cit.*, at p. 1036.

<sup>1093</sup> *Supra.*

the other hand, in *Berchie-Badu v. Berchie-Badu*<sup>1094</sup> the wife's contribution, the purchase for C150 of the plot of land on which the house was built, was held to be the proportion that amount bore to the total cost of the construction of the house. The estimated cost was given by the parties to be either C65, 000 or C80, 000. On either estimate, the wife's share in the house would have been negligible. The Court of Appeal however, was of the view that although the wife's claim was based on s. 21(1) of MCA 1971, which entitled the court to order the transfer to a spouse of only the property due to that spouse, and which in the instant case would be the negligible fraction, the court nevertheless was not inhibited from applying the wide powers given to it under s. 20(1) to make an order for financial provision.<sup>1095</sup> Since on the evidence the disputed house was the only asset of the parties had and since the wife paid for the plot and no financial provision was ordered on her behalf, the court awarded her half of the beneficial interest in the house.

It is submitted that the undue reliance on financial contribution will in most cases not meet the justice of the case. It is an unduly restrictive

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<sup>1094</sup> *Supra.*

<sup>1095</sup> For a detailed discussion of ss. 20 and 21 of the MCA 1971, see pp. 460-480 *infra.*

view of contribution which leaves out indirect contribution, such as domestic services, which is not quantifiable in terms of money. Such indirect contribution to the acquisition of matrimonial property is progressively being given prominence in other jurisdictions in the determination of disputes over matrimonial property.<sup>1096</sup> However, the Ghanaian courts have not taken any serious cognisance of this factor in determining the ownership of the matrimonial property. In *Clerk v. Clerk*,<sup>1097</sup> the couple had married in 1929 and were, at the time of the proceeding, eighty and seventy years old respectively. They had been living apart for fifteen years and had several adult children. The wife applied for an order for property settlement for the matrimonial home. She had been a housewife and claimed a beneficial interest in the matrimonial home "*because she had given [the] husband moral and material support in the acquisition of the home.*" The court held that her entitlement to a share in the matrimonial home depended on the question of whether she had actually given up a salaried job in order to look after the home and family. Since this was not the case, and since "*she was not*

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<sup>1096</sup> See for example, s. 25(2)(f) of the English Matrimonial Causes Act and s. 7(4) of the South African Divorce Act 70 of 1979.

<sup>1097</sup> [1981] G.L.R. 583.

a woman who had a job or would have worked," she did not get a share in the matrimonial home.

In *Bentsi-Enchill v. Bentsi-Enchill*,<sup>1098</sup> a wife's claim for an order that she should stay in a flat, bought by her former husband, until their infant child attained maturity was dismissed by the court. The court, whilst conceding that there was a trend to give credit to a wife's domestic services, held that if one spouse bought property with his own money for the common use of the spouses, the other spouse did not necessarily acquire a proprietary interest in it.<sup>1099</sup> This position was reiterated in *Odoteye v. Odoteye*<sup>1100</sup> where the wife, after a divorce, brought an action for ancillary relief and for a transfer into her name of a house for herself and the children. There was no evidence as to her financial contribution to the acquisition of the property. The court held that in the absence of evidence of the wife's actual financial contribution to the cost of the acquisition of the house, it could not order a transfer of the house to her. Also, in *Gyang*

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<sup>1098</sup> [1976] 2 G.L.R. 303.

<sup>1099</sup> See also *Jonas v. Ofori* unreported (11<sup>th</sup> January 1988), High Court, Accra and *Abobor v. Abobor* unreported (16<sup>th</sup> February 1987), High Court, Accra cited by Wanitzel *op. cit.*, at pp. 94-95.

<sup>1100</sup> [1984-86] 1 G.L.R. 519.

v. *Gyang*<sup>1101</sup> the couple married in England in 1972. The matrimonial home was purchased by the husband, apparently without the financial support from the wife. The court held that:

*“The woman may not contribute substantially financially but she may contribute through her services in the house and by giving comfort and encouragement to the husband to acquire the properties of the marriage. The law however is that such wifely duties do not make her a joint owner of the properties which the husband has acquired.”*

Finally, in *Ribeiro v. Ribeiro*<sup>1102</sup> Francois J.S.C., in a dissenting judgment, reiterated the prevailing view of the judiciary towards the domestic services of a wife. He opined that the argument that domestic services of a wife enabled a husband a free leash to pursue money-winning ventures, is a recent concept which modern legislation elsewhere has sought to stamp on the marital relationship. He argued that Ghana has not as yet passed any comparable legislation and consequently, a wife cannot press

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<sup>1101</sup> Unreported but cited by Wanitzek *op. cit* at p. 95.

<sup>1102</sup> [1989-90] 2 G.L.R. 109 at p. 118.

with any degree of optimism an interest in her husband's properties by virtue of mere domestic services in the house. Only the clear, unambiguous words of a statute, in his view, can extend a woman's dominion over marital property. Although the High Court in that case came close to recognising domestic services as a relevant contribution, the Court of Appeal did not take the same view of the case. That court and the majority of the Supreme Court were rather of the view that the case was one of mere financial provision for the ex-wife rather than property settlement. An opportunity was therefore lost for a definitive statement on a wife's domestic contribution as a relevant factor in acquiring a right in the self-acquired property of her husband.

Some ray of hope for the recognition of a wife's domestic services can be found in the decision of the High Court in *Oparebea v. Mensah*.<sup>1103</sup> In that case the wife, who was married under customary law, asked for financial provision to be made for her under s. 20 of the MCA 1971 and a declaration that she had a beneficial interest in the family assets.<sup>1104</sup> The

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<sup>1103</sup> D & MC 1608/88 unreported (14<sup>th</sup> December 1989), High Court, Accra, cited by A. Kuenyehia & E. Ofei-Aboagye "Family law in Ghana and its in implications for women" in *Women & Law in West Africa* A. Kuenyehia (ed.), WaLWA, 1998 at p. 34.

<sup>1104</sup> This is possible under s. 41(2) of the Act. See *infra* pp. 490-500.

husband had other wives and children in addition to the petitioner and her five children. She adduced evidence that for 28 years of their marriage, she worked in the husband's stores in addition to keeping house and taking care of the children. She was paid no wages, salary or allowances beyond normal housekeeping money for the household. Several properties, vehicles etc., were acquired out of their joint efforts in business. The husband admitted that his wife did work in his store and that she was not paid for her efforts. He however, argued that what his wife did was no more than what was expected of a wife because by customary law a married woman was under an obligation to assist her husband in his business. Such assistance, he submitted, was never rewarded with wages or allowances. He further argued that during the marriage his wife had obtained sufficient cash with which she had bought a lot of personal property. Consequently, he did not think his wife was entitled to any more assets from the marriage.

In the opinion of the court four issues fell to be determined, namely,

1. Whether or not there was any contribution by the petitioner to the acquisition of the properties;

2. What the extent of the contribution was;
3. Whether or not the wife had established sufficient grounds to justify her claims, and
4. What the appropriate matrimonial relief would be in order to do justice between the parties, having regard to the particular circumstances of the case.

In answer to the first issue, the court held that even if the assistance of the petitioner was not financial in nature, what she did during the marriage amounted to a contribution worthy of consideration in deciding on financial provisions or declaration of her interest in the acquired assets. It is true that the extent of the contribution was more easily determined where such contribution was financial or an agreed share in a company or a settled role had been played in a business, but in the instant case it could not be denied that the wife's contribution did help the business to flourish. Consequently, in answer to the second issue, the wife's 28-year service could be quantified to be a substantial proportion thereby making it a substantial contribution to the acquisition of the assets. It followed, therefore, in answer to the third issue that the wife had established

sufficient grounds for an award of financial provision in her favour and had established a beneficial interest in the assets acquired during the marriage. In determining the appropriate relief however, the court took into account the fact that the husband had five other wives and numerous other children apart from the petitioner and her children. The court therefore awarded the wife the house in which she lived with some of her children, which belonged to the husband. This the court considered sufficient in the circumstances and did not award any financial provision for her.

An aspect of this case which is of particular importance is the court's remarks that times have changed and the courts should have the courage and conviction to change with the times. In its view, the notion that a wife's domestic services need not be remunerated was probably no longer valid in its entirety. Where, as in the instant case, the wife worked in the business of the husband, helping in and keeping the shop, it was an affront to common sense and a gross violation of all notions of equity, justice and fair play to deny such a woman a share in the property acquired over 28 years because of "*custom which is unsteadily rooted in anachronism.*" These remarks show a rare willingness on the part of the courts to recognise the domestic services of a wife as a "contribution" for

the purpose of acquiring an interest in the self-acquired property of her husband. One suspects though that the wife working gratuitously in the husband's store for 28 years may have influenced the decision. Furthermore, there was a clear show of willingness to jettison custom which had become anachronistic in contemporary circumstances. One may hope that more judges will take such bold steps in the march to liberate wives from the yoke placed on them by customary law.

In the light of the case law, it would seem that the courts' application of English common law and equitable principles have gone some way to alleviate the hardship imposed on wives by the rule in *Quartey v. Martey*.<sup>1105</sup> The application of the principles however, lends itself to the whims of individual judges and their understanding of the principles, especially those of equity, in their contemporary context. This is so because some of the presumptions underlying the equitable principles are based on life of a bygone generation<sup>1106</sup> and need to be adapted to suit contemporary reality. This is clearly evident by the court's attitude to a wife's domestic contribution to the upkeep of the family. This is usually

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<sup>1105</sup> See Quansah "Determination of proprietary rights..." *op. cit.*, at p. 393.

<sup>1106</sup> See *dicta per* Lords Upjohn and Diplock in *Pettitt v. Pettitt op. cit.* at pp. 813 and 824.

undocumented and unquantifiable and yet contributes to the family's wealth. The courts have generally refused to acknowledge this as a "contribution" in determining property rights of the spouses on the assumption, which is no longer valid, that the husband is the sole provider for the family. Married women in Ghana have played, and continue to play, a pivotal role in the welfare and well-being of their families and it is time for due recognition to be given to their contribution.<sup>1107</sup>

Furthermore, the situation created by the non-recognition of a wife's domestic services as a "contribution", has been exacerbated by the courts' undue reliance upon "substantial" financial contribution. Most of these contributions from wives may be difficult to prove although such contribution may have gone some way towards helping in the acquisition of the disputed property. Wives, as some of the cases above indicate, are thereby deprived of their just deserts. There is a need for legislative intervention to rectify the injustice being suffered by wives since the courts have not been able to come up with a satisfactory solution to their plight.

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See generally A Kuenyehia & E Ofei-Aboagye "Family law in Ghana and its implication for women" in *Women and Law in West Africa*, A Kuenyehia (ed.) Accra, WaLWA, 1998 at pp. 36-37.

**(d) Determination and settlement of property under sections 20 and 21 of the MCA 1971**

As mentioned above, these two sections of the MCA 1971 provide the machinery for the court to exercise the power given to it by s. 19 of the Act to “*whenever it thinks just and equitable*” to award maintenance pending suit or financial provision to either party to the marriage after it “*has considered the standard of living of the parties and their circumstances.*”

Section 20 (1) provides:

*“The court may order either party to the marriage to pay the other party such sum of money or convey to the other party such movable or immovable property as settlement of property or in lieu thereof or as part of financial provision as the court thinks just and equitable.”*

The scope of ss. 19 and 20 is intended to bring about a shift of emphasis, like legislation in England,<sup>1108</sup> from the old concept of “maintenance” of the wife and children by the husband to one of re-distribution of assets and what has been described as “purchasing power”.<sup>1109</sup> This will entail a disregard of the question “*Whose is this?*” and deal rather with the question “*To whom shall this be given?*”<sup>1110</sup> But as will be evident from the following discussions, the question “*Whose is this?*” has tended to dominate the question “*To whom shall this be given?*” and in determining the former question the principles for the determination of ownership of property discussed above are invariably relied upon.<sup>1111</sup>

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<sup>1108</sup> See pp. 323-326 *supra*.

<sup>1109</sup> *Per* Ormrod J in *Wachtel v. Wachtel* [1973] 1 All E.R. 113 at p. 116. See also W.C Ekow Daniels “The basis for award of financial provision” (1989-90) 17 *Review of Ghana Law* 49 at p. 58.

<sup>1110</sup> See *Pettitt v. Pettitt* [1970] AC 777 at p. 798 *per* Lord Morris and note 641 *supra*.

<sup>1111</sup> See for example, *Achiampong v. Achiampong supra* at p. 1035.

In the leading case of *Ribeiro v. Ribeiro*<sup>1112</sup> the Supreme Court held, by a majority of 3-2, that s. 20(1) has two limbs. The first limb empowers the court to pay money or convey property, movable or immovable to either spouse to a divorce suit as settlement of property rights. The second limb, on the other hand, empowers the court to make financial provision for either party to a divorce suit and in doing so, can order the conveyance of property, movable or immovable, as part of the financial provision. The object of the section (especially the first limb) being to provide an informal method or procedure whereby property disputes between husband and wife can be determined and in a summary manner, either of the spouses can bring an application in an appropriate case under

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<sup>1112</sup> *Supra*. Subsequent to the appeal, the appellant brought an application before the court for review of its decision to dismiss the appeal. The application was refused by a 3-2 majority. See *Ribeiro v. Ribeiro (No. 2)* [1989-90] 2 G.L.R. 130. The Supreme Court only reviews its own decision where there are special circumstances such as the discovery of new and important evidence which, after the exercise of due diligence, was not within a party's knowledge or could not be produced by him at the time when the judgment was given. See Ord. 39 r. 1 High Court (Civil Procedure) Rules 1954, *Practice Direction (Reviews in the Supreme Court)* [1987-88] 2 G.L.R. 274, *Swaniker v. Adotei Twi II* [1966] G.L.R. 151, *Asckar v. Karam* [1972] 1 G.L.R. 1 and S.Y. Bimpong-Buta "The supreme court and the power of review" (1989-90) 17 *Review of Ghana Law* 192.

the section, praying for an order that property or some beneficial interest therein be given to him or her.<sup>1113</sup>

In exercising its power under the second limb of the section to make financial provision, the majority was of the view that it is not necessary to make a determination as to whether or not a spouse has an interest in the disputed property by way of contributions made towards its acquisition. The court merely examines the needs of the parties and makes reasonable provision for their satisfaction out of the money, goods or immovable property of his or her spouse. This limb was succinctly paraphrased by Adade J.S.C. in *Ribeiro v. Ribeiro (No. 2)*<sup>1114</sup> as follows:

*“The court may order [the husband] to convey to the [wife] such ...[house/building]...as part of financial provision as the court thinks just and equitable.”*

It will seem therefore that the court may only make a determination of the property rights of the spouses if one is seeking a property settlement but

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<sup>1113</sup> See *Achiampong v. Achiampong supra* at p. 1034 *per* Abban J.A. (as he then was).

<sup>1114</sup> *Supra* at p. 136.

where one is asking for financial provision there is no need for such determination. In the earlier case of *Achiampong v. Achiampong*,<sup>1115</sup> the Court of Appeal had expressed the view that property is not ordered to be transferred to a spouse under s. 20(1) of the 1971 Act simply because there is a divorce. Apart from agreement, direct or indirect financial contribution which can be regarded as substantial is a necessary requirement. The court therefore held that it would not be a proper exercise of discretion under s. 20 (1) to order the transfer of property to a spouse who had not contributed substantially in money or money's worth towards the acquisition of that property.<sup>1116</sup> This seemingly contradictory view of s. 20(1) was explained by the Supreme Court in *Ribeiro v. Ribeiro (No. 2)* to be limited to that part of the subsection dealing with settlement of property rights. It was that court's view that it would be erroneous to extend it to cover the portion which relates to applications for financial provision.<sup>1117</sup>

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<sup>1115</sup> *Supra.*

<sup>1116</sup> See pp. 380-386 *supra.*

<sup>1117</sup> *Per Adade J.S.C. in Ribeiro v. Ribeiro (No. 2) op. cit., at p. 136.*

The couple in *Ribeiro* had been married for thirty-four years. The wife had been a housewife throughout the marriage and had looked after both the children she had with her husband and those he had by other women. This enabled the husband to concentrate fully on his business. During the subsistence of the marriage he had become a well-known printer and owned a printing press, more than ten houses and stocks and shares. When the marriage was dissolved at the instance of the wife, she claimed ancillary relief, *inter alia* maintenance and “*one of the houses...for her accommodation.*” Subsequent to the marriage being dissolved, the ex-husband married his mistress with whom he had children and conveyed three of his houses, two of which were conveyed during the currency of the ex-wife’s application, to his new wife. One of the houses conveyed to his new wife was a commercial property popularly known as “Haulage House” because the Ghana Road Haulage Association had offices there. In determining the ex-wife’s ancillary relief the High Court held:

*“Even though there is no direct evidence of contribution by the applicant for the acquisition of these houses, I think her devotedness to her duties as a housewife and her invaluable services rendered to the respondent [husband] in looking after the home, the children, some of whom were not the children of the*

*marriage, entitled her to enjoyment of the houses which her husband acquired during the marriage.*"<sup>1118</sup>

The High Court rescinded the conveyance to the new wife of "Haulage House" on the ground that it had been made in bad faith and to defeat the ends of justice and ordered it to be given to the ex-wife by way of settlement. The court further awarded her a lump sum of C150 000. The High Court's decisions were confirmed by the Court of Appeal<sup>1119</sup> but in relation to the award of "Haulage House" to the ex-wife, it was the opinion of the court that:

*"...the issue was not whether or not the wife-petitioner had made or had not made a 'substantial contribution'. The issue was simply whether she was entitled to be provided with decent accommodation by the appellant as part of financial provision...It was not a case of a wife-petitioner wanting to have a share in the properties of her husband after divorce in which case she would*

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<sup>1118</sup> Quoted by the Court of Appeal in [1987-88] 2 G.L.R. 464 at p. 466.

<sup>1119</sup> [1987-1988] 2 G.L.R. 464.

*be compelled to establish that she made 'substantial financial contribution' towards their acquisition.*"<sup>1120</sup>

On a subsequent appeal by the husband to the Supreme Court challenging the vesting of "Haulage House" in his ex-wife, the majority of that court agreed with the Court of Appeal. In the majority's view, in making an order for financial provision under the subsection it is not necessary to make a determination as to whether or not the wife has an interest in the property because of the contribution she had made towards its acquisition. The court is empowered in that circumstance to transfer property to her even though she made no claim to title. On this view, determination of the contribution of the benefiting spouse becomes relevant only where an order for the conveyance of immovable property from the other spouse in settlement of property rights is asked for.

In the view of the minority however, s. 20(1) does not authorise the court to order the conveyance of immovable property to a spouse without making a determination as to what contribution, if any, was made by the spouse claiming the property towards the acquisition of it. This will be

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<sup>1120</sup>

*Per Abban J.S.C. at p 474.*

the case irrespective of whether the claim is for property settlement or financial provision. In the words of Francois J.S.C.:

*“I think it is all agreed that section 20 of Act 367 does not pretend to entrust the courts with powers arbitrarily to re-align proprietary rights where there is no claim to title in the recipient party. I do not think also that the facts allow the wife to press with any degree of optimism an interest in the husband’s properties by virtue of mere domestic services in the house. The argument that such services enabled a husband a free leash to pursue money-winning ventures, is a recent concept which modern legislation elsewhere has sought to stamp on matrimonial relationship...No such legislation exists here.”<sup>1121</sup>*

Later on in his judgement the learned Justice of Appeal said that:

*“...the reasoning of the Court of Appeal, justifying the award on grounds of contribution in toil in the acquisition of her husband’s properties, and the inequity of depriving her of her deserts, is as*

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1121

[1989-1990] 2 G.L.R. 109 at p. 118.

*emotive as it is contradictory to their earlier stance that a claim to title did not arise.”<sup>1122</sup>*

The other dissentient judge, Wuaku J.S.C., expressed his view thus:

*“...the court has no power under section 20(1) to order that the Haulage House of which the husband is the undisputed legal owner be conveyed to the wife without first establishing her title, as required by section 21(1).”*

The conclusion that can be drawn from the views expressed in the case by the Court of Appeal and the majority of the Supreme Court is that contribution by a spouse becomes relevant only where a spouse is seeking an order under s. 20(1) MCA 1971 for the conveyance of property which is not in his name in pursuance of settlement of property rights. The minority thought the determination of property rights is a condition precedent to the exercise of the powers conferred by the subsection irrespective of the order sought. It is submitted that the general liberal position taken by the majority of the Supreme Court is to be preferred.

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<sup>1122</sup>

At p. 121.

However, if the inference drawn from the majority decision, to the effect that the determination of a spouse's contribution to acquisition of property is dependent on the type of order being sought under the subsection is correct, it will mean that the exercise of the liberal interpretation of the subsection will depend on the ingenuity of counsel for the non-contributing spouse. Counsel will have to appreciate the importance of applying for financial provision instead of property settlement where, on the evidence before him, his client will be unable to satisfactorily prove substantial financial contribution towards the acquisition of the property, part of which he is claiming. This will be a most unsatisfactory outcome of the majority's decision.<sup>1123</sup> It is submitted that the majority would have done greater service to a downtrodden spouse if the liberal interpretation was made applicable to the two limbs of the subsection and some guidelines furnished as to when, for example, a court may order a transfer of property movable or immovable in lieu of a lump sum payment. An important opportunity was missed by the appellate court to articulate such guidelines.

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<sup>1123</sup> It must be noted that in *Berchie-Badu v. Berchie-Badu supra* the Court of Appeal utilized the provisions of s. 20(1) to do justice to the wife although her claim was based on s. 21(1). See pp. 475- 479 *infra*.

Notwithstanding the above misgivings, the majority's interpretation of the subsection will allow a court, assuming financial provision is asked for, to exercise a discretion by giving an interest in disputed property to a spouse who would otherwise be constrained by evidence in proving an interest in such property. Although the criteria for the exercise of the discretion were not spelt out, it is hoped that, if exercised with prudence, decisions such as that reached in *Otoo v. Otoo*<sup>1124</sup> will in future be avoided. In that case the couple had married under customary law for 19 years before remarrying under the Ordinance in 1972. Both were employed and the wife did petty trading to supplement her income. The husband acquired a house with a loan from his employer. In her evidence, the wife stated:

- (1) that she made contributions towards the house,
- (2) the husband did not give her any housekeeping money, but
- (3) he asked her to pay the children's school fees and

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<sup>1124</sup> Unreported (26<sup>th</sup> June 1984), High Court, Accra cited by Wanitzek *op. cit.*, at p. 99.

(4) she paid money to the workmen who were building the house.

The husband admitted the first three statements but disputed the fourth. The wife stated that she did not get any receipts from the workers, but informed her husband each time she paid money to them. No refunds were made for these payments, and she did not expect it because the husband had told her that he was building the house for her and the children. In a divorce proceeding, the High Court refused her claim for a half share in the house. The court held:

*“Failure by the [husband] to give housekeeping money at the time the building was being put up, and the [wife] providing the house-keeping money and also payments of the workmanship to the workers who were constructing the building are not enough grounds to enable the [wife] to have [a] half share of the matrimonial home.”*

Furthermore, it was the court’s view that since the wife could neither produce any receipts nor mention the names of the workers to whom she had paid the money, she had no concrete evidence that she had actually

paid money to the workers. It therefore concluded that the wife did not contribute to the purchase of the matrimonial home.

A similar conclusion was reached in *Adai v. Sackey*<sup>1125</sup> where the couple had been married under customary law for nearly 50 years. The marriage was dissolved extra-judicially and the wife subsequently claimed a house as her share of the matrimonial property. Her claim was based on the fact that she “*forewent her entitlements as a wife, and also helped her husband to trade in Akpeteshie [a local alcohol], without any pay to enable [him] to use whatever income he had from the cocoa farm to put up...the house in dispute in Accra.*” The court, however, found that there was no evidence to support these allegations and consequently, held that there was no proof of a “*substantial contribution*” by the wife, apart from the performance of her “*normal wifely duties of cooking and washing the clothes*” of the husband, which did not count in this context. She was only granted a right to live in the house with her children subject to good behaviour for her life or until she remarries.<sup>1126</sup>

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<sup>1125</sup> Unreported, (9<sup>th</sup> April 1986) High Court, Accra cited by Wanitzek *op. cit.*, at p. 100.

<sup>1126</sup> Similar problems of proof arose in *Odoteye v. Odoteye supra* and *Abobor v. Abobor* unreported, (16<sup>th</sup> February 1987), High Court, Accra cited by Wanitzek *op. cit.*, at p. 94.

In the light of the wide range of activities undertaken by women in the contemporary situation in Ghana to improve the well-being of their families a distinction between “*substantial contribution*” and “*mere house-work and childcare*” seem to be outdated and need to be jettisoned. Marriage should be looked upon as a partnership with each partner contributing his or her quota, be it financial or otherwise, to the well-being of the partners and their offsprings.

In conclusion, it will be noted that the general application of the minority view in *Ribeiro v. Ribeiro* will create injustice in many cases where the contributing spouse, usually the wife, cannot lead satisfactory evidence of her contribution or that the contribution was in the form of domestic services. As seen above, the courts have not given credit to a wife’s domestic services in the determination of interests in matrimonial property.

The other power given to the court to adjudicate in disputes over matrimonial property is s. 21(1). That section provides as follows:

*“When a decree for divorce or nullity is granted, if the court is satisfied that either party to the marriage holds title to movable*

*or immovable property part or all of which rightfully belongs to the other, the court shall order transfer or conveyance of the interest to the party entitled to it upon such terms as the court thinks just and equitable."*

The subsection deals with contested title to property acquired during a marriage, that is, whether a particular property was in fact acquired by the husband, or the wife, or by both of them jointly. It would seem that it is aligned to the first limb of s. 20(1) in that when the court under that subsection determines who owns the disputed property, it will then utilise s. 21(1) to give effect to its decision. Alternatively, a spouse can ask for conveyance of property directly under s. 21(1) as happened in *Berchie-Badu v. Berchie-Badu*.<sup>1127</sup> In that case the ownership of the matrimonial property was in dispute and as part of the divorce proceedings, the wife applied under the subsection for the transfer of the house to her in trust for their children. The wife had purchased the land on which the house was built for C150 but there was no satisfactory evidence of her contribution towards its construction. The trial judge granted her

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1127

*Supra.*

application but on appeal, the Court of Appeal on the available evidence found, *inter alia*, that:

- (a) the trial judge had ignored the inconsistent evidence from the wife on the financing of the construction of the house;
- (b) the husband, who had children with some other women, kept his name on the building plans and refused the wife's suggestion to change it into their children's names and
- (c) the total cost of construction of the house, given as C65, 000 by the husband and C80, 000 by the wife, had been borne mainly by the husband.

The only contribution from the wife was the money for the acquisition of the land. The Court of Appeal allowed the appeal and held that where spouses jointly acquired property but the legal estate was vested solely in one spouse, the amount of the share of the other spouse in the beneficial interest in cases where he had made a direct or identifiable contribution to the acquisition, had to be proportionate to the payment made. But where the contributing spouse made indirect or unidentifiable

contributions, although his share then would be less to evaluate, the difficulty in the evaluation did not in itself justify the application of the maxim "equality is equity" if the fair estimate of the intended share might be some fraction other than one half. Since, on the evidence, the wife was only able to prove that she paid for the plot of land, her beneficial interest in the matrimonial home should be the proportion that C150 bore to the total cost of construction, that is, C65, 000 or C80,000. In either case her beneficial interest would be negligible.

The court however, was of the view that when the High Court assumed its divorce jurisdiction it was, under the provisions of s. 20(1) of the MCA 1971, armed with sufficient powers to make provision for the wife on the breakdown of the marriage. In the exercise of the court's discretion to award ancillary relief under that section, the overriding consideration was that the order had to be "just and equitable". But in the instant case, counsel for the wife did not address the court for ancillary relief by way of financial provision under s. 20(1); he restricted himself to s. 21(1) which entitled the court to order the transfer to a spouse of only the property due to that spouse and which in the case of the wife would be the negligible fraction of the total cost. This notwithstanding, the Court was of the view that the High Court was not inhibited from

applying the wide powers under s. 20(1) to serve the ends of justice. On the evidence, the matrimonial home seemed to be the only capital asset of the spouses. Since the wife paid for the plot of land and no financial provision was ordered on her behalf, her beneficial share in the matrimonial home should be half and that of the husband, the other half.

The decision in this case again shows the court's willingness to use s. 20(1) to achieve a purpose which, in the circumstances, appeared to it just and equitable. Although there was a finding that she had no interest in the matrimonial home, this did not deter the court from using s. 20(1) to give her an interest in the house. This position taken by the court puts pay to the suggestion that has been made to the effect that in interpreting s. 21(1) the court should be guided by legal principles which were developed under the English Married Women's Property Act 1882 rather than case law which have grown out of the operation of the English Matrimonial Proceedings and Property Act 1970.<sup>1128</sup> The said principles were developed mainly under the provisions of s. 17 of the 1882 Act. That section provides that "*in any question between husband and wife as*

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<sup>1128</sup> See Daniels "The basis for award of financial provision" *op. cit.*, at p. 67. On the principles developed under the Matrimonial Proceedings and Property Act 1970 (later consolidated under Part II of the Matrimonial Causes Act 1973), see chap. five *supra*.

*to the title to or possession of property, either party...may apply, in a summary way to any judge of the High Court...or...of the county court...and the judge...may make such order in respect of the property in dispute...as he thinks fit.*" In the leading English case of *Pettitt v. Pettitt*<sup>1129</sup> all the members of the House of Lords agreed that the section was purely procedural. The question which the court had to answer was "*Whose is this?*" and not "*To whom shall this be given?*"<sup>1130</sup> In other words, the task of the court was to ascertain the rights of the parties. It has no power to vary established rights. It is submitted that the application of these principles would hamper the court in doing justice in a great number of cases as is evidenced by the majority of the case law discussed above. A majority of wives have been unfairly disadvantaged by the undue reliance on the answer to the question "*Whose is this?*" Their domestic contributions of generally looking after the well-being of their husband and children have not been given the necessary recognition they deserve.

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<sup>1129</sup> *Op. cit. supra.* See note 641 *supra*.

<sup>1130</sup> *Per* Lord Morris at p. 798.

Although the MCA 1971 was enacted with the avowed aim of improving the situation of women, the interpretation given to sections 20(1) and 21(1) has not significantly advanced the cause of women. The way those sections have been formulated leaves the court groping for guidelines to interpret their provisions. This has led to the reliance on principles of customary and common law and equity relating to the determination of ownership of property instead of the development of fair criteria for settlement of property. The use of the common law and equitable principles has nonetheless gone some way to alleviate the hardship of women but the excessive reliance on substantial financial contribution from a spouse as opposed to contribution in domestic services have stunted the growth of a fair deal for non-contributing spouses, especially women, in the acquisition of rights in matrimonial property. There must be a recognition that unless a wife plays her part in looking after the family a husband cannot play his. The courts' attention must specifically be directed by legislation to the importance of contribution by way of domestic services in order to "*break the shackles of constraint and extend a woman's dominion over marital property.*"<sup>1131</sup>

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*Per Francois J.S.C. in Ribeiro v. Ribeiro supra* at p. 120. See also *Ribeiro Ribeiro (No. 2) supra* at pp. 143-144 *per Francois J.S.C.*

**(e) Orders that a court can make for financial provision for spouses under the MCA 1971**

The orders which the court can make for the financial provision of a spouse after divorce are similar to those available to the English courts in a similar situation. S. 20(2) of the Act permits financial provision to be made either in gross or by instalments. Thus, orders for (a) periodical payments and (b) for the payment of a lump sum may be made, so also may (c) property settlement/adjustment orders be made. These orders may be made if the court “*thinks [it] just and equitable*” to do so. If the court is minded to make any of these orders it must take into account the peculiar circumstances of the parties and their standard of living. The orders, in terms of s. 19 of the Act, may be awarded to either the husband or the wife. Thus, like under English law, it is “*abundantly plain that husbands and wives come to the judgment seat in matters of money and property upon the basis of complete equality.*”<sup>1132</sup> However, economic

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*Per* Scarman L.J. in *Calderbank v. Calderbank* [1976] Fam. 93 at p. 103. See *Erskine v. Erskine* [1984-86] 1 G.L.R. 249 where it was held that husbands and wives were placed on equal footing as far as costs in matrimonial causes were concerned and were subject to the general discretion of the court in respect of award and payment of costs. See also s. 16 of the MCA 1971 under which either party to a marriage may petition for an order for maintenance.

realities usually dictate that it would be the wife who will be the beneficiary of the court orders particularly where her claim for a share in the matrimonial property has been rejected by the court.<sup>1133</sup>

### (i) Periodical payments

This type of order will usually be made where the resources of the parties are limited. The order is usually made for the maintenance of the wife but the case law indicates that it is only in a few cases that such an order is made and in those few cases, it seems that the existence of children of the marriage was crucial in making the award.<sup>1134</sup> The amount awarded is usually one-third of the joint income of the spouses. This is done by adding the incomes of the spouses and dividing it into three; the wife's income is then deducted from the dividend and the balance is what the husband is required to pay.<sup>1135</sup> Where the court has reason to believe that

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<sup>1133</sup> See for example, *Beckley v. Beckley* [1974] 1 G.L.R. 393, *Happee v. Happee* [1974] 2 G.L.R. 186 and *Gyang v. Gyang supra*.

<sup>1134</sup> See *Wanitzek op. cit.* at p. 102 citing the unreported cases of *Abobor v. Abobor* High Court, Accra (16<sup>th</sup> February 1987) and *Ahmed v. Ahmed* High Court, Accra (4<sup>th</sup> October 1988) as typical examples.

<sup>1135</sup> See *Clerk v. Clerk* [1981] G.L.R. 583.

the payer may default or may be unwilling to pay, it may ask the payer to give reasonable security for the payment ordered.<sup>1136</sup>

A drawback to the use of this order is that it perpetuates the financial dependence of the recipient on the payer thus exacerbating any bitterness that would have been generated by the divorce. Furthermore, its enforcement may be problematic, hence it has not been frequently utilised.

Under s. 28(2) of the MCA 1971, the death of a party for whose benefit an order for financial provision has been made, or the death of the party adversely affected by such order, shall automatically terminate the order. Consequently, periodical payments automatically cease when the spouse entitled to it remarries<sup>1137</sup> or the paying spouse dies.

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<sup>1136</sup> See s. 23 of the 1971 Act.

<sup>1137</sup> See s. 28(1) of the 1971 Act.

**(ii) Lump sum**

This order is unlikely to be made unless the husband has capital assets out of which to pay without crippling his earning power. It is one way of removing the bitterness often associated with divorce and to afford a “clean break” of the financial relationship between the spouses.<sup>1138</sup> This order is, *inter alia*, intended “to help the wife to resettle in her new life.”<sup>1139</sup> Thus, in *Ribeiro v. Ribeiro*<sup>1140</sup> the High Court awarded the wife a lump sum of C150, 000 which the Court of Appeal thought was “woefully inadequate” having regard to the wealth of the appellant and the circumstances of the wife-respondent who was in her old age.<sup>1141</sup> On the evidence the couple had lived an affluent married life and the

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<sup>1138</sup> See note 477 *supra*.

<sup>1139</sup> See *Gyang v. Gyang supra* where the wife, though found not to have contributed “substantially” to the acquisition of her husband’s property, was awarded a lump sum of C150, 000 to enable her to settle down fully to her new way of life. See also *Okang v. Okang* unreported (3<sup>rd</sup> September 1985) High Court, Accra cited by Wanitzek *op. cit.* at p. 103.

<sup>1140</sup> *Supra* pp. 462-470. The appeal to the Court of Appeal and the Supreme Court was against the order to convey a house to the wife in addition to the lump sum ordered.

<sup>1141</sup> *Per* Abban J.S.C. [1987-88] 2 G.L.R. 464 at pp. 475-476. The Court however, did not interfere with the award because there was no cross-petition by the wife against it.

husband had sufficient capital assets out of which he could pay the sum awarded.

Such an order when granted is not affected by the subsequent re-marriage of the recipient and it cannot be varied when circumstances change. For as stated in *Ribeiro v. Ribeiro (No. 2)*, “Where a court orders a package of a lump sum together with immovable property as financial provision...that package cannot be reached by section 28(2)<sup>1142</sup> of Act 367...”<sup>1143</sup>

Under s. 41(2) of the 1971 Act,<sup>1144</sup> when the court is applying the provisions of the Act to a customary (including a Mohammedan) marriage, a lump-sum payment is referred to as “customary

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<sup>1142</sup> See p. 483 *supra*.

<sup>1143</sup> *Per Adade J.S.C.* [1989-90] 2 G.L.R 130 at p. 140 citing, with approval, the *dictum* of Sarkodee J. in *Aikins v. Aikins* [1979] G.L.R. 223 at p. 231. See also s. 27(2)(b) of the 1971 Act which provides that where a decree provides for a monetary or property settlement in lieu of financial provision and that settlement has been executed, the court shall not have the power to review or vary the order subsequently in the event of the remarriage of the payee or after the death of the payer.

<sup>1144</sup> For further discussion of the subsection, see pp. 490-500 *infra*.

compensation” or “send-off” money<sup>1145</sup> in compliance with the subsection’s injunction “to grant any form of relief recognised by the personal law of the parties, either in addition to, or in substitution for, the matrimonial reliefs afforded by this Act.”

### (iii) Property adjustment/settlement

The nature of the power to order transfer of property is similar to the power to award a lump sum. It is often utilised as an alternative to a lump-sum order but the terms of s. 20 of the 1971 Act are such that the two orders may be made together as exemplified by the case of *Ribeiro v. Ribeiro*<sup>1146</sup> where property belonging to the husband was given to the wife in addition to a grant of a lump sum.

Property settlement orders are seldom made but a possible use of it may be to secure an order for periodic payment. The court’s power to vest property under s. 20(1) of the 1971 Act is not contingent upon proof that the recipient either was the owner of the property or made a substantial

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<sup>1145</sup> For further discussion of this payment, see pp. 489-490 *infra*.

<sup>1146</sup> *Supra*.

contribution towards its acquisition. A submission, based upon English and Ghanaian authority, to this effect was rejected by the majority in *Ribeiro v. Ribeiro*. The exercise of the power, in the view of the majority, could be part of a package of financial provision which the court considered the wife was entitled to.<sup>1147</sup>

A property adjustment or settlement order, like that of a lump sum, is a one-off order. It is incapable of variation and is unaffected by the re-marriage of the recipient and the death of either the recipient or the spouse against whom the order was made.<sup>1148</sup>

#### **(f) Marriage under customary law**

Under customary law, extra-judicial divorce is the usual mode by which a marriage is terminated. Such a process involves the two families of the spouses or their representatives who sit to adjudicate on the problems of the couple. They would only grant a divorce if they are convinced that

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<sup>1147</sup> See pp. 462-470 *supra*.

<sup>1148</sup> See p. 485 *supra*.

there is no possibility for reconciliation.<sup>1149</sup> Thus, in *Attah v. Annan*<sup>1150</sup> it was held that a customary marriage can only be terminated after an arbitration, to which members of the family of each spouse and neutral persons must be invited, had been conducted to find out whether any of the spouses had committed any marital offence. If an offence was proved, it was the duty of the arbitrators to try their utmost to effect reconciliation between the spouses in a genuine attempt to salvage the marriage. If the arbitrators ruled that the situation called for a divorce, the spouses must then be given an opportunity to show whether any of them owed any amount or had any property belonging to the other. After settling all legitimate accounts between them, the final act of divorce was then performed by the husband releasing the wife from conjugal

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<sup>1149</sup> See Kuenyehia & Ofei-Aboagye *op. cit.*, at p. 38 and note 1087 *supra*.

<sup>1150</sup> [1975] 1 G.L.R. 366.

obligation, either by “chalking” her<sup>1151</sup> or saying so in the presence of the gathering.<sup>1152</sup>

Because of the operation of the rule in *Quartey v. Martey*<sup>1153</sup> ancillary relief in post-extra-judicial divorce, has tended generally to revolve around the payment of “send-off” money. This is a monetary award to enable the wife to settle down in her new way of life. In *Abobor v. Abobor*<sup>1154</sup> for instance, the court said:

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<sup>1151</sup> In *Penin v. Duncan* (1869) Sar.F.L.R. 118, one of the assessors in the case explained that “chalking” is done by marking with chalk on the shoulders of the wife. This was proved by the wife going to neighbours and showing the marks and telling them “my husband has chalked me.”

<sup>1152</sup> See also *Ginbuuro & Anor. v. Kaba* [1971] 2 G.L.R. 416 where it was held that Frafra customary-law marriage is dissolved when the husband’s family returns to the wife’s family their “calabash” (an euphemism for their daughter).

<sup>1153</sup> *Supra*.

<sup>1154</sup> *Supra*. The extract in the text can be found in Wanitzek *op. cit.* at p. 104. *Cf. Adai v. Sackey* unreported (9<sup>th</sup> April 1986), High Court, Accra cited by Wanitzek *op. cit.* at p. 104 where the marriage had been dissolved customarily out of court and the wife claimed send-off money in the High Court. The court held that the proper place to claim send-off is at the place or time of the dissolution of the marriage. In the court’s view, under customary law the guilty party is not entitled to any send-off.

*“Customarily when a marriage is dissolved, it is part of the arrangements of the dissolution to grant “send-off” to the innocent party. It has not been possible to ascertain the innocent party in the case since both agreed that the marriage has broken down beyond reconciliation... Looking at the evidence as a whole I am satisfied that the petitioner is entitled to some compensation for the contribution she has made so far to the marriage. [She is] entitled to some financial compensation to resettle her in her new way of life. Accordingly, looking at the financial means of the couple and the responsibilities placed on them in this judgment I will order... C60, 000 as a lump sum financial provision.”*

A spouse to a customary marriage may however resort to a formal judicial process for the dissolution of his marriage, in which case he has a choice of going to the Community Tribunal<sup>1155</sup> which applies only customary law in dissolving the marriage or to apply to the High Court under s. 41(2) of the MCA 1971 for the provisions of the Act to be applied to his divorce.<sup>1156</sup> This latter provision was a novelty introduced

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<sup>1155</sup> See s. 47(1)(f) of the Courts Act 1993.

<sup>1156</sup> See G.R. Woodman “The adaptation of customary law to the Matrimonial Causes Act” (1981 & 82) 13 & 14 *Review of Ghana Law* 218.

by the Act as “*a bold step which will enable the reliefs and benefits afforded by the Act to be made available to persons married under customary law or to the children of such marriages.*”<sup>1157</sup>

The enactment of the subsection is a partial attempt to integrate the customary laws and statutory laws regarding matrimonial proceedings though not the laws regarding the marriages themselves.<sup>1158</sup> However, empirical evidence indicates that very few matrimonial proceedings relating to customary law marriages are brought under the MCA 1971.<sup>1159</sup>

On assumption of jurisdiction over a customary marriage, the High Court must apply the provisions of the Act to the said customary marriage, though in doing so it is at liberty to modify the provisions to suit the peculiar incidents of that marriage. This is subject to the overall

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<sup>1157</sup> See 7 *Parliamentary Debates* (2nd Ser.) 1971 at p. 5 *per* Victor Owusu, the then Minister of Justice.

<sup>1158</sup> See *Parliamentary Debates supra* at p. 223 and Morris *op. cit.*

<sup>1159</sup> Wanitzek, *op. cit.*, at pp. 84-85 states that of 61 High Court cases evaluated in 1989, only 9 were concerned with customary-law marriages. This writer's own perusal of judicial statistics in the High Court in Accra in November 1999 supports the paucity of customary-law marriage cases before the High Court.

requirements of justice, equity and good conscience. In *Adjei v. Foriwa*<sup>1160</sup> the plaintiff was the customary-law wife of the defendant, by whom he had six children. There was a deterioration in their relationship, and the defendant married another woman. The plaintiff brought an action claiming, *inter alia*, a declaration that a certain house was the joint property and matrimonial home of the parties and an injunction restraining the defendant from ejecting her from the house. The defendant also initiated an action against the plaintiff and her parents for an order to compel them to dissolve the marriage customarily, or alternatively an order of dissolution, and an order ejecting the plaintiff from the house. As a result of the defendant's action the plaintiff and her children were ordered to be ejected from the house. Subsequently, the two actions were consolidated, and the defendant was ordered, pending the final determination, to reinstate the plaintiff and her children to the section of the house which they previously occupied. The plaintiff chose not to return but the children did.

In applying the peculiar incidents of the marriage in terms of s. 41(2) of the MCA 1971, the court held that Akan customary law knew no

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<sup>1160</sup>

[1981] G.L.R. 378.

personal right of occupation of the matrimonial home by the wife, and that since the children in this case belonged to their mother's family they also could have no such personal right.<sup>1161</sup> No authority was cited by the court for these conclusions but as pointed out by Woodman,<sup>1162</sup> case law relating to the rights of wives and children in the matrimonial home after the man's death intestate, is to the effect that obligations owed by him to his wife and children during his lifetime pass to the family which inherits his estate. Such rights were expressed in terms of entitlement to accommodation, albeit, not specifically in the matrimonial home.<sup>1163</sup> In the absence of any customary right of occupation in the matrimonial home, the court felt uninhibited in exercising its discretion in the context of justice, equity and good conscience. It was the court's view that the conditions in the house had become such that the children should be

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<sup>1161</sup> The Akan-speaking people are matrilineal, that is, they trace their lineage from a common female ancestor. Thus, every married woman who has children originates a family which becomes part of the wider family to which she belongs. For a description of the matrilineal family see *Mills v. Addy* [1958] 3 W.A.L.R. 357, Sarbah *op. cit.*, at pp. 33-36 and Ollennu *op. cit.*, pp. 139-143, 171-174.

<sup>1162</sup> "Adaptation of customary law to the Matrimonial Causes Act, 1971" *op. cit.*, at p. 220.

<sup>1163</sup> See for example, *Amamoo v. Clement* (1871) Sar.F.C.L. 180, *Boham v. Marshall* (1892) Sar.F.C.L. 193 and *Mensa v. Krakue* (1894) Sar.F.C.L. 86.

compelled to leave. Although the defendant did not ask for their ejection, the court held it had power to make such order as good conscience dictated and the justice of the case demanded. It consequently ordered the children to vacate the house within 28 days.<sup>1164</sup> In *Abobor v. Abobor*<sup>1165</sup> the customary “send-off” money was awarded to the wife as part of a lump-sum payment made under s. 19 of the MCA 1971. The same position was taken by the court in *Jonas v. Ofori*<sup>1166</sup> and *Mensah v. Berkoe*.<sup>1167</sup>

The court is also enjoined to have regard to the peculiar incidents of that marriage in determining appropriate relief, financial provision and child custody arrangements. Thus, in applying the provisions of the Act to a customary marriage, the court must have regard to the interests of other wives, if any, where the application has been brought by one of them. The existence of other wives will qualify as a peculiar incident of the marriage in question meriting consideration in determining the

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<sup>1164</sup> See also *Mensah v. Berkoe* [1975] 2 G.L.R. 347.

<sup>1165</sup> *Supra*.

<sup>1166</sup> Unreported (11<sup>th</sup> January 1988), High Court, Accra cited by Wanitzek *op. cit.* at p. 104.

<sup>1167</sup> *Supra*.

appropriate relief. In *Oparebea v. Mensah*<sup>1168</sup> the court, in considering financial provision and a declaration of interest in the matrimonial assets of a marriage, in which there were five other wives and children, awarded the wife, who brought the action, one of the houses which belonged to the husband and refused to make any financial provision. This was because the court took into account the interests of the other wives and children of the husband. The court considered that the award of the house was sufficient for her needs in light of the circumstances of the case. The decision was made easy because there were several other properties available. There was no indication in the judgment as to how the court would have exercised its discretion if, for instance, there was only one house or one farm and all the wives had contributed in the same way as the wife who brought the action. Presumably in such a circumstance, the appropriate relief would have been financial provision in the form of a lump-sum payment or perhaps periodic monthly payments, which the court may order the husband to provide reasonable security for their payment in terms of s. 23 of the Act.

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*Supra.*

One of the questions arising from s. 41(2), which has not been satisfactorily answered, is whether the court can assume jurisdiction to grant relief under the Act in the case of a polygamous marriage, merely because a party to such a marriage has filed a petition for divorce there, or whether the party has to apply to the court, before the petition for divorce is filed, for leave to apply the provisions of the Act to the case.<sup>1169</sup> In *Adjei v. Foriwaa*<sup>1170</sup> the court adopted the former view when it held that any party to a polygamous marriage who seeks relief from the High Court must be deemed to have made an application to the court to apply the provisions of the Act to the marriage. It is submitted that this is the correct approach as it is in consonance with the desire to integrate the customary law on matrimonial causes with that of the marriage under the Ordinance. Besides, it is not in the interest of justice to unnecessarily put impediments in the way of litigants in the form of leave to apply to the court before the provisions of the Act can be applied to the customary marriage in question. If the goal of giving a customary wife a fair deal is to be achieved then it is desirable to encourage her to take advantage

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<sup>1169</sup> See W.C.E. Daniels "Dissolution of customary law marriages by the court" (1977) 9 *Review of Ghana Law* 71.

<sup>1170</sup> *Supra.*

of the more favourable provisions of the Act.<sup>1171</sup> The less impediments in her way, the better the prospect of her benefiting from the provisions of the Act. In the light of evidence of infrequent use of the Act by spouses of customary marriages, this is the way to proceed.<sup>1172</sup>

A second question in relation to the subsection that has not been satisfactorily answered is whether a party whose customary marriage has already been dissolved extra-judicially can nevertheless still come within the ambit of the subsection and raise post-divorce claims under the Act? Although there have been cases<sup>1173</sup> in which post-divorce ancillary matters of customary marriages that have been dissolved extra-judicially have been dealt with, the court in other cases did not apply the provisions of the Act. Instead, the principles of the law of trusts in combination with customary law were utilised. In *Domfe v. Adu*<sup>1174</sup> for example, the

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<sup>1171</sup> Research has not disclosed a single case in which a husband of a customary-law marriage has opposed the application of the provisions of the Act to his marriage on the ground that the application of customary law will be more advantageous to him. See Wanitzek *op. cit.* at p. 80 note 26.

<sup>1172</sup> See further Wanitzek *op. cit.* p. 80.

<sup>1173</sup> See for example, *Adai v. Sackey supra*, *Abobor v. Abobor supra*, *Jonas v. Ofori supra*, *Mensah v. Berkoe supra* and *Domfe v. Adu supra*.

<sup>1174</sup> *Supra*.

court held that the appellant was the sole proprietor of a business registered in his name but “pierced through the veil” to find out who were the real beneficiaries of the business. On the evidence, the court found that the respondent contributed the initial capital for the business and contributed in kind, working without wages. Consequently, even though the business stood in the appellant’s name as the sole owner, he held it as well as the other profits and the proceeds accruing therefrom in trust for himself and the respondent. Abban J.A said:

*“In my view, this was a proper case where the court should invoke equitable principles and refer to decided cases, both English and local, to elucidate or explain how the parties stood to each other in relation to the business itself as well as the profits and the proceeds realised therefrom.”*<sup>1175</sup>

The court did not give any reason why the provisions of the Act were not applied. However, as seen from cases such as *Abobor v. Abobor*,<sup>1176</sup> the power given to the court to grant any form of relief recognised by the

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<sup>1175</sup> At p. 665.

<sup>1176</sup> *Supra.*

personal law of the parties to the proceedings, either in addition to or in substitution for the matrimonial reliefs afforded by the Act,<sup>1177</sup> has been used to provide “send off” money as a financial relief to enable a wife to settle down in her new way of life. One can therefore conclude from this that a spouse whose customary-law marriage has been dissolved extra-judicially can still apply to the High Court for the provisions of the Act to be used for post-divorce ancillary reliefs.

The efficacy of the subsection has been said<sup>1178</sup> to be minimal because of the limitation of the jurisdiction to the higher courts, and the application of the provisions of the Act only on application of a party. Other factors militating against frequent use of the provisions of the Act by customary-law spouses are the lack of knowledge among rural dwellers about the possibility of applying for relief under the Act, the lack of resources to obtain the services of a lawyer even if such knowledge exists,<sup>1179</sup> and the

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<sup>1177</sup> See s. 41(2)(b) of the Act.

<sup>1178</sup> See Wanitzek *op. cit.* at p. 81.

<sup>1179</sup> The impact of lack of resources on women in taking legal actions against their husbands or paramours is seen from the experience gathered from the Legal Services Centre of the Ghana Chapter of the International Federation of Women Lawyers, known by its Spanish acronym as FIDA. Experience at the Centre shows that women are unable to seek maintenance for their

constraints placed on such dwellers by customary insistence on matrimonial disputes being settled extra-judicially by the families of the spouses. Furthermore, local cultural practices may militate against a wife bringing an action against her husband in court.<sup>1180</sup> Despite the minimal impact of the subsection on customary marriages, it is submitted that it has been generally beneficial to women who have used it because the rights conferred by the 1971 Act are not available under the various customary laws. What is needed to further enhance its efficacy is sustained information on its availability to those for whom it was intended, namely women married under customary law. To this end, non-Governmental Organisations such as Women & Law in West Africa<sup>1181</sup> are urged to take up the challenge.

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children in the Family Tribunal unless offered free legal assistance. See Kuenyehia & Ofei-Aboagye *op. cit* at p. 49.

<sup>1180</sup> For example, it has been found among the Anlo-Ewe tribe that a woman would not sue her children's father for maintenance of the children for fear of being accused by the community that she is lazy or cannot find a way of caring for the children. See P.W. Jones-Quartey "The effects of the Maintenance of Children Act on Akan and Ewe notions of parental responsibility" in *Domestic Rights and Duties in Southern Ghana*, C. Oppong (ed.), Legon, Institute of African Studies, University of Ghana, 1974.

<sup>1181</sup> This Organisation is based in the Human Rights Centre of the Faculty of Law, University of Ghana. It carries out research on specific areas of law that affect the lives of women.

### 3. CONCLUSION

The shortcomings of the separate matrimonial property regime in Ghana have been tackled vigorously by the courts with the aid of the legislature. However, like the position in England, the attempts have been patchy and the outcome has not always been satisfactory. Of particular note is the general lack of recognition of a wife's domestic services as a contribution to the acquisition of matrimonial property. It is rather arbitrary and unfair that in the modern cash economy, where almost every activity has a monetary value, a wife is denied her just deserts for her contribution in kind to the upkeep of the family. As pointed out by a learned writer,<sup>1182</sup>

*"...in view of the socio-economic realities of the Ghanaian situation, it is not possible to assert that there are many households where the woman does nothing but domestic chores. There may be a few such cases. Even in those situations, the domestic skills of the woman ought to be quantified. We suggest therefore that legislation be introduced to rectify the situation."*

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Kuenyehia "Distribution of matrimonial property..." *op. cit.* at p. 107.

Despite the lofty intentions behind the Matrimonial Causes Act 1971 to ensure an equitable readjustment of the property rights of spouses on divorce, there are still problems, such as the absence of guidelines for the exercise of the court's discretion, to be resolved. Factors such as:

- (a) the length of the marriage,
- (b) the kind of economic activity engaged in by the spouses, and
- (c) the domestic services of a spouse

must be legislated as factors a court must take into account in determining rights to matrimonial property on divorce. The lack of such guidelines has given rise to the courts resorting to customary, common-law and equitable principles in applying the provisions of the Act to the determination of the spouses' proprietary rights. The result has not been satisfactory. It is submitted that the legislature should provide a clear statutory basis for the right of a divorced woman to a fair share of matrimonial property.<sup>1183</sup> This right to a fair share of matrimonial

property has been enshrined in the Constitution as a right of every Ghanaian.<sup>1184</sup> Article 22 of the 1992 Constitution provides that:

*“(1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.*

*(2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.*

*(3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article - (a) Spouses shall have equal access to property jointly acquired during marriage; (b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.”*

These provisions are emphatic declaration of equitable distribution of matrimonial property and taking into account the primacy of the

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See W.C.E. Daniels “The impact of the 1992 Constitution on family rights in Ghana” (1996) *Journal of African Law* 183.

Constitution, should override any principle of law or custom to the contrary. It is hoped that the legislature will sooner rather than later fulfil the constitutional obligation imposed on it by Article 22 of the Constitution.<sup>1185</sup>

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The then Attorney-General, Dr. Obed Asamoah, was reported as saying the enactment of a law to regulate the property rights of spouses has not been neglected by the government. The Law Reform Commission has been asked to submit proposals for consideration. See the *Free Press*, Friday March 12<sup>th</sup> - Thursday March 18<sup>th</sup> 1999 at p. 12. The new government that assumed power in January 2001 is yet to make a pronouncement on the issue.

**CHAPTER SEVEN****A COMPARATIVE SUMMARY OF THE MATRIMONIAL  
PROPERTY REGIMES IN SOUTH AFRICA, ENGLAND AND  
GHANA****1. INTRODUCTION**

The general survey in the preceding three chapters of the matrimonial regimes in the selected countries shows progressive attempts to improve those regimes in the light of changing social and economic circumstances. The fundamental thrust of the improvements in these countries is the need to better the lot of married women.<sup>1186</sup> Two types of approaches are discernible, namely the discretionary approach and the fixed rule approach. In this chapter a comparative look will be taken at these approaches to see what lessons can be learnt from them in order to

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In South Africa for instance, a view has been expressed that although the Matrimonial Property Act 88 of 1984 does not distinguish between husband and wife, the introduction of the accrual system by that Act is especially to enable a wife, who is married out of community of property and out of community of profit and loss, and who is not economically active, to share in the economic wealth of her ex-husband. See Visser & Potgieter *op. cit.*, at p. 146.

indicate in which direction the Botswana law on matrimonial property rights should develop.

## 2. THE DISCRETIONARY APPROACH TO DETERMINING MATRIMONIAL PROPERTY RIGHTS

The discretionary approach takes the form of a conferment of a discretion on the court to redistribute the matrimonial property on divorce as it thinks the justice of the particular case warrants. The discretionary approach features prominently in England and Ghana and to a very limited extent in South Africa. In England and Ghana, the courts are given wide and flexible discretionary powers to distribute and reallocate the parties' resources irrespective of the rights of ownership but according to specified statutory criteria.<sup>1187</sup> The discretion is exercisable in these two countries mainly in regard to monogamous marriages but on application of a party to a polygamous marriage, the court can exercise its statutory discretion with regard to that marriage.<sup>1188</sup>

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<sup>1187</sup> In Ghana no such statutory criteria exist. See *Achiampong v. Achiampong* [1982-83] G.L.R. 1017 at p. 1035.

<sup>1188</sup> In England, the discretion may be exercised in regard to a polygamous marriage under s. 47(1) of the MCA 1973. That section allows the court to grant any matrimonial relief existing under the 1973 Act where the marriage

In South Africa on the other hand, the courts do not have a general discretion to redistribute matrimonial property. The limited discretion that exists applies only to a limited category of monogamous marriages<sup>1189</sup> which category will eventually disappear altogether<sup>1190</sup> although the Recognition of Customary Marriages Act 120 of 1998 has extended it to

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was entered into under a law which permits polygamy. The effect of this statutory provision is to make available to spouses of such marriages all forms of relief which can be classified as matrimonial. See *Re Sehota* [1978] 3 All E.R. 385 at p. 389. In Ghana, s. 41(2) of the MCA 1971 gives the court the requisite power to apply the provisions of the Act to polygamous marriages. Despite the fact that the majority of marriages contracted in Ghana is potentially polygamous, only a few of them are dealt with under the MCA 1971. See pp. 490-500 *supra*.

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See s. 7(3) of the Divorce Act 70 of 1979 (applied only to some marriages out of community of property). Under s. 7(9) of the Act a South African court may exercise a discretion to order a redistribution of assets in a marriage subject to a foreign system if that system allows the court to order a redistribution in that country. However, Cronje & Heaton *op. cit.* at pp. 157-158 have asserted that this amendment achieved little as it merely restated the already existing rule that the proprietary consequences of a marriage are governed by the *lex loci domicilli* (the law of the place where the husband is domiciled at the time of the marriage). It still does not answer the question whether s. 7(3) of Act 70 of 1979 can also be invoked in respect of a foreign marriage, they added.

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See N.D.C. Dillon "The financial consequences of divorce..." *op. cit.*, at pp. 275-276.

cover polygamous customary marriages.<sup>1191</sup> In exercising this limited discretion the courts in South Africa, like their English counterparts, are guided by statutory criteria.<sup>1192</sup>

### (a) Highlights of the application of the statutory criteria

In applying the statutory framework for the determination of the proprietary rights of the spouses the rights of ownership are secondary to the needs of the spouses.<sup>1193</sup> Nevertheless, it is still important in some cases to determine ownership of a particular property especially where one spouse is claiming a definite interest in the said property as opposed to asking the court for a discretionary benefit. In England and Ghana the principle of separate property by which each spouse may acquire and deal

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<sup>1191</sup> See s. 8(4)(b) of the 1998 Act which gives a court dissolving a polygamous customary marriage, *inter alia*, all the powers contemplated under s. 7(4) (5), (6) or (7) of the 1979 Act.

<sup>1192</sup> See s. 7(5) of Act 70 of 1979 and s. 8(4) of the 1998 Act.

<sup>1193</sup> See the English cases of *Browne v. Pritchard* [1975] 3 All E.R. 721 at p. 724 and *S. v. S.* [1976] 1 All E.R. 56 at p. 60. Although it may be argued that since the enactment of the Matrimonial and Family Proceedings Act 1984, the emphasis has shifted to the needs of children, the financial needs of the spouses are still regarded as a pre-eminent factor under s. 25 of the English MCA 1973.

with his or her property as if he or she were single, is of fundamental importance.<sup>1194</sup> With a few exceptions,<sup>1195</sup> the fact that two people are married makes no difference to their ownership of property. The marriage relationship gives rise to certain obligations, including that of support,<sup>1196</sup> which may directly or indirectly affect a spouse's liberty to deal freely with his or her property.<sup>1197</sup> But neither these obligations nor

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<sup>1194</sup> In South Africa, the principle is also important in marriages out of community of property and out of community of profit and loss as well as those out of community of property but with the accrual system. See pp. 205-243 *supra*.

<sup>1195</sup> For example, in England under s. 37 the Matrimonial Proceedings and Property Act 1970, a spouse who has contributed substantially to the improvement of the other spouses' property may thereby acquire an interest in the property. See pp. 315-320 *supra*.

<sup>1196</sup> A husband for instance, has an obligation to support his wife according to his economic circumstances. See the English case of *Povey v. Povey* [1972] Fam. 40. A similar obligation is thrust upon Ghanaian husbands. See Kuenyehia & Ofei-Aboagye *op. cit.*, at p. 31. In South Africa, spouses owe each other a reciprocal duty of support. See *Jodaiken v. Jodaiken* 1978 (1) S.A. 784 (W) at p. 788.

<sup>1197</sup> In England, s. 30 of the Family Law Act 1996 gives the non-owning spouse certain "matrimonial home rights" such as the right not to be evicted or excluded, if in occupation, from the matrimonial home by the other spouse except with the leave of the court. This section of the 1996 Act is in operation. See The Family Law Act 1996 (Commencement No. 2) Order 1997. See also note 734 *supra*. Also in South Africa, s. 8 of the Matrimonial Property Act 88 of 1984 allows a spouse in a marriage out of community with the accrual system to apply to the court for an order of

the marriage relationship itself directly changes the ownership of property. English and Ghanaian law have no concept of community of property whereby property is owned in equal shares during marriage and divided equally on divorce. The statutory discretion given to the court in these countries does not alter the legal rules which determine the ownership of property. For instance, the statutory injunction in England to take into account a spouse's contribution by looking after the home<sup>1198</sup> does not confer upon such a spouse a legal right in the assets of the other spouse. It only empowers the court to have regard to such contribution in deciding whether or not to transfer to the claimant spouse some or any part of the other spouse's property. In Ghana, it has been asserted that divorce *per se* does not confer on a spouse any beneficial interest or otherwise in the property, movable or immovable, of the other spouse. The spouse claiming a share in the other spouse's property must either

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immediate division of the accrual of the marriage. The order is granted if he can show that his share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse. See pp. 237-241 *supra*.

prove an agreement to share or have made a substantial contribution towards the acquisition of the property in dispute.<sup>1199</sup>

Similarly, in South Africa the statutory provision for the exercise of the limited discretion for redistribution of matrimonial assets does not alter the law of ownership pertaining to marriages (including customary marriages) which come within the scope of the court's discretion. Like the position in England, it only allows the court to order what it deems just in the circumstances of the case. This is to be done by taking account of stated factors which have been described as "*remarkably brief*" in view of the importance of the subject.<sup>1200</sup>

### **(i) Determining ownership of matrimonial property**

Because most claimants cannot prove that they have a legal right to the disputed property, the courts in England and Ghana have relied upon the equitable doctrines of implied, resulting or constructive trust in

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<sup>1199</sup> See *Achiampong v. Achiampong supra* at p. 1036 and also pp. 448-452 *supra*.

<sup>1200</sup> See Dillon *op. cit.* at p. 283.

determining beneficial interest in such disputed property.<sup>1201</sup> The underlying principle of all three doctrines is that it would in the circumstances be unconscionable to allow the legal owner to assert the absolute ownership which appears on the deed of conveyance. However, although unconscionability may be a necessary pre-requisite for asserting an equitable interest by way of these equitable doctrines, it is not sufficient merely to show that denial of a beneficial interest would be unfair to the claimant. For, as it was put by Slade L.J. in the English case of *Thomas v. Fuller-Brown*.<sup>1202</sup>

*“...under English law the mere fact that A expends money or labour on B’s property does not by itself entitle A to an interest in the property. In the absence of agreement or a common intention to be inferred from all the circumstances or any question of estoppel, A will normally have no claim whatever on the property in the circumstances.”*

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<sup>1201</sup> See pp. 287-307 and 437-448 *supra*.

<sup>1202</sup> [1988] 1 F.L.R. 237 at p. 240.

The circumstances in which a claimant would be successful in asserting an equitable interest were clarified by the decision of the House of Lords in *Lloyds Bank Plc. v. Rosset*.<sup>1203</sup> This case, which dealt with constructive trust,<sup>1204</sup> reiterated the law to be that there must be an express or implied agreement, arrangement or understanding that the claimant has an interest in the property and in either case he or she has acted to his/her detriment. Where there is no such agreement, arrangement or understanding, the court may infer an intention to share the property beneficially from the conduct of the parties. In this latter circumstance, direct contribution to the purchase price by the claimant would readily justify the necessary inference. Despite this clarification, one cannot state the law in this area with any measure of confidence because practical difficulties do arise which cannot be reconciled with the case law.<sup>1205</sup>

These equitable doctrines have not featured in the case law of South Africa because, one suspects, of the dominance of the fixed rules for determining matrimonial property and also because the division of

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<sup>1203</sup> *Supra.*

<sup>1204</sup> The distinction between the three types of trusts is not always clear. See *Gissing v. Gissing supra.*

<sup>1205</sup> See *dictum* of Mustill L.J. in *Grant v. Edwards supra* at p. 101.

matrimonial assets, of those spouses married out of community of property, had not been a function of the courts prior to the introduction of s. 7(3) of Act 70 of 1979. The matter had hitherto been governed exclusively by antenuptial contract.<sup>1206</sup>

The situation in England and Ghana is in contrast with that of South Africa where the basic premise is that the type of marriage contracted by the spouses determine the matrimonial property consequences of the marriage.<sup>1207</sup> Accordingly, matrimonial property must be divided according to the rules governing the type of marriage contracted that is, community of property, the accrual system, or complete separation of property (unless the spouses enter into a settlement agreement).<sup>1208</sup> Thus, the South African matrimonial property regimes provide extreme points in a range of options with a linking bridge between the two extremes. On the one hand there is the universal community of property, and on the other, the contractual alternative of complete separation. Sandwiched between these two extremes is the marriage out of community of property

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<sup>1206</sup> See pp. 160-162 *supra*.

<sup>1207</sup> See pp. 145-147 *supra*.

<sup>1208</sup> See pp. 177-243 *supra*.

and out of community of profit and loss but with the accrual system. The object of this latter system is to cause some of the advantages of a marriage in community of property to apply to a marriage out of community of property, a system that can be described as deferred community of gains.<sup>1209</sup>

### (ii) Domestic contribution by a spouse

One significant criterion for determining the beneficial interest in the disputed property is the intangible domestic contribution of the married woman. Legislation in England, for instance, enjoins the court to take into account “*contributions made by looking after the home or caring for the family*”.<sup>1210</sup> Similarly, in South Africa the court is enjoined to take into account the contribution made “*directly or indirectly during the*

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<sup>1209</sup> See Hahlo “*Husband and Wife*” *op. cit.*, at p. 304.

<sup>1210</sup> See s. 25(2)(f) of the English Matrimonial Causes Act 1973. The subsection does not distinguish between husband and wife but in practice it is the wife who will usually benefit from its provisions. In *Daly v. General Steam Navigation Ltd.* [1981] 1 W.L.R. 120, the English Court of Appeal recognised the economic cost and value of house work as a separate head of damage in an action for negligence. See also K. O’Donovan “Legal recognition of the value of housework” (1978) 8 *Family Law* 215 and M. Brazier “The cost of ‘women’s’ work” (1981) 44 *Modern Law Review* 725.

*subsistence of the marriage to the maintenance or increase of the estate of the other spouse*".<sup>1211</sup> But this is restricted to a very limited category of marriages, such as, marriages entered into in terms of antenuptial contract prior to 1984 excluding community of property and profit and loss and any form of accrual system.<sup>1212</sup> In marriages outside this limited category, for instance, marriage in community of property, the wife's services in managing the joint household and caring for the children are taken into account when the court is determining whether or not to grant a forfeiture of benefit order.<sup>1213</sup> Thus, a wife who has been ordered to forfeit the benefits of the marriage would be allowed to keep what she had contributed to the joint estate.<sup>1214</sup> However, in the case of a customary marriage, such contribution of a wife is unlikely to be taken into account

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<sup>1211</sup> See s. 7(4) of the South African Divorce Act 70 of 1979. This subsection, like s. 25(2)(f) of the English MCA 1973, does not distinguish between husband and wife. However, it is the wife of a marriage to which the subsection applies who will usually benefit from its provisions. See *Beaumont v. Beaumont supra* pp. 209-210 where it was held that the mere fact that a wife has fulfilled her traditional role as wife and mother amounts to a contribution to her husband's estate.

<sup>1212</sup> See p. 205 and note 439 *supra*.

<sup>1213</sup> See pp. 194-200 *supra*. See also *Gates v. Gates* 1940 N.P.D. 361 at pp. 365-366.

<sup>1214</sup> See *Singh v. Singh* 1983 (1) S.A. 781 (C).

because of the view taken by customary law that whatever a wife contributes towards the well-being of the family belongs to the husband.<sup>1215</sup>

The rationale behind these statutory injunctions seems to be the increasing recognition that marriage is a special partnership, the economic dimension of which is expressed in terms of purposive interaction between the spouses. Thus, in the words of Gray,<sup>1216</sup>

*“[W]here there is an internal division of labour between a wage-earner and a home-maker, the respective roles of the spouses are rightly perceived to be complementary. The wife’s domestic effort is regarded as a dynamic causal factor in the acquisition of matrimonial property, since the performance of her supportive and complimentary role is functional sine qua non of the viability of her family as an economic unit.”*

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<sup>1215</sup> See p. 252 *supra*.

<sup>1216</sup> *Reallocation of Property on Divorce op. cit.*, at p. 35.

The same view was reiterated by Sir Jocelyn Simon P. when he said:<sup>1217</sup>

*“In the generality of marriages the wife bears and rears children and minds the home. She thereby frees her husband for his economic activities. Since it is her performance of her function which enables the husband to perform his, she is in justice entitled to share in its fruits.”*<sup>1218</sup>

This type of contribution comes in various forms, such as providing *“general and moral support to a man sometimes hard pressed by business*

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<sup>1217</sup> In an extra-judicial lecture to the English Law Society titled “The seven pillars of divorce reform” (1965) 62 *Law Society Gazette* at p. 345.

<sup>1218</sup> See also para. 69 of the English Law Commission’s *Report on Financial Provision in Matrimonial Proceedings* (1969) Law Com. No. 25 which recommended the recognition of the contribution made (normally by the wife) in looking after the home and the family and para. 644 of the Report of the Royal Commission on Marriage and Divorce *op. cit.* See further B.A. Rwezaura “Division of matrimonial assets under the Tanzania marriage law” (1984) 17 *Verfassung und Recht in Ubersee* 177 at p. 181 and the dictum of Van den Heever J. in the South African case of *Edelstein v. Edelstein supra* at p. 14.

worries that a good wife does”<sup>1219</sup> or for being an “excellent mother”<sup>1220</sup> or supplying “the infrastructure and support by which [the husband] was able to work hard, prosper and accumulate his wealth”.<sup>1221</sup> An attempt in South Africa to restrict the wife’s contribution to those made over and above her normal domestic functions was rejected by the then Appellate Division in *Beaumont v. Beaumont*, the court saying:<sup>1222</sup>

“there can be no doubt that the plain meaning of these words is so wide that they embrace the performance by the wife of her ordinary duties of looking after the home and caring for the family.”

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<sup>1219</sup> See the English case of *Trippas v. Trippas* [1973] Fam. 134 per Scarman L.J. See also the South African case of *Beaumont v. Beaumont* 1987 (1) S.A. 967 (A) at p. 997 per Botha J.A.

<sup>1220</sup> See the English case of *Wachtel v. Wachtel* [1973] 1 All E.R. 829 at p. 831.

<sup>1221</sup> See the English case of *Vicary v. Vicary* [1992] 2 F.L.R. 271. See also *Page v. Page* [1981] 2 F.L.R. 198 at p. 205 where the court held that the wife had contributed by being “practically involved and has participated in a family business project, whether farming, industry, or otherwise...”

<sup>1222</sup> 1987 (1) S.A. 967 (A) at p. 997 per Botha J.A.

In Ghana however, there is no legislative injunction for the courts to take indirect contribution into account. The law of separate property, which applies in that country, does not have any means for measuring, in terms of property rights, the value of a wife's contribution as a homemaker.<sup>1223</sup> Consequently, the courts in the absence of a legislative injunction have generally ignored this type of contribution in assessing a wife's share in matrimonial property.<sup>1224</sup>

The recognition of a wife's domestic services as a contribution in determining the proprietary rights of spouses on divorce is a welcome development. It accords with legitimate expectations of wives, who in most cases, after diligently looking after the husband and children expect to benefit from property acquired during the marriage. It is true that the underlying assumption for the recognition of a wife's domestic services, that is, a wife is not normally engaged in economic activity outside the

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<sup>1223</sup> See further the views of the Canadian Law Reform Commission expressed in their Working Paper No. 8 on Family Law (1975) at pp. 9-10.

<sup>1224</sup> See the *dicta* of Francois J.S.C. in *Ribeiro v. Ribeiro* [1989-90] 2 G.L.R. 109 at pp. 118-120. However, some attempts have been made in a few cases to recognize a wife's domestic contributions. See for example, *Bentsi-Enchill v. Bentsi-Enchill supra*, *Odoteye v. Odoteye* and *Oparebea v. Mensah supra*.

home, has changed over the years.<sup>1225</sup> Nevertheless, it is still important that her domestic services be recognised within the context of the family's economic well-being. For even where she is engaged in economic activity outside the home, her earnings are comparatively smaller than those of her husband. In addition to her economic activity outside the home, she is still, in many cases, expected to discharge the household responsibilities as well.<sup>1226</sup> These tremendous responsibilities of the wife deserve the recognition accorded them in legislation in England and South Africa.

### **(iii) The one-third rule**

In the exercise of their discretion, the English courts tended initially to rely on the one-third rule, by which, as a starting point, a wife is regarded

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<sup>1225</sup> For example, in England it was reported in 1994 that the majority of married women had paid employment and more than three-quarters of all women aged between 35 and 45 were economically active, albeit often in low-paid and part-time jobs. See (1994) 24 *Social Trends* 57, 59-60 cited by Cretney & Masson *op. cit.*, at p. 219. There has also been an increase over the years in the economic activities of wives outside the matrimonial home in Ghana. See A. Kuenyehia *op. cit.*, at p. 94 and p. 391 *supra*.

<sup>1226</sup> See Cretney & Masson *op. cit.*, at p. 220.

as entitled to one third of the combined resources of the parties.<sup>1227</sup> Subsequently, the popularity of this rule waned and is now regarded as just one of the factors the court will take into account in assessing the post-divorce needs of the spouses. This so-called rule was held by the then Appellate Division to be inapplicable to South African law<sup>1228</sup> although there had been occasions when lower courts had utilised it.<sup>1229</sup> It is only meant to be a rational starting point in the court's exercise of its discretion,<sup>1230</sup> but it is not an appropriate starting point in all cases.<sup>1231</sup> It will be better, as suggested by the then South African Appellate Division, not to curtail the court's discretion by placing judicial glosses on it.<sup>1232</sup> Despite this criticism, the one-third rule seems to have worked fairly well

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<sup>1227</sup> See *Wachtel v. Wachtel supra* at p. 839 per Lord Denning M.R. See also *Bullock v. Bullock supra*, *Dew v. Dew supra* and *White v. White supra*.

<sup>1228</sup> See *Beaumont v. Beaumont supra* at p. 991.

<sup>1229</sup> See *Van Gysen v. Van Gysen* 1986 (1) S.A. 56 (C), *MacGregor v. MacGregor* 1986 (3) S.A. 644 (C) and *Kroon v. Kroon* 1986 (4) S.A. 616 (E).

<sup>1230</sup> *Wachtel v. Wachtel supra* at p. 839. In view of the decision in *Beaumont's* case, the one-third rule may not even be used as a starting point in South Africa.

<sup>1231</sup> See *O'D v. O'D supra* at p. 91.

<sup>1232</sup> *Beaumont v. Beaumont supra* at p. 991.

in England even though it has been repeatedly emphasised that any such starting point must give way to the peculiar circumstances of individual cases and the specific statutory factors.<sup>1233</sup>

The Ghanaian courts have not utilised the one-third rule and there is hardly any discussion of it in the case law.<sup>1234</sup> They have rather concentrated on trying to alleviate the harsh effects on married women of the application of customary law. The Ghanaian courts' attitude in this regard has been summarised as follows:

*"...[I]t is fairly clear that in dealing with disputes between husband and wife as to title to property jointly acquired with the assistance of each other, the proper function of the court is to decide the case on the footing of the agreement of the parties at the time of the transaction, and their intention or inferences that can be drawn from their conduct, e.g. contribution to the*

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<sup>1233</sup> See *Burgess v. Burgess* [1996] 2 F.L.R. 33 (CA).

<sup>1234</sup> In *Clerk v. Clerk* [1981] G.L.R. 583 the court used the one-third rule in assessing the maintenance payable by the husband. Kuenyehia "Distribution of matrimonial property..." *op. cit.* at p. 107 has suggested that legislation should guarantee one-third of all matrimonial property to the wife should the marriage break up. This, according to her, is the absolute minimum which any woman faced with divorce should be entitled to.

*purchase price. In the absence of any evidence as to what was agreed or intended the doctrine of resulting trust may be invoked to arrive at a just and equitable decision.*"<sup>1235</sup>

Once a spouse has been found to have acquired a share in the other spouse's property by a contribution, it has been suggested that the best formula for determining the beneficial interest is for the Ghanaian courts to draw a *prima facie* inference that they are entitled to an equal share, at any rate where the respective contributions are substantial.<sup>1236</sup> It is submitted that this inference should give way to the peculiar circumstances of individual cases. Thus, for instance, where the contribution is neither substantial nor financial, the court should be able to adopt a different formula for the distribution of the matrimonial property.

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<sup>1235</sup> Daniels "The ascertainment of property rights between husband and wife" *op. cit.*, at p. 151.

<sup>1236</sup> *Ibid.* at p. 147 relying on the *dictum* of Lord Denning M.R. in *Gissing v. Gissing supra*. Cf. *White v. White supra*.

#### (iv) Conduct of the spouses during the marriage

Another factor that has featured in the courts' exercise of their discretion is the conduct of the parties. In both England and South Africa conduct is one of the factors the court is enjoined to take into account in the post-divorce adjustment of matrimonial property.<sup>1237</sup> This factor, it is submitted, is antithetical to the "no fault" principle underlying the divorce law of both countries. In realisation of this, it has been held in England that conduct should only be taken into account in determining financial provision on divorce if it is "*both obvious and gross*".<sup>1238</sup> The statutory framework for the exercise of the discretion is designed essentially as a financial and not a moral exercise. Therefore, a spouse's conduct should generally be ignored except where in the court's opinion it would be inequitable to ignore the said conduct.<sup>1239</sup> Similarly, in South Africa the

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<sup>1237</sup> See s. 25(2)(g) of the 1973 English statute and s. 7(2) of the South African Divorce Act 70 of 1979 with regard to maintenance order. In *Beaumont v. Beaumont supra*, it was held that the wording of s. 7(5)(d) ("*any other factor which should in the opinion of the court be taken into account*") is wide enough to take a party's misconduct into account when a redistribution order is being considered under s. 7(3) of the Act.

<sup>1238</sup> See *Wachtel v. Wachtel supra* at p. 835.

<sup>1239</sup> See pp. 356-365 *supra*.

courts have been urged to take a conservative approach in assessing a party's conduct as a relevant factor and where there is no conspicuous disparity between the conduct of one party and that of the other, the court should not indulge in an exercise to apportion the fault of the parties, and thus nullify the advantages of the "no fault" system of divorce.<sup>1240</sup>

In contrast to England and South Africa, Ghana has no statutory provision regarding the taking into account of the parties' conduct in determining their proprietary rights. However, during the parliamentary debates on the Bill which was eventually passed as the Matrimonial Causes Act 1971, the then Attorney-General expressed the following view on the possible role conduct will play under the Act.

*"We would expect a certain standard of decorum from the woman whilst she is living on the charity of the former husband. I think it unwise to allow the woman to continue to draw this permanent alimony in spite of this open conduct. When it has become clear that the woman is flirting openly with a gentleman or gentlemen, it will be proper for the paying party to go to court...to say that*

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<sup>1240</sup> *Beaumont v. Beaumont supra* at p. 994 and pp 222-224 *supra*.

*because of certain circumstances the court should rescind or vary such order for the payment of the alimony.*"<sup>1241</sup>

This view clearly relates to an order for periodical payments which may last until a remarriage of the recipient spouse or for the joint lives of the spouses unless varied or rescinded by the court. This, it is submitted, is an appropriate case where conduct should be a relevant factor. But in the absence of a clear statutory guideline on the point and taking into account the "no fault" principle underlying the Act, it is submitted that conduct should not, as a rule, be a factor in determining the post-divorce proprietary rights of the spouses. There may however, be occasions when the conduct of a spouse is so "obvious and gross" that the justice of the case would warrant its consideration as a factor in determining his/her proprietary right.

#### **(v) The "clean break" principle**

The "clean break" principle, which incorporates the notion that divorced spouses should not remain under a long-term financial obligation to one

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<sup>1241</sup>

Parliamentary Debates (2<sup>nd</sup> Series), Vol. 7, No. 10, col. 348, 28<sup>th</sup> June 1971.

another after divorce, features in all the jurisdictions. This is more pronounced in England and South Africa than in Ghana. The rationale behind the principle is to enable the spouses to a failed marriage, wherever fairness allows, to go their separate ways without the running irritant of financial interdependence or dispute.<sup>1242</sup> The desired termination of the financial obligations of the spouses is achieved by either an award of a capital sum or a commutation of the right to be maintained on a periodical basis. But this is usually feasible only where there are sufficient assets to make the order fair. The presence of children of the marriage is not an obstacle to the termination of the spouses' financial obligation to each other. This is because within the statutory framework the welfare of children is only a "first" and not a "paramount" consideration.<sup>1243</sup>

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<sup>1242</sup> See the English case of *Tandy v. Tandy* (unreported) per Waite J. cited with approval in *Whiting v. Whiting supra*.

<sup>1243</sup> See pp. 327-329 and note 756 *supra*.

## (b) Advantages and disadvantages of the discretionary approach

The main advantage of the discretionary approach is its flexibility.<sup>1244</sup> It provides a flexible response to individual circumstances and is adaptable to changing socio-economic circumstances as well. This very attribute has led to criticism of this approach as creating uncertainty in forecasting what the court is likely to do in a particular case<sup>1245</sup> and may lead to subjective justice in some cases.<sup>1246</sup> But as was noted by Sinclair,<sup>1247</sup> if the guidelines and principles upon which the discretionary decision must be based are realistic and workable, the apparent disadvantage of uncertainty may be outweighed by the fact that the preservation by the

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<sup>1244</sup> See M. Maclean and J. Johnson "Alimony or compensation" (1990) *Family Law* 20 and H.R. Hahlo "Recent trends in family law: A global survey" 1983 *Acta Juridica* 1 at p. 13.

<sup>1245</sup> See for example, G. Davis *et al Simple Quarrels*, Oxford, Clarendon Press, 1994 pp. 255-256 and E. Jackson *et al* "Financial support on divorce: The right mixture of rules and discretion" [1993] 7 *International Journal of Law and the Family* 230, Hahlo "Recent trends in family law..." *op. cit.*, at p. 13 and Sinclair "Financial provision on divorce..." *op. cit.*, at p. 481.

<sup>1246</sup> See B. Baker *et al op. cit.*, para. 3.30. Cf. J.M. Eekelaar "Some principles of financial and property adjustment on divorce" (1979) 95 *Law Quarterly Review* 253 at p. 254 who argues that discretionary justice is not synonymous with subjective justice.

<sup>1247</sup> "Financial provision on divorce" *op. cit.*, at pp. 481-482.

court of “*the utmost elasticity to deal with each case on its own facts*”<sup>1248</sup> will be conducive to a more equitable resolution of family conflicts. Furthermore, the discretionary approach is criticised on the basis that the claimant spouse does not have a right to a share in the matrimonial property but only a hope of obtaining a share.<sup>1249</sup> It can also impose high costs upon litigants as it encourages them to appeal against awards which they may consider unfair.<sup>1250</sup> It is submitted that whilst these are legitimate criticisms, they are the necessary prices to pay for flexibility of this approach. The discretion given to the courts, though extensive, is not limitless. The courts must consider certain statutory criteria and objectives, the highlights of which have been indicated above, in their attempt to determine the matrimonial property rights of the spouses.<sup>1251</sup> The statutory criteria and objectives have allowed the court to exercise the

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<sup>1248</sup> *Per* Ormrod L.J. in the English case of *Martin v. Martin* [1978] Fam. 12 at p. 20.

<sup>1249</sup> See the Canadian Law Reform Commission’s Working Paper No. 8 on Family Property (1975) *op. cit.* at p. 18.

<sup>1250</sup> See Van Wyk “Matrimonial property systems in contemporary perspective” *op. cit.* at p. 63 quoting S.J. Brake (1981-1982) 23 *Boston College Law Review* 761 at p. 788. In the English cases of *Dart v. Dart supra*, the wife’s costs were stated to be £406, 000 whilst in *F. v. F.* [1995] 2 F.L.R. 45, the wife’s costs were £733, 000 and the husband’s £777, 182.

<sup>1251</sup> See pp. 508-528 *supra*.

discretion within the statutory framework with a measure of success although empirical evidence in England indicates an imperfect achievement of the statutory objectives.<sup>1252</sup> This led to the abandonment of the “principle of minimum loss” by which the court was to exercise its discretion in such a way as to place the parties in the position they would have been had the marriage not broken down.

### 3. THE FIXED RULE APPROACH TO DETERMINING MATRIMONIAL PROPERTY RIGHTS

The discretionary approach in England and Ghana to the determination of matrimonial property rights is in sharp contrast with the South African approach which deals mainly with fixed rules for the distribution of such property with a judicial discretion, as discussed above, only in respect of a limited category of cases. The fixed rule approach has its major influence in marriages in community of property. This form of marriage is the primary form of marriage in South African. There is a rebuttable presumption that all marriages are in community of property.<sup>1253</sup> In other

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<sup>1252</sup> See J.M. Eekelaar “Some principles of financial and property adjustment on divorce” (1979) 95 *Law Quarterly Review* 253.

<sup>1253</sup> See p. 178-179 *supra.*, Hahlo *op. cit.*, at p. 157, *Edelstein v. Edelstein supra* and *Brummund v. Brummund's Estate* 1993 (2) S.A. 494 at pp. 498-499.

words, if spouses have not expressly selected a different marriage form in the prescribed manner, their marriage will automatically be in community of property. The community ends on divorce or death of a spouse and in either event the joint property is divided equally after the liabilities have been paid.<sup>1254</sup>

In marriages out of community but to which the accrual system applies, the accrual is determined when the marriage is dissolved. On the occurrence of that event, if one spouse's estate has shown no accrual or a smaller accrual than the other spouse's estate, the former spouse acquires the right to payment of half of the difference between the accrual of the respective estates of the spouses.<sup>1255</sup>

#### **(a) Advantages and disadvantages of the fixed rule approach**

The main advantage of the fixed rule approach is that a spouse with fewer assets would not have to depend on the court's discretion to obtain

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<sup>1254</sup> See pp. 185-188 *supra*.

<sup>1255</sup> See pp. 233-234 *supra*.

property rights on divorce.<sup>1256</sup> Such property rights would arise not from any financial contribution, nor from any contribution to the welfare of the family, nor from any other factors to be assessed by the court, but from the marriage relationship itself. It also gives security and status to a spouse (usually a wife) who, because of marital and family ties, is unable to acquire an interest in assets of the other spouse by a financial contribution. It does not treat such a spouse as a dependant who must apply to the court for a possible discretionary benefit but rather as an equal partner in marriage, entitled to claim an equal share in the net assets acquired during the marriage. It is in tune with the contemporary trend of a “clean break” on divorce by enabling a spouse to be self-reliant and independent of his or her former spouse. Furthermore, the fixed rule approach provides a property division method that is inexpensive, predictable, and able to minimise the need for litigation.<sup>1257</sup>

On the other hand, this approach has the disadvantage of not being able to take account of the special circumstances of individual cases.<sup>1258</sup> For

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<sup>1256</sup> See Hahlo “Recent trends in family law...” *op. cit.*, at p. 13. See also pp. 186-188 *supra*.

<sup>1257</sup> See Van Wyk “matrimonial property systems...” *op. cit.*, at p. 63.

<sup>1258</sup> See Hahlo “Recent trends in family law...” *op. cit.*, at p. 13.

example, it might give an undeserved benefit to a spouse whose contribution to the marriage had been nil, and who had failed to fulfil his matrimonial obligations. A situation that springs to mind in which the application of the fixed rule will not be appropriate is Professor Rheinstein's example of "*a short-lived marriage of...a highly paid movie star to a lazy bum*"<sup>1259</sup>.

A variant of the fixed rule approach, the accrual system, introduced in South Africa has the advantage of preserving the independence and equality of the spouses during the marriage. Although it does not change the ownership of property during the marriage, it does give a spouse who has little or no assets or earnings some measure of security and certainty that he will share in the accrual of the other spouse's estate at some future time. This system thus recognises the partnership element in marriage and does away with the necessity of the spouse with little or no assets relying on the court's limited discretion to secure an interest in the

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<sup>1259</sup>

See (1973) 68 *North Western University Law Review* 463 at p. 476 cited by Hahlo "*Husband and Wife*" *op. cit.*, at p. 312 in the context of an observation that the accrual system by no means guarantees equitable results. Sinclair "*Financial provision on divorce...*" *op. cit.*, at p. 480 also cited the statement in justification of her call for the introduction of judicial discretion to distribute property on divorce.

matrimonial property. However, as stated above, the accrual system also has flaws.<sup>1260</sup>

#### 4. CONCLUSION

The reforms in the three jurisdictions tend to address particular shortcomings of the operating matrimonial regimes. In England and Ghana for instance, the separate property regime made it difficult for a wife who was not economically active or who, though economically active, earned substantially less than her economically active husband, to acquire a right to share in any property that such economically active husband may acquire during the marriage. This difficulty was ameliorated by the application of equitable doctrines of implied, resulting or constructive trusts in both countries and in addition, in England, by the statutory recognition of the contribution made in looking after the home or caring for the family. Furthermore the court was given a wide discretion in both countries to redistribute the matrimonial assets on divorce.

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<sup>1260</sup>

See pp. 241-243 *supra*.

In South Africa, the shortcoming in the community of property regime, namely, the sole control by the husband over the joint estate by virtue of his having the marital power, was remedied by the abolition of that power and the establishment of legal equality of husband and wife in the administration of their joint estate. In marriages out of community of property, limited discretion was given to the court to redistribute the assets of the spouses if certain conditions are fulfilled. The legislature went further by offering potential parties to a marriage out of community of property the option of the accrual system.

In determining the property rights of the spouses on divorce, the exercise of the judicial discretion to adjust those rights are similar in all the jurisdictions because it is exercised on similar criteria.<sup>1261</sup> The difference that emerges is that in South Africa, where the fixed rule predominates, the discretion has limited scope of operation. The two approaches discernible from the selected countries have both advantages and disadvantages. It is however not easy to determine which one is better than the other because they are adopted to solve problems which are

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<sup>1261</sup> In relation to customary marriages however, there is a difference of approach. Whilst in South Africa the court is enjoined to take certain factors into account, there is no such injunction in Ghana where the court has struggled to find an acceptable criteria.

peculiar to the particular country. Nevertheless, it seems that a combination of the two approaches within a single country as found in South Africa is preferable, although with some reservations.<sup>1262</sup> This dual approach has resulted in some convergence of the effects of marriage out of community of property (complete separation) with that of marriage in community in that there is sharing of matrimonial assets on divorce even if in a limited manner in the case of the former type of marriage. It is submitted that the view of Sinclair to the effect that judicial discretion equitably to redistribute assets on divorce should apply to all marriages, must be given serious consideration as a further means of doing substantial justice to married couples.<sup>1263</sup> For, as she rightly points out, equal apportionment of property is too rigidly built into marriages based on sharing whilst it is absent from those based on complete separation of property. There is the need to empower the court, where the circumstance permits, to either prevent automatic equal sharing or to impose a form of sharing where none exists. In the latter case, it is further submitted that the present limited power to redistribute the assets of pre-1984 marriages out of community of property should be extended to all marriages. “*More*

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<sup>1262</sup> For example, the exclusion of some marriages out of community of property from the judicial discretion to redistribute assets on divorce.

<sup>1263</sup> See “Financial provision on divorce...” *op. cit.*, at pp. 481-482 and 485.

*justice may be achieved if we can minimize that age-old tension between total discretion and total certainty.*"<sup>1264</sup>

Finally, what lessons can be drawn from the situation in these three countries for the improvement of the matrimonial regimes in Botswana? The clear lessons that emerge from the situation in the three countries are:

- (a) That the law cannot remain static in the face of socio-economic changes in society.
- (b) That socio-economic changes have helped to reassess a wife's traditional role as a home-maker and as such a dependent domestic. Her home-maker role is now seen as different but equal to that of her husband and deserving of recognition in the form of a right to share in the matrimonial property. The quantum of such right however, is not fixed but is subject to the exercise of a discretionary power by the court.

(c) That it is possible to combine the fixed rule approach to determining matrimonial property rights with a discretionary approach within the same jurisdiction.

(d) That the court's power to determine matrimonial property rights on divorce has been significantly stripped of its previous overtone of moral censure. A marriage breakdown is a misfortune which befalls the parties to the marriage and carries no stigma but only sympathy. The parties' conduct in the breakdown of the marriage therefore is not generally a significant factor in the determination of their matrimonial property rights.

(e) That a reform of matrimonial property rights must take into account customary rules and practices.

**CHAPTER EIGHT****REFORM OF THE MATRIMONIAL PROPERTY REGIMES IN  
BOTSWANA****1. THE CASE FOR REFORM**

In Chapters Two and Three of this study the inadequacies and shortcomings of the existing matrimonial regimes were discussed. It was shown that in the case of marriages in community of property the intrinsic value of equal apportionment of the joint estate when the community comes to an end cannot be faulted. However, its efficacy is dependent on the prudent and judicious management of the joint estate by the husband, factors which cannot too often be relied upon with any measure of certainty and confidence. Consequently, it was argued that its admitted fairness is in danger of being illusory if the husband continues to have unrestricted administrative powers over the joint estate.<sup>1265</sup> This is more so if one takes into account the court's reluctance to protect the wife of

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<sup>1265</sup> See pp. 133-134 *supra*. See also A. Armstrong *et al* "Uncovering reality: Excavating women's rights in African family law" (1993) 7 *International Journal of Law and the Family* 314 at pp. 342-346.

such a marriage from the proclivity of a husband to do what he likes with the joint estate.

Furthermore, there is a need to re-examine the present approach to the scope of the joint estate. It is important that job-related benefits should be included within the scope of the joint property. Job-related benefits such as pensions and gratuities, the so called "new property",<sup>1266</sup> are presently not regarded as property for inclusion in the joint estate or in determining the mutual property rights of the spouses married out of community of property or under customary law. The accumulated sums of money in a spouse's pension fund, for example, may turn out to be considerable and although may not be available to such a spouse at the time of the divorce, it represents a sizeable capital asset.<sup>1267</sup> This capital asset accrues only to the spouse who had been in paid employment and is generally not assignable or transferable.<sup>1268</sup> However, it is a legitimate expectation of married couples that such pensions or gratuity will ensure some financial security in the future when hopefully they are in the

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<sup>1266</sup> See pp. 128-130 and 191-194 *supra*.

<sup>1267</sup> Under s. 7(1) of the Pensions Act 1966, 2/3rd of a public officer's highest emoluments are payable as pension on his retirement.

<sup>1268</sup> See s. 8 of the Pension Act 1966.

twilight of their lives. When a marriage comes to an end, a spouse, (usually the wife) stands to lose the value of such expectations, consequently, there must be a mechanism in place for the realisation of this expectation. Under s. 8 of the Pension Act 1966 it is possible for a court to order that a husband's pension be used for periodic payment of sums of money by way of maintenance of a former wife or a minor child. However, there is no reported case in which the court has utilized this power. As stated earlier, discussions of pension rights have not featured in the case law at all. There must be an expressed statutory recognition of pension and other job-related benefits as a specie of property capable of being included in the joint estate of the spouses for the purpose of the division of their estate or in determining the proprietary rights of spouses in marriages out of community or under customary law. The present situation whereby these benefits are ignored needs to be looked at in the light of the rudimentary nature of social security payments from the State to supplement an otherwise meagre income in one's old age.<sup>1269</sup> This can only be done by legislative intervention because of the uncertainty which surrounds the common law's position with regards to this type of property in Botswana.

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<sup>1269</sup>

Under the old age pension scheme, persons of 65 years and over are entitled to P117 per month as old age pension. See note 229 *supra*.

In the case of marriages out of community of property and those under customary law, the separate property concept underlying them ensures that a spouse, usually the wife, who has a weak economic power base because she has no formal job, is unable to share in the property acquired during the marriage by the other spouse with a strong economic power. This is so irrespective of any indirect contribution made towards the acquisition of the said property by the spouse with the weak economic power. Even where there has been a direct contribution towards the acquisition of the property, such contribution must be “substantial” to warrant a share in the acquired property.<sup>1270</sup> Furthermore, such a spouse cannot count on the courts for support because the courts have imposed a restrictive interpretation on their power to determine the mutual property rights of spouses on divorce.<sup>1271</sup>

The situation is further complicated by the application of the common law to the personal consequences of the marriage of persons subject to customary law who marry under the Marriage Act, whilst the proprietary

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<sup>1270</sup> See pp. 104-106 *supra*.

<sup>1271</sup> See pp. 81-82 *supra*.

consequences are generally governed by customary law.<sup>1272</sup> The spouses can only opt out of customary law if they complete a special form prior to the celebration of the marriage indicating a choice in favour of common law.<sup>1273</sup> In this connection, empirical evidence suggests that the procedure for opting out of customary law is cumbersome for both the parties wishing to opt out and the Marriage Officers who are obliged to explain the procedure to the parties.<sup>1274</sup>

This situation notwithstanding, there seems to be some evidence that in practice there is interchange of principles between the customary law and the common/statutory law in the determination of the proprietary rights of spouses on divorce.<sup>1275</sup> Thus, it has been asserted<sup>1276</sup> that “‘*customary*’ and ‘*common*’ law in the context of marriage, divorce and division of property are intimately linked both in theory and practice so that any

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<sup>1272</sup> See pp. 82-83 *supra*.

<sup>1273</sup> See pp. 44-45 *supra*.

<sup>1274</sup> See Molokomme “Disseminating family law reforms...” *op. cit.*, *supra* at p. 311.

<sup>1275</sup> See p. 71 *supra*.

<sup>1276</sup> A. Griffiths “Legal duality: Conflict or concord in Botswana” *op. cit.*, *supra* at p. 161.

*attempt at appositional labelling fails.*" This conclusion was arrived at from analysis of property division cases in the Customary and High Courts in which similar results were reached using either system. Despite this evidence of possible integration of the principles of statutory/common law with those of the customary law, the joint application of these principles has proved to be wholly inadequate to satisfy the legitimate aspirations of spouses married out of community and those married under customary law. The lack of discretion to readjust or divide the proprietary rights of spouses of these marriages on divorce has the potential to do grave injustice. There should be a more ready acknowledgement of the multiplicity of the matrimonial regimes and a definite attempt made to integrate their consequences as far as practically possible.

Despite the above shortcomings, little or no reforms of the matrimonial property regimes have taken place for nearly three decades. Law reform in general and particularly in the area of family law, has not been a regular feature of the Botswana legal system.<sup>1277</sup> The mechanism for law reform

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See A.J.G.M. Sanders "Ten years of the Botswana Matrimonial Causes Act - Further proposals for divorce reform" (1982) 26 *Journal of African Law* 163 at pp. 163-167.

is, at best, rudimentary and at worst, non-existent. The Law Reform Committee, a Parliamentary Standing Committee of nine members,<sup>1278</sup> is the body that has been instrumental in the piecemeal reforms that have been undertaken by the Legislature. The impact of the Committee on law reform has been minimal. It has no specialised staff at its disposal and it meets and reports on an ad hoc basis since its members have to double their duties on the Committee with those of their parliamentary duties and responsibilities to their constituents.<sup>1279</sup>

The law reform situation in Botswana contrasts sharply with those in the jurisdictions selected above for comparative perspectives. In those jurisdictions there are formal designated bodies entrusted solely with the task of law reform.<sup>1280</sup> There is a similar need to set up a full-time Law Reform Commission consisting of legal experts charged with the overall

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<sup>1278</sup> Appointed under Parliamentary Standing Order 85C.

<sup>1279</sup> Their last published report was in 1986 on: (i) The Marriage Act, (ii) The Law of Inheritance, (iii) The Electoral Law and (iv) The Citizenship Act. See *Report of the Law Reform Committee* (June-December 1986), Government Printer, Gaborone, 1986.

<sup>1280</sup> See the Law Commission Act 1965 of England, the South African Law Commission Act 19 of 1973 and the Law Reform Commission Decree 1975 (NRCD 325) of Ghana.

reform of the laws of Botswana. The Commission should be able to set out a scheduled law reform programme and be able to take up specific proposals emanating from the Government or any interest groups. Furthermore, the method of disseminating proposed reforms and substantive reforms for general information must be enhanced to enable the widest publicity possible to be given to them.

In order for the proposed reforms to be meaningful, there is the need also to strengthen the existing structural weakness in the legal system. Allott has identified four such weaknesses which may lead to the failure of legal reforms in a given legal system.<sup>1281</sup> These are, firstly, failures in the communication system, secondly, the norms and institutions themselves may be inappropriate because of their character, expression, the way they fit with others, or simply because they are out of step with the social context, thirdly, law reform may fail at the stage of application and implementation and fourthly, there may be failure in monitoring and scrutinising them. Some of these weaknesses no doubt exists in Botswana, a country where, in the words of Molokomme,

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See *The Limits of Law*, London, Butterworths, 1980 and "Reforming the law in Africa - aims, difficulties and techniques" in *Southern Africa in need of Law Reform* A.J.G.M. Sanders (ed.), Durban, Butterworths 1981 at p. 228.

*“a multiplicity of traditional personal laws operates side by side with those received during the colonial period. Traditional personal laws are not always affected by state reform programmes, and even where they are, their relationship with the state law is not always made clear, as the state reforms are usually couched in technical language most people do not understand.”*<sup>1282</sup>

It has already been pointed out above<sup>1283</sup> that the institutional framework for law reform is weak and therefore needs strengthening. Molokomme has suggested, *inter alia*, the following means for enhancing reforms in family law:

- (a) The setting up of appropriate machinery for the study of social problems so that policy makers are properly informed about the nature and dimensions of the problems they seek to deal with. It is only on the basis of such information that they can even begin to work out ways of dealing with family law problems.

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<sup>1282</sup> “Disseminating family law reforms in Botswana...” *op. cit.*, *supra* at p. 304.

<sup>1283</sup> See p. 546 *supra*.

(b) Once the appropriate legal provisions are worked out, they must fit together with those already available, and the relationship between the existing and the new law must be made clear. The legislature must recognise the real importance of customary law in the lives of most people, and seek to incorporate their values in planned reforms of the law.

(c) The institutions which administer the law must be properly staffed and managed, and the enforcement mechanisms strengthened in order to give real meaning to the rights conferred on individuals. Special institutions such as family courts should be constituted to deal specifically with family problems.

(d) Dissemination of law to the public must be given official recognition and priority, and should go beyond mere publication in the government Gazette or the occasional workshop.

It is submitted that these suggestions, if implemented, will go some way to enhance the development and modernisation of family law in general and the matrimonial property regimes in particular.

## 2. ATTEMPTS AT REFORMING FAMILY LAW

Apart from the enactment of the Matrimonial Causes Act 1973, an Act which revolutionised divorce law without any attendant change in the financial consequences of divorce, the few statutes that have attempted reform in the area of family law have been piecemeal without any significant impact on the area of law intended to be reformed.<sup>1284</sup> For example, the Deserted Wives and Children Protection Act 1963 lays down a procedure by which married women who have been deserted may obtain maintenance for themselves and their children. Traditional practices militate against the frequent use of the provision of the Act by women. It has been said that:

*“Women are traditionally socialised into being good wives, which means enduring maltreatment by their husbands ‘for the sake of the family’. In times of crisis a good wife must report the matter to her in-laws even before she consults her own parents. To expect a deserted wife from such an environment to enlist the*

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<sup>1284</sup>

See Molokomme “Disseminating family law reforms...” *op. cit.*, *supra* at pp. 308-317.

*assistance of a total stranger such as a court official is rather unrealistic.*"<sup>1285</sup>

Thus, married women are reluctant to take advantage of the options provided by the Act.

The Affiliation Proceeding Act 1970 (as amended)<sup>1286</sup> provides for proof of paternity and a procedure for the maintenance of children born to single women in the Magistrate Court. A glaring shortcoming of the Act before its amendment was the maximum payment of P40 for the maintenance of an illegitimate child.<sup>1287</sup> This led to single mothers applying to the High Court for relief. The attendant high legal costs of High Court actions were disincentives to most single parents pursuing remedy in that court. In fact the cases which were able to go to the High

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<sup>1285</sup> Molokomme "Disseminating family law reforms..." *op. cit.*, *supra* at p. 316.

<sup>1286</sup> See Affiliation Proceedings (Amendment) Act 1999 which has increased, *inter alia*, the maximum amount a court can award for maintenance under the 1970 Act from P40 to P100. See E.K. Quansah "Botswana's Affiliation Proceedings (Amendment) Act 1999" (2000) 44 *Journal of African Law* 119.

<sup>1287</sup> S. 7(2) of the 1999 Amendment has increased the P40 to P100.

Court were financed by a local non-government organisation.<sup>1288</sup> Although the amount the Magistrate Court is empowered to award has been increased by the Amendment Act, the problem of enforcement of awards, which bedevils the Act still remains.<sup>1289</sup>

The Succession (Rights of the Surviving Spouse and Family Provisions) Act 1970 provides, *inter alia*, that a surviving spouse is entitled to a share in the estate of a deceased spouse, a right which did not exist under Botswana common law. This Act however, does not apply to estates which fall under customary law.<sup>1290</sup> Thus, the Act effectively excludes a vast majority of Batswana, whose estates fall under customary law, from its innovatory provisions.

The Married Persons Property Act 1970 sought to address some of the criticisms that have been levelled against the community of property regime. It relegated that regime from being the primary matrimonial

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<sup>1288</sup> See Quansah "Botswana's Affiliation Proceedings (Amendment) Act 1999" *op. cit.*, *supra* at p. 122.

<sup>1289</sup> See *Beyond Inequalities: Women in Botswana*, Gaborone/Harare Ditshwanelo/SARDC, 1998 at p. 52 and Botswana/UNICEF Report *op. cit.*, *supra*.

<sup>1290</sup> See s. 3 of the Act.

property regime for civil marriages to that of a secondary regime and replaced it with the out of community regime. However, the marital power of the husband, which was considered as the ugly face of the community of property regime, was left intact. The avowed aim that the 1970 Act would raise the status of women married in community was thus rendered nugatory.<sup>1291</sup>

Finally, the Deeds Registry (Amendment) Act 1996 was enacted principally to enable women, whether married in or out of community of property, and whether or not the marital power had been excluded, to execute deeds and other documents required or permitted to be registered in the Deeds Registry without their husband's assistance.

Apart from the above limited reforms, no comprehensive reform of family law has been undertaken.

The lack of legislative initiative in the area of family law reform has been compounded by the judiciary's reluctance to adapt the existing law to ameliorate hardships in particular cases. In contrast to the courts in

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<sup>1291</sup>See p. 43 *supra*.

England and Ghana for instance, the Botswana courts have shown no appetite for creativity or innovation in trying to adapt the existing law to changing circumstances.<sup>1292</sup> The few opportunities that presented themselves for the court to be innovative or creative were wasted by restrictive interpretation of the power given to them to determine the mutual property rights of parties on divorce. One may wonder whether this attitude is an example of a particular application of the fiction that judges do not make law but merely declare law?<sup>1293</sup> The courts should by now have overcome this “childish fiction”<sup>1294</sup> for, in spite of the protestation of judges to the contrary, it is generally accepted that judges do make law occasionally. In the words of Van den Heever J.A.: “*Judges while purporting merely to expound and apply the law sometimes make*

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<sup>1292</sup> The South African courts have had very few opportunities for innovation in this regard. Very few cases on the division of property in marriages in community and those subject to the accrual system have been reported.

<sup>1293</sup> See the English cases of *Willis v. Baddeley* [1892] 2 Q.B. 324 at p. 326 and *Home Office v. Dorset Yacht Co. Ltd.* [1970] AC 1004 at 1045, 1051.

<sup>1294</sup> The term used by the eminent English jurist John Austin. See *Jurisprudence* (5<sup>th</sup> ed.) II at p. 655. See also R.W.M. Dias *Jurisprudence* 5<sup>th</sup> ed. London, Butterworths, 1985 at pp.151-152, Lord Reid “The judge as law maker” (1972) 12 *Journal of the Society of Public Teachers of Law* 22, Hahlo & Kahn *The South African Legal System and its Background*, Kenwyn, Juta & Co, 1973 at p. 306 and Justice Holmes in the American case of *Southern Pacific Co. v. Jensen* 244 U.S. 205 (1916) at p. 221.

*law in the process*".<sup>1295</sup> The Botswana courts should have taken advantage of the few opportunities that have presented themselves to undertake some creative judicial legislation in the area of determining matrimonial property rights, especially in marriages out of community of property and those under customary law, in the face of the inherent unfairness of these regimes and the legislature's inertia. The unfairness of the said matrimonial regimes has been attributed to the increase in relationship outside the bounds of matrimony especially among educated women.<sup>1296</sup>

However, even if a judge is willing to be creative, there can be no meaningful change unless there is some kind of judicial consensus on desirable social change. Sadly this consensus has been lacking among

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<sup>1295</sup> See the South African case of *Sachs v. Donges N.O.* 1950 (2) S.A. 265 (A.D.) at p. 312. See also the South African case of *Daniels v. Daniels* 1958 (1) S.A. 513 (A.D.) at p. 522 *per* Schreiner J.A., the English case of *Indyka v. Indyka* [1967] 2 All E.R. 689 (H.L.) at p. 701 *per* Lord Reid and T.O. Elias "Judicial development of customary law" in *African Indigenous Laws* T.O. Elias *et al* (eds.) Nsukka, Institute of African Studies, University of Nigeria, 1975 Chap. 7.

<sup>1296</sup> See *Beyond Inequalities: Women in Botswana op. cit.*, at p. 56. On the prevalence of cohabitation in Botswana, see the Report of the Botswana Law Reform Committee on *Marriage, Inheritance, Electoral Law and Citizenship Law* 1989 at p. 5.

Botswana judges.<sup>1297</sup> This unsatisfactory situation notwithstanding, it is submitted that the courts and the legislature cannot continue to ignore the significant changes that are occurring in the socio-economic life of Botswana. One hopes that with increased public pressure on an otherwise conservative legislature, from organisations such as, the Botswana Centre for Human Rights (Ditshwanelo), Women and Law in Southern Africa, Emang Basadi and Metlhaetsile Women's Information Centre, requisite reforms will be carried out in the not too distant future to accord with the legitimate aspirations of married couples.

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<sup>1297</sup>

See for example, the valiant attempts by Hayfron-Benjamin C.J. in the late 1970s and early 1980s to instil constitutionalism in the judicial system. These are documented by A.J.G.M. Sanders in "Constitutionalism in Botswana: A valiant attempt at judicial activism" (1983) XVI *Comparative and International Law Journal of Southern Africa* 350 and (1984) XVII *Comparative and International Law Journal of Southern Africa* 49. The lack of consensus on desirable social changes may be explained on the basis that until 1991, when the first Motswana was appointed as Chief Justice, the High Court bench was dominated by non-citizens from diverse backgrounds with diverse social ethos than those prevailing in Botswana.

### 3. OPTIONS FOR REFORM

Any attempt to reform the matrimonial property regimes must take into account the pluralism of the existing laws.<sup>1298</sup> The predominance of the received law in relation to the indigenous customary law has the effect that in reality plurality of laws means essentially, dualism of laws, that is, a choice between the received law and customary law.<sup>1299</sup> In the sphere of private law, the customary law governs the lives of the vast majority of Batswana.<sup>1300</sup> Consequently, as noted above, customary law generally governs the proprietary consequences of a marriage of a person subject to

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<sup>1298</sup> A discussion on legal pluralism can be found in J. Griffiths "What is legal pluralism?" (1986) 24 *Journal of Legal Pluralism* 1.

<sup>1299</sup> For the origin and nature of legal dualism in Botswana, see note 31 *supra* and A.J.G.M. Sanders "The internal conflict of laws in Botswana" (1985) 17 *Botswana Notes & Records* 77, "Legal dualism in Lesotho, Botswana and Swaziland: A general survey" (1985) 1 *Lesotho Law Journal* 47 and A. Molokomme "The reception and development of Roman-Dutch law in Botswana" (1985) 1 *Lesotho Law Journal* 121.

<sup>1300</sup> See A. Molokomme "*Children of the Fence*": *The maintenance of extra-marital children under law and practice in Botswana* Ph.D. thesis University of Leiden, 1991 at p. 40 and *Beyond Inequalities: Women in Botswana op. cit., supra* at p. 46.

customary law (a “tribesman”<sup>1301</sup>), who marries under the Marriage Act<sup>1302</sup> whilst the personal consequences of such marriage are governed by the common law. It will therefore be convenient to attempt to incorporate the salient aspects of the two main systems which will advance reform in the matrimonial property regimes. This will not only give legitimacy to the reforms but it will also help to bring them within the prevailing social context.

Also any attempt at reform of the matrimonial law must first address two preliminary questions namely, (1) is it desirable to enact a uniform matrimonial regime applicable to all types of marriages? and (2) is the way forward to integrate or harmonise the rules of the existing regimes? The difference between these two questions can be illustrated by Allott’s definition of the terms unification and integration:

*“Unification is different from integration. Unification imposes a uniform law; integration creates a law which brings together, without totally obliterating, laws of different*

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<sup>1301</sup> For a definition of the term, see p. 63 *supra*.

<sup>1302</sup> See s. 7(1) Married Persons Property Act 1970.

*origins...Integration...implies that variant laws remain in being, but there is an attempt to standardise their effects and remove conflicts between them. Thus one may get married by customary law or by statute law, but the end result - a marriage - will be the same in either case..."*<sup>1303</sup>

Commenting on this definition, Woodman has said that "*standardisation*" of the effects of the different constituent systems would seem to amount to unification of the norms determining their effects. The "*removal of conflicts*" may mean the removal of instances of mutually contradictory norms. On the other hand, it may mean ensuring that the norms of the constituent systems have identical or "*standardised*" effects. He concludes by saying that in any event, integration would seem to mean partial unification, an interpretation which accords with the common use

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<sup>1303</sup>

A.N. Allott "What is to be done with African customary law?" (1984) 28 *Journal of African Law* 56 at p. 65. See also A.N. Allott "The codification of the law of civil wrongs in common law African legal systems", a paper delivered at a conference for the integration of customary and modern legal systems, Ibadan, Nigeria in 1964 and cited by D.A. Ijalaye in "Marriage laws in Nigeria - Harmonisation or unification" (1974) XII *Nigerian Bar Journal* 21 at p. 22, and "Towards the unification of laws in Africa" (1965) 14 *International and Comparative Law Quarterly* 366 at pp. 376-377. See also E. Cotran & N. Rubin *Readings in African Law Vol. I* London, Frank Cass, 1970 at pp. xxii-xxiv.

of the term.<sup>1304</sup> This meaning of integration is also accepted by Prinsloo who contends that integration embodies a practical approach to the question of unification, namely that unification can be achieved gradually or by a cumulative process, unifying rules where this is possible and leaving matters which cannot be unified to the personal laws of the parties.<sup>1305</sup> Harmonisation may however be taken as different from integration. It seeks to eliminate points of friction between the different legal systems but leaves the systems to continue to exist separately.<sup>1306</sup>

It is submitted that a positive answer to the first question will be too revolutionary. This will entail the creation of a new uniform legal regime entirely replacing the pre-existing regimes which will cease to exist as self-sufficient systems or as systems incorporated in the larger whole. Nevertheless, the new system may well draw its rules from any of the pre-existing systems which it has replaced. The law of marriage and its

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<sup>1304</sup> G.R. Woodman "Unification or continuing pluralism in family law in Anglophone Africa: Past experience, present realities, and future possibilities" (1988) 4 *Lesotho Law Journal* 33 at p. 52.

<sup>1305</sup> See "Pluralism or unification in family law in South Africa"(1990) XXIII *Comparative and International Law Journal of Southern Africa* 324 at p. 325.

<sup>1306</sup> *Ibid.*

attendant consequences deal with personal behaviour that has been followed for many years and any reform geared towards a drastic change in such ingrained behaviour will bring more problems than it will solve. An example of such ingrained behaviour is the prevailing practice of couples who intend to marry under the Marriage Act, first going through the customary marriage formalities before marrying under the Act.<sup>1307</sup> This practice is adhered to despite the fact that a valid customary marriage is not a pre-requisite for a valid statutory marriage and that both marriages are legally recognised in their own right.<sup>1308</sup> Law reform, it has been said,<sup>1309</sup> has most chance of success when it has the consensus of the people behind it, when it confirms attitudes and patterns which people, by their behaviour, have demonstrated that they hold and value. Any attempted reform to the contrary may prove to be futile.

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<sup>1307</sup> Griffiths "Legal duality..." *op. cit., supra* at p. 153 states that a survey in Molepolole revealed that 60% of married couples were married under both customary law and the Marriage Act. See also Molokomme "Disseminating family law reforms..." *op. cit., supra* at p. 309, A.J.G.M. Sanders "The internal conflict of laws in Botswana" (1985) 17 *Botswana Notes and Records* 77 at p. 80.

<sup>1308</sup> See s. 2 of the Marriage Act 1917, Molokomme "Disseminating family law reforms..." *op. cit., supra* at p. 309 and B. Othogile "Is customary marriage a 'union'?" (1987) 21 *Botswana Notes and Records* 61 at p. 62.

<sup>1309</sup> See Allott "Reforming the law in Africa - aims, difficulties and techniques" in *Southern Africa in need of Law Reform op. cit., supra* at p. 229.

The futility of changing established behaviour is graphically demonstrated by the practice of husbands of statutory marriages, who are subject to customary law, taking additional wives, a practice permissible under customary marriages but prohibited under statutory marriages. These husbands are then subjected to criminal proceedings for bigamy.<sup>1310</sup> Such proceedings, though rare, do take place but when the offence is proved, the penalty imposed is comparatively lenient.<sup>1311</sup> The contemporary social relevance of the offence is debatable. The offence is honoured more by its breach than by its observance.

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<sup>1310</sup> See s. 173 of the Botswana Penal Code 1964 which provides for such an offence and a penalty of 5 years imprisonment. See also Molokomme *Disseminating family law reforms...* *op. cit.*, *supra* at p. 309. On the effectiveness of the prosecution of the offence of bigamy in Nigeria, a country with plurality of marriage laws like Botswana, see Ijalaye *op. cit.*, *supra* at pp. 28-29 and C.O. Okonkwo "Bigamy in a polygamous society (Nigeria)" (1976) 1 *Nigerian Juridical Review* 76.

<sup>1311</sup> See *State v. Groenewald* Review case 308/1972 unreported (8<sup>th</sup> June 1972) High Court, Lobatse (3 months imprisonment), *State v. Mmusi* Review case 382/1973 (28<sup>th</sup> December 1973) High Court, Lobatse (6 months imprisonment), *Petros Modise v. The State* Crim. App. 57/1983 unreported (11<sup>th</sup> May 1983) High Court, Francistown (suspended sentence) and *Bele Maje v. The State* Crim. App. F152/1984 unreported (28<sup>th</sup> January 1985) High Court, Francistown (binding over to be of good behaviour for a year). See also Okonkwo *op. cit.*, *supra* at p. 82, *Marriage Laws in Africa* A. Phillips & H.F. Morris (eds.) London, Oxford University Press, 1971 at p. 152 and M.L. Marasinghe "Monogamy, polygamy and bigamy" (1968) 2 *Journal of Islamic and Comparative Law* 54 at p. 71.

A further objection to a positive answer to the first question can be found in the view expressed by Lord Denning, the then Master of the Rolls of the English High Court, some years ago, that although uniformity of laws in Africa is desirable, it may prove impracticable at the personal law level because of the varieties of these laws.<sup>1312</sup> The same view was reiterated at a conference on Local Courts and Customary law held in 1963 in Dar es Salaam, Tanzania. The conference generally agreed that:

*“In the present state of African society it was difficult if not impossible to devise a single system of marriage law replacing these different (statutory, customary and Islamic) kinds of marriage.”*<sup>1313</sup>

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<sup>1312</sup>

See A.N. Allott “What is to be done with African customary law?” (1984) 28 *Journal of African Law* 56 at p. 64 quoting Lord Denning’s remarks at a conference in 1960 on the future of law in Africa. For details of that conference, see A.N. Allott, (ed.) *The Future of Law in Africa (Record of Proceedings of the London Conference)* (1960). See also Sinclair assisted by Heaton *The Law of Marriage op. cit., supra* Chap. 3, Woodman “Unification or continuing pluralism in family law...” *op. cit., supra* and Prinsloo *op. cit., supra*.

<sup>1313</sup>

See E. Cotran “Integration of the laws of marriage and divorce in Kenya” a paper presented at the conference on integration of customary and modern legal system in Ibadan, Nigeria in 1964 cited by D.A. Ijalaye in “Marriage laws in Nigeria - Harmonisation or unification” (1974) 12 *Nigerian Bar Journal* 21 at p. 27. For excerpts of the recommendation of the Dar es Salaam conference, see Allott “What is to be done with African customary

The conference recommended that a general regulatory enactment should be passed to deal with, *inter alia*, the elimination so far as possible, of the variable consequences attaching to different kinds of marriages.<sup>1314</sup>

These views still hold true today and may be used as further arguments to buttress the point that unification of the marriage laws will be too drastic to undertake in Botswana. The different types of marriages that exist have different ways by which they are entered into and it will not be desirable to impose a uniform procedure which will upset established behaviour. However, the imposition of a judicial discretion to interfere with proprietary consequences of the different marriages will be desirable in order to eliminate to a considerable extent, the present differences between the proprietary consequences of the different marriages.

A positive answer to the second question however, will keep the present regimes intact whilst removing, as far as possible, any conflicts between them. As discussed above, s. 7 of the Married Person's Property Act provides that when the parties to a marriage under the Marriage Act are

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law? *op. cit.*, *supra* and (1963) 7 *Journal of African Law* 133-135.

<sup>1314</sup>

The variable consequences are concerned with property rights.

subjected to customary law,<sup>1315</sup> their matrimonial property regime will, in the absence of a prior arrangement between them, be governed by customary law. Therefore, upon divorce, the matrimonial property will be divided according to customary law. It has also been shown that in some cases, the customary courts apply common-law principles in dividing matrimonial property subject to customary law.<sup>1316</sup> It will therefore be appropriate to harmonise or integrate the principles for determining and dividing matrimonial property of both systems while maintaining their intrinsic nature. This will be of particular help to spouses of customary marriages, especially the wife who suffers from a dominantly male-oriented attitude to access to property under customary law.<sup>1317</sup> It will also be in consonance with the fact that it is inevitable that the monogamous and polygamous marriages will continue to co-exist and that the immediate practical thing to do is to make such co-existence as

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<sup>1315</sup> See p. 55 *supra*.

<sup>1316</sup> See p. 71 *supra*.

<sup>1317</sup> See P.E. Kidd *et al Botswana Families & Women's Rights in a changing Environment*, Gaborone, The Women and Law in Southern Africa Research Trust, 1997 at pp. 47-57, O. Gulbrandssen *Access to Agricultural Land and Communal Land Management in Eastern Botswana*, Ministry of Local Government and Lands, Gaborone, 1984 and G. C. Motlhasedi "Women and the law - a brief overview of issues affecting women in customary law" in *Women and the Law in Botswana* Gaborone, Emang Basadi, 1987 pp. 13-17.

conflict free as possible. Harmonisation or integration of the principles for determining and dividing matrimonial property in the various regimes is one sure way of avoiding such conflicts.<sup>1318</sup> Botswana already has uniformity of marital status as far as recognition of the various marriages is concerned. What remains to be done, is to find some uniformity in the proprietary consequences.

It must be remarked here that the various tribes found in Botswana are not as diverse as may be found in other African countries.<sup>1319</sup> The tribes that exist in Botswana are variants of the same Tswana ethnological and linguistic group that can be found in Southern Africa and as such have generally the same language and marital practices.<sup>1320</sup> They are therefore more homogeneous than heterogeneous, consequently, the differences

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<sup>1318</sup> See Allott "The unification of laws in Africa" (1968) 16 *American Journal of Comparative Law* 51 at p. 72 who argues that a cautious approach should be taken with regard to unification of laws in Africa due to, *inter alia*, the variety of the tribal societies existing in African countries.

<sup>1319</sup> Compare for example, the situation in Nigeria where there are 300 distinct clans moulded into 12 or so different linguistic groups. See B.O. Nwabueze *Constitutional Law of the Nigerian Republic* London, Butterworths, 1964 at pp. 145-146.

<sup>1320</sup> See I. Schapera *The Tswana*, London, International African Institute, 1953 at p. 9. The homogeneity of the customary family law is evident from Robert's Restatement of those rule in *Tswana Family Law op. cit.*

between the customary laws of these tribes are minimal. That being the case, there will be no major upheaval or disruption in established behaviour if a reform is made to the proprietary consequences of customary marriages.

The attractiveness of this second option is that it not only maintains stability of the existing systems but it also creates an opportunity to rationalise their effects.<sup>1321</sup> It is submitted that this mode of reform should be adopted in an attempt to reform the existing regimes in the future.

**(a) Should the fixed or discretionary system be adopted?**

In Chapter Seven, the discretionary and fixed rule systems for determining matrimonial property on divorce were evaluated. It was there pointed out that each has advantages and disadvantages and that the operation of both systems within the same jurisdiction is preferred. The Botswana legal system already incorporates a fixed system in the form of community of property which, since 1971, has been relegated to the status of a secondary

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<sup>1321</sup>

See, for example, the Tanzanian attempt in its Marriage and Divorce Act 1971. See J.S. Read "A milestone in the integration of personal laws: The new law of marriage and divorce in Tanzania" (1972) 16 *Journal of African Law* 19.

matrimonial property system. The primary matrimonial property system is that of marriage out of community of property and of profit and loss. Consequently, it would be expected that the discretionary approach should also be in operation. However, though the discretionary system is sanctioned by law,<sup>1322</sup> it has had a minimal impact in determining the matrimonial property on divorce. As has been shown earlier, the High Court has given a restricted interpretation to the power to determine the matrimonial property of spouses on granting a divorce decree of a civil marriage. This has led to little or no discretion being exercised in order to effect an equitable distribution of matrimonial property. The customary courts which, invariably, determine the matrimonial property of persons subject to customary law and who marry under the Marriage Act as well as those who marry under customary law, have followed the example set by the High Court by also exercising little or no discretion in determining and distributing matrimonial property. The situation in the customary courts is exacerbated by the patriarchal nature of customary law itself which leads to women being discriminated against in the event of sharing property in general.<sup>1323</sup>

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<sup>1322</sup> See s. 13 of the Matrimonial Causes Act 1973.

<sup>1323</sup> See note 1317 *supra*.

The cumulative effect of all these is that women who marry under customary law or who marry out of community of property under civil law face a harsh financial situation on the dissolution of the marriage. Their counterparts who marry in community of property only fare a little better for although they may hope to gain from the industry of their husbands at the end of the marriage, “*the archaic subjection of them to the virtually unbridled marital power of their husbands*”<sup>1324</sup> coupled with the concomitant power to solely administer the joint estate, may turn this hope into a forlorn one. For the husband may dissipate the joint estate by reckless administration of it to such an extent that, at best, by the time it is up for distribution there will be little or none left and at worse she may be saddled with debts. It is therefore submitted that the discretionary approach should be expressly made applicable to all marriages irrespective of the matrimonial property regime governing the marriage. The sentiments expressed by Sinclair about the use of judicial discretion in this regard in South Africa are apposite to the Botswana situation. She said:<sup>1325</sup>

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<sup>1324</sup> Sinclair “The financial consequences of divorce in South Africa...” *op. cit.*, *supra* at p. 796. This statement, though made in relation to the then situation in South Africa, still has a forceful application in Botswana where the marital power is still applicable to marriages in community of property. See pp. 42-43 *supra*.

<sup>1325</sup> See “The financial provision on divorce...” *op. cit.*, *supra* at p. 485.

*“My belief that the judicial discretion equitably to redistribute assets on divorce should apply to all marriages stems from the fact that equal apportionment of property is too rigidly built into unions based on sharing and is absent from those based on complete separation of goods. Equity must surely be the necessary corrective of legal justice when laws are defective in their very universality. At times it will be necessary for the courts to use the discretion to prevent automatic equal division, and at other times, where no sharing would otherwise take place, it will be necessary for them to impose a form of sharing. In this way we can bring together the disparate forms of marriage that are (undesirably, perhaps) available in South Africa.”*

The type of discretion being advocated here is not an unstructured discretion but one structured by a clear basic statutory policy as to the financial consequences of divorce. The policy must aim at enabling *“the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.”*<sup>1326</sup> (Emphasis added.) The

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This was said by the English Law Commission to be the aim of a good divorce law. See its *Reform of the Grounds of Divorce - The Field of Choice* Cmnd. 3123, 1966, para. 15.

statutory policy must be based generally on the “property approach” to financial provision on divorce, that is, that the financial affairs of the spouses are to be resolved generally by means of readjustment of property rather than the “support approach” which calls for some form of permanent or long-term maintenance in favour of a spouse.<sup>1327</sup> The present post-divorce financial provisions in Botswana are heavily tilted towards the “support approach” and exclusively for the benefit of a wife.<sup>1328</sup> S. 25(2) of the Matrimonial Causes Act 1973 for instance, empowers the court to order a husband to secure to his ex-wife, a gross

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<sup>1327</sup> See Gray *op. cit., supra* at pp. 282-292, Eekelaar “Some principles of financial and property adjustments on divorce” *op. cit., supra* at pp. 261-265 and Sinclair “Financial provision on divorce - need, compensation or entitlement?” *op. cit., supra* at p. 476.

<sup>1328</sup> Himsworth has criticized this exclusive support for a wife on divorce on the ground that during the marriage the Roman-Dutch common law does not distinguish between the husband’s right to be maintained and the wife’s rights to the same. A reciprocal duty of support is imposed on both spouses. Therefore to introduce a notion, as does s. 25 of MCA 1973, that the prime responsibility for maintenance following a “breakdown” falls exclusively on the husband is quite wrong. See “Effects of matrimonial causes legislation in Botswana” (1974) 18 *Journal of African Law* 173 at p. 177. The only apparent concession is found in s. 25(3) where on a grant of divorce to a wife on the “ground” of her husband’s insanity, such a wife may be ordered to maintain her ex-husband. This concession is illusory as the only ground for granting a divorce is proof of the irretrievable breakdown of the marriage under s. 14 of the Act. Insanity, if it is to feature at all in divorce proceedings, must give rise to behaviour which, in terms of s. 15(1)(b) of the Act, a spouse cannot reasonably be expected to live with.

sum of money or an annual sum of money for a term not exceeding her life. Furthermore, the court may order a husband to pay to his ex-wife, during their joint lives, such periodical sum for the maintenance and support of the wife as the court may think reasonable.<sup>1329</sup> The rationale behind this apparent women-centred approach is rooted deeply in cultural conservatism. This is borne out by the contribution made by the then Attorney-General to the debate on the Bill which became the 1973 Act. He said<sup>1330</sup> that Botswana as a nation did not expect a husband ever to ask financial support from his wife. The man was the bread winner and if he was incapable of winning bread, he should not get married in order to be subsidised by the wife and her family. Although he conceded that there may be occasions when the wife would be richer than the husband, he did not think in those circumstances the man should be supported by his wife. A few parliamentarians thought the Attorney-General's view was wrong<sup>1331</sup> but the majority seemed to have sided with him as the said provisions became part of the Act.

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<sup>1329</sup> See pp. 111-114 *supra*.

<sup>1330</sup> See p. 112 *supra* and A.J.G.M. Sanders "Ten years of the Botswana Matrimonial Causes Act - Further proposals for divorce reform" (1982) 26 *Journal of African Law* 163 at pp. 173-174.

<sup>1331</sup> See the contributions of the Messrs. Steinberg, Monwela and Tshane in Hansard vol. 41 Part I (1972) at pp. 22, vol. 42 (1972) pp. 93 and 95.

Despite the legislature taking the support approach to financial provision on divorce, the courts have not lent their weight to it. They have shown no enthusiasm (perhaps influenced by customary law ideas of a divorced wife being looked after by her family group)<sup>1332</sup> to award maintenance to ex-wives. Payments of lump sums have also not materialised due generally to non-availability of capital assets. This situation reinforces the argument that the “property approach” should dominate the exercise of judicial discretion in these circumstances to enable an equitable distribution of whatever assets that may be available to satisfy the future needs of the spouses. The “support approach” should only be utilised as an interim measure in circumstances where the court is minded to provide some support for a spouse to enable him or her to adjust to the post-divorce reality of having to fend for himself or herself. In this regard, fairness demands the abandonment of the present discriminatory non-reciprocal maintenance provision in the MCA 1973.<sup>1333</sup> The 1973 Act

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<sup>1332</sup> See p. 115 *supra*.

<sup>1333</sup> However, it seems that s. 15(4)(c) of the Constitution permits discriminatory laws in the area of divorce. That subsection excludes from the ambit of the protection against laws that are discriminatory by themselves or in their effect afforded by s. 15(1), any law which makes provision with respect to *inter alia*, marriage and divorce. In the light of the liberal approach to the interpretation of s. 15 adopted by the Court of Appeal in *Attorney-General of Botswana v. Unity Dow* [1992] B.L.R. 119, it cannot be taken that the

should be amended by making express provision for the exercise of a gender-neutral judicial discretion based upon the statutory policy suggested above.

The present absence of judicial discretion to determine and redistribute matrimonial property on divorce seriously undermines the realisation of the legitimate expectation of spouses married out of community of property. A spouse of such a marriage, who does not earn an independent income outside the home and thus has a relatively weak economic base (usually the wife), faces a bleak future without the support, that was forthcoming during the marriage, of the other spouse with a strong economic base. Urbanisation and labour migration have eroded the built-in insurance mechanism of the extended family group without putting anything in its place.<sup>1334</sup> A divorced woman with a weak economic base is therefore unlikely to find financial or material support from that group

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framers of the Constitution intended that discriminatory laws should be enacted in the areas of marriage and divorce. For a commentary on the case, see E.K. Quansah "Unity Dow v. Attorney-General of Botswana - One more relic of a woman's servitude removed?" (1992) 4 *African Journal of International and Comparative Law* 195 and "Unity Dow v. Attorney-General of Botswana - The sequel" (1993) 5 *African Journal of International and Comparative Law* 189.

which used to serve as a safety net in the event of need. The existence of judicial discretion will go some way to alleviate the plight of such a wife in that the court may allocate a portion of the matrimonial property to her use.

Although a spouse married in community of property does not need judicial discretion to acquire a share of the joint estate, equal division of the joint estate may not always be desirable.<sup>1335</sup> Consequently, the exercise of judicial discretion in marriages in community of property may enable the court to interfere with equal division of such assets where the circumstances of a particular marriage warrant it.

Furthermore, the introduction of judicial discretion to determine and redistribute matrimonial property on divorce in all marriages will also make it unnecessary to introduce the accrual system in Botswana. The accrual system as shown above, allows spouses the freedom associated with a marriage out of community of property whilst on dissolution of the marriage, it gives the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, a claim against the other spouse

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<sup>1335</sup>

See p. 534 *supra*.

for an amount equal to half of the difference between the accrual of the respective estates of the spouses. The calculation of the accrual can be a complicated matter but the exercise of judicial discretion will simplify matters by dividing the available assets in such a way as to meet the justice of the particular case. However, one may argue that a spouse married out of community of property may frustrate the division of assets on divorce by disposing of a large proportion of his assets before the court has the opportunity to exercise its discretion, whilst under the accrual system the spouse who stands to benefit from the accrual of the other spouse's estate may take steps during the marriage to safeguard his interest.<sup>1336</sup> It is conceded that the possibility of a spouse married out of community of property, who has no assets of his own, not getting a share of the other spouse's property is a legitimate concern. But it is submitted that this will, hopefully, be the exception rather than the rule and that in a vast majority of cases there will be some asset against which the court may exercise its discretion. In England where marriage out of community is the matrimonial property regime, such dissipation of assets *stante matrimonio*

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<sup>1336</sup>

See for example, s. 8 of the Matrimonial Property Act 88 of 1984 of South Africa which permits a spouse, whose marriage is subject to the accrual system, to take legal action for immediate division of the accrual where the conduct of the other spouse seriously prejudices his right to share in the accrual of the other spouse's estate. See pp. 237-241 *supra*.

to frustrate a possible exercise of the court's discretion on divorce is rarely encountered.

#### 4. THE EXERCISE OF JUDICIAL DISCRETION

The argument in favour of the exercise of judicial discretion in determining and redistributing matrimonial property on divorce is that it provides flexibility to enable the court to take into account the peculiar circumstances of the case before it.<sup>1337</sup> Commenting on the wide discretion given to English courts by the Matrimonial Causes Act 1973 to adjust matrimonial property on divorce, Ormrod L.J said in *Martin v. Martin*<sup>1338</sup>

*“It is the essence of such a discretionary situation that the court should preserve, so far as it can, the utmost elasticity to deal with each case on its facts. Therefore it is a matter of trial and error and imagination on the part of those advising clients. It equally means that decisions of this court can never be better than*

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<sup>1337</sup> See pp. 529-531 *supra*.

<sup>1338</sup> [1978] Fam. 12 at p. 20. See also *Hanton v. The Law Society op. cit., supra* and note 344 *supra*.

*guidelines. They are not precedents in the strict sense of the word. There is bound to be an element of uncertainty in the use of the wide discretionary powers given to the court...and no doubt there always will be, because as social circumstances change so the court will have to adapt the ways in which it exercises discretion.”*

This *dictum* highlights both the strength and weakness of judicial discretion. It gives the court the much needed flexibility to treat each case on its own peculiar facts and to adapt the law to socio-economic changes in society. On the other hand, judicial discretion in this context creates uncertainty, as one cannot predict with any measure of exactitude what the court's reaction will be in a particular case. Furthermore, it may lead to judicial arbitrariness and subjectivity. This latter aspect of the exercise of discretionary power was found by the English Law Commission to be a fundamental cause of dissatisfaction of the powers given to the court under the Matrimonial Causes Act 1973.<sup>1339</sup> However, it has been demonstrated that discretionary decisions, in the judicial context, can be

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<sup>1339</sup>See Working Paper No. 42 *op. cit.*, at para. 0.22.

(and are) controlled by the operation of legal principles.<sup>1340</sup> The possibility of subjective justice is avoided by the legislature setting out the considerations to be taken into account by the courts in the exercise of their discretion and the objectives they are to seek to achieve.<sup>1341</sup> It follows that the essentially discretionary nature of the “*matrimonial adjustive jurisdiction*” need not and should not be an occasion for sliding into subjective justice.<sup>1342</sup>

The discretionary approach is further criticised for its high legal costs and the lengthy time it takes for a court to hear a case and make a decision.

Despite the criticisms levelled against using judicial discretion to adjust matrimonial property, it is submitted that the strengths of discretionary

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<sup>1340</sup> See R. Dworkin, *Taking Rights Seriously*, London, Duckworth, 1977 at pp. 31-39 relied upon by J.M. Eekelaar “Some principles of financial and property adjustment on divorce” (1979) 95 *Law Quarterly Review* 253 at p. 254.

<sup>1341</sup> See for example s. 25 (1) of the English Matrimonial Causes Act 1973 as amended by the Matrimonial and Family Proceedings Act 1984, s.7 (5) of the South African Divorce Act 70 of 1979 and s. 7(3) of the Zimbabwean Matrimonial Causes Act 1986.

<sup>1342</sup> See Eekelaar “Some principles of financial and property adjustment on divorce” *op. cit.*, *supra* at p. 254.

matrimonial adjustive power outweigh the perceived weakness it may have. If the legislature sets realistic and workable perimeters within which the court is to exercise the discretion, this will go a long way to bringing about the realisation of the legitimate expectations of spouses on divorce. The general outcome should be one of fairness. But fairness, like beauty, lies in the eye of the beholder.<sup>1343</sup> Consequently, there must be perimeters within which the judicial discretion should be exercised. To help achieve this goal, the following guidelines are proposed for the guidance of the court.

#### **(a) Guidelines for the exercise of judicial discretion**

The first guideline in the adjustment of the matrimonial property must be one that presumes equality of sharing. This will be in line with treating a marriage as a “partnership”<sup>1344</sup> of equals in which each spouse contributes, economic or otherwise, to the general welfare of the family. Sharing does not however mean complete equality under any circumstance, for there may be particular cases in which the peculiar circumstances of a particular

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<sup>1343</sup> See the remark of Lord Nicholls in the English case of *White v. White* *op. cit* at p. 1573.

<sup>1344</sup> On what is meant by this type of partnership, see note 230 *supra*.

marriage may dictate otherwise. In this regard the contribution made by a wife towards looking after the home or caring for the family must be accorded the significance it deserves notwithstanding the fact that she is unable to show that she made a financial contribution towards the acquisition of the property in question. This is a most important consideration in the Botswana context where women, married or unmarried, form a minority of the labour force although they form the majority of the population.<sup>1345</sup> It follows from this that very few women will be able to show any significant financial contribution towards the acquisition of matrimonial property, and consequently be able to claim an interest in such property as a right.

The evaluation of a spouse's indirect contribution towards the acquisition of matrimonial property should not be quantified in monetary terms but rather on "*...the relative approach of differential equality between financial and non-financial contributions to the acquisition of matrimonial assets.*"<sup>1346</sup> There should be no requirement that the non-

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<sup>1345</sup> See note 217 *supra*. 32% of women as opposed to 72% of men are in paid employment. See *Beyond Inequalities - Women in Botswana op. cit., supra* at p. 36.

<sup>1346</sup> Gray *op. cit., supra* at p. 71.

financial contribution must be shown to have had an impact upon the value or to have assisted materially in the acquisition of the property in question. It is submitted that to fully acknowledge the economic importance of a spouse's non-financial contribution, a contribution of a general nature, not specifically referable to the acquisition of a particular property, should be held sufficient to warrant the spouse concerned to be given a share in the said property.<sup>1347</sup>

The peculiar circumstances of particular cases will of course determine whether the presumptive equality of sharing will apply or will be rebutted and a different formula of sharing applied. For example, the duration of the marriage will affect this presumption of equality. In a short marriage where there are no children, it will be highly inappropriate to adhere to the presumption. Rather, it will be appropriate, for instance, to award a lump sum or periodical payments of a limited duration to enable the spouse in a weaker financial position to adjust to the new situation. However, the following view, expressed by a New Zealand judge with regard to a wife's domestic services, should find no place in the envisaged exercise of judicial discretion. He said:

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<sup>1347</sup>

See the similar view of Botha J.A. on s. 7 (4) of South African Divorce Act 70 of 1979 in *Beaumont v. Beaumont* 1987 (1) S.A. 967 (A) at pp. 996-997.

*“The contribution claimed for the purposes of this Act must be a contribution which results in some appreciation in value of the asset, and the competent performance of housewifely duties does not do that.”*<sup>1348</sup>

This portrayed an assumption on the part of the court that, even when fully and faithfully discharged, the domestic duties of the housewife are intrinsically of less value than the income-earning activity of a husband.<sup>1349</sup> This undermines the concept of matrimonial partnership which is being advocated for Botswana and should not be countenanced in the envisaged reform.

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<sup>1348</sup> *Per Wilson J. in Allely v. Allely* (1973) unreported but cited by Gray *op. cit.*, at p. 81. The judge was construing s. 6(1A) of that country's Matrimonial Property Act 1963, introduced by the Matrimonial Property (Amendment) Act 1968. The section empowered the court to make an order in favour of a spouse notwithstanding that he or she made no contribution to the property in the form of money payments or that his or her contribution in any other form was of a usual and not an extraordinary character. See further s. 11(1) of the Matrimonial Property Act 1976 which provides equal sharing of the matrimonial home and the family chattels and Gray *op. cit.*, *supra* at pp. 91-96.

<sup>1349</sup> See Gray *op. cit.*, *supra* at p. 84.

Secondly, conduct, which features as a factor in the award of a gross sum of money to an ex-wife under s. 25(2) of the MCA 1973, should not be considered a significant factor in deciding the share of a spouse in the property of the other spouse. It should only play a part if the conduct has adversely affected the financial well-being of the couple or it is such that it would be inequitable to ignore. The court's approach to the issue of conduct in apportioning the matrimonial property should be modelled on the *dictum* of Ormrod J in the English case of *Wachtel v. Wachtel*.<sup>1350</sup> He said:

*“The court can only approach this issue in a broad way. It should bear in mind the new basis of divorce which recognises that, generally speaking, the causes of breakdown are complex and rarely to be found wholly or mainly on one side, and that the forensic process is not well-adapted to fine assessments or evaluations of behaviour, and that it is not only conduct in relation to the breakdown which may affect the discretion of the court in many ways, e.g. the appearance of signs of financial recklessness in the husband or of some form of socially*

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<sup>1350</sup>

[1973] 1 All E.R. 113 at 119.

*unacceptable behaviour by the wife which would suggest to a reasonable person that in justice some modification to the order ought to be made. In my experience, however, conduct in these cases usually proves to be marginal issue which exerts little effect on the ultimate result unless it is both obvious and gross.*"<sup>1351</sup>

Thus, for conduct to be a significant factor, it must be one of exceptional gravity, for example, "*of a kind that would cause an ordinary mortal to throw up his hands and say, 'surely that woman is not going to be given any money' ...*"<sup>1352</sup>

Thirdly, the welfare of children of the marriage, if any, must be taken into account in adjusting the matrimonial property. Thus, where there are minor children of the marriage, the spouse who is granted custody would

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<sup>1351</sup> See further elucidation of this *dictum* by Denning M.R. when the case went on appeal in *Wachtel v. Wachtel* [1973] 1 All E.R. 829 at pp. 835-836. A similar view of conduct is taken by the South African courts under s. 7 of the Divorce Act 70 of 1979 - see for example, *Beaumont v. Beaumont* 1987 (1) S.A. 967 (A) at pp. 994-995 *per* Botha J.A.

<sup>1352</sup> *Per* Sir George Baker in the English case of *W. v. W. (Financial Provision: Lump Sum)* [1976] Fam. 107 at p. 110. See also pp. 356-365 *supra*.

generally be favoured.<sup>1353</sup> However, it must be remarked here that if this guideline is not applied equitably, it could be detrimental to the wife's right to share in the matrimonial property. This is because in custody cases there is a general tendency on the part of the courts to recognise the father's right as superior to that of the mother.<sup>1354</sup> This is despite the fact that the courts are enjoined to make the welfare of the child the paramount consideration in custody cases.<sup>1355</sup> This tendency of the courts is a

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<sup>1353</sup> See for example, *Molomo v. Molomo* [1980] B.L.R. 250 where although the couple were given joint custody of the minor children, the wife was awarded the matrimonial home because the children were residing with her.

<sup>1354</sup> This is a common law principle reiterated, for example, in the South African case of *Calitz v. Calitz* 1939 A.D. 56 at p. 61-63 *per* Tindall J.A. See also M. Sornarajah "Parental custody: The recent trends" (1973) 9 *South African Law Journal* 13. It must be noted that the above common law principle no longer applies in South Africa. The current primary guideline used by the court in deciding which parent should be awarded custody is what is in the child's best interest. See s. 28(2) of the 1996 Constitution and *McCall v. McCall* 1994 (3) S.A. 201 (C) at p. 205.

<sup>1355</sup> S. 6 of the Customary law Act 1969 provided that in "...any case relating to the custody of children the welfare of the children shall be the paramount consideration irrespective of which law or principle is applied." This statute was subsequently consolidated into the Common Law and Customary Law Act 1969 but s. 6 was omitted. The said omission has been rectified recently by the Rectification of Laws (No. 5) Order, 2000 (17<sup>th</sup> November 2000) S.I. No. 74 of 2000. This Order inserts immediately after s. 9 of the Common Law and Customary Law Act, a new s. 10 which reproduces the provision of s. 6 of the Customary law Act 1969. *Dicta* in cases such as *Peter v. Peter* [1975] 2 B.L.R. 18, *Ex parte Veen* [1978] B.L.R. 43, *Verona v. Verona*

hangover from the customary law which confers that superiority on the husband by virtue of his having paid “*bogadi*”<sup>1356</sup> for the wife. One of the consequences of such payment is to transfer the reproductive power of the woman from her own family to that of her husband’s.<sup>1357</sup> It is submitted that the proper application of the welfare principle will enable the court to deal equitably with both spouses depending on the peculiar circumstances of the case.

Fourthly, the court must strive to adhere to the “clean break” principle in terms of which the financial relationship between the spouses is severed as fully as possible if the circumstances permit. Currently, there is no expressed statutory provision enjoining the court to attempt to sever the financial relationship between the spouses as soon as possible after divorce. Rather, the existing statutory provisions rely heavily on

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[1983] B.L.R. 9 and *Rangaka v. Rangaka* Misc. No. 29/1996, unreported (13<sup>th</sup> January 1997) High Court, Lobatse reiterate the welfare principle in custody cases.

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This is cattle delivered by a man’s family to a woman’s family after agreement to marry. For further details of the significance of *bogadi* in a customary marriage, see Schapera *op. cit., supra* at p. 138, Roberts *Tswana Family Law op. cit., supra* at p. 34, and Nsereko *op. cit., supra* at p. 682. See also note 546 *supra*.

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See Schapera *op. cit. supra* at p. 139.

permanent maintenance for a wife and this would have to be jettisoned in favour of a provision that will enable the court where possible to sever the financial relationship between the spouses on divorce.<sup>1358</sup>

Although it has been suggested above that the law should move away from the present “support approach” to post-divorce financial arrangement and that the court should strive for a clean break of the financial obligations between the spouses, there may be situations where a spouse may still need the financial support of an ex-spouse. Therefore in exercising its discretion to redistribute matrimonial property, the court must make a conscious effort to relate the discretion to the award of maintenance for a spouse.<sup>1359</sup> Thus, if in the view of the court some form of maintenance is to be given to the wife, then this should be taken into account in determining the nature and extent of the redistribution of the matrimonial property under the proposed dispensation. A limited order for maintenance may be necessary in order to help the wife who was formerly dependent to become self-sufficient while making the transition from being married to being single. It must be of such duration as to facilitate

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<sup>1358</sup> See note 477 *supra*.

<sup>1359</sup> See pp. 115-116 *supra*.

the transition instead of the present duration of the joint lives of the spouses. Alternatively, where this is possible, such limited maintenance can be computed into a lump sum payable forthwith in order to lessen the post-divorce dependency of the recipient spouse on the paying spouse.

Fifthly, the court should also be empowered to take into account any relevant factor which the justice of the case may warrant. This may be apposite in the exercise of discretion not to allow an equal division of the joint estate in marriages in community of property.

A question that arises in connection with the exercise of the court's discretion is the delineation of what constitutes property for post-divorce readjustment? The perimeters of such property have already been delineated at the beginning of this study to comprise of those assets "*intended to be a continuing provision for [the spouses and their children] during their joint lives...acquired, by their joint efforts during the marriage...*"<sup>1360</sup> Since the emphasis for the acquisition of these assets is the joint effort of the spouses, one will take it that any antenuptial assets will not be included in them. So also will property acquired separately in

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See *Wachtel v. Wachtel* [1973] 1 All E.R. 829 (C.A.) at p. 836 *per* Lord Denning M.R. quoted in full at p. 1 *supra*.

consequence of a gift or inheritance from a third party not be included. In both cases, it is conceivable that these individually acquired assets will be the only ones that a spouse possesses on divorce. In which case, it will be unfair not to treat them as property in relation to which the discretion that is being advocated for the Botswana courts can be exercised - especially where the said property has been used for the provision of the other spouse and children, if any, during the subsistence of the marriage.

## **5. REFORM OF SPECIFIC ASPECTS OF THE MATRIMONIAL REGIMES**

### **(a) Marriage in community of property**

#### **(i) Abolition of the marital power**

The disadvantages that the exercise of the marital power entails for a wife are sufficiently detailed elsewhere.<sup>1361</sup> It is only necessary to note here that women regard the marital power not only as a restriction on their contractual capacity but also as a personal humiliation because they are placed in a position of inferiority to their husbands. Furthermore, the main

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<sup>1361</sup>

See pp. 39-41 *supra* and the South African Law Commission's Report on matrimonial property law, *op. cit.* at paras. 13.1.3 - 13.1.4.

reason advanced for the justification of the marital power, that is, the natural superiority of a man and the innate weakness of a woman, cannot seriously be sustained in the contemporary scheme of things in Botswana. Botswana women are increasingly holding their own in a male dominated society and the abolition of the marital power will go a long way to advance the course of their emancipation from male subjugation.<sup>1362</sup>

Although one of the avowed rationales behind the enactment of the Married Persons Property Act 1970 was “*to place women in the same position as any other adult*”,<sup>1363</sup> this could not be achieved because the marital power was not abolished. Instead what the Act did was to reverse the then existing presumption in favour of community of property in statutory marriages to that of a presumption in favour of separation of property.<sup>1364</sup> This reversal was prospective rather than retrospective and although an opportunity was given to couples married in community of

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<sup>1362</sup> An example of women’s advancement in the socio-economic life of the country is the recent appointment of Miss Linah K. Mohohlo as the Governor of Bank of Botswana, the country’s Central Bank.

<sup>1363</sup> See *Official Report of the Parliamentary Debates (Hansard)* vol. 34 1970 at p. 16. See also p. 43 *supra*.

<sup>1364</sup> See s. 3 (1) of the Act.

property prior to the coming into force of the Act to change to the new dispensation, there are still many marriages in which the wives are subject to the marital power of their husbands. In the light of its restrictive effect on the legal capacity of wives subject to this power, it is submitted that the time has come for the marital power to be abolished by statute in order to enhance the legal status of women married under the community of property regime.<sup>1365</sup>

#### **(ii) Consequence of the abolition of the marital power**

The main consequence of the abolition of the marital power and which in the context of this study is germane, will be the restoration of full legal capacity to a wife of a marriage in community of property. This will make it possible for her to partake in the administration of the joint estate. Such participation will be achieved by the imposition of equal and concurrent administration of the joint estate on the spouses, thus giving the wife a say

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<sup>1365</sup>

A tentative step has been taken by the Deeds Registry (Amendment) Act 1996 which has abolished restrictions imposed on married women in registering documents under the Act. See p. 553 *supra*.

in the administration of an estate in which she has a vested interest.<sup>1366</sup>

This will rectify the present position whereby the wife lacks the capacity to deal with the joint estate. The aim of imposing equal contractual and administrative capacity on the spouses is not for them to act jointly in all transactions, for if that is the case commercial activities will unduly be impeded and the administration of the joint estate will become too unwieldy. Rather the aim will be that a juristic act of either of them in relation to the joint estate will be valid subject to the requirement that certain important acts cannot be performed by one spouse without the consent of the other spouse.<sup>1367</sup> Thus, the system of equal management in effect consists of two elements, namely (a) equal or concurrent (independent) management by which both spouses have the power to perform acts binding on the joint estate without the consent of the other spouse and (b) joint management by which a spouse may perform certain defined important acts affecting the joint estate only with the consent of

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<sup>1366</sup> An alternative device of restricting the husband's powers of administration *vis a vis* the joint estate will not solve the problem of giving the wife a share of the power to administer the joint estate. Hence the proposal to impose equal contractual and administrative capacity on the spouses.

<sup>1367</sup> See for example, s. 15(2) of the Matrimonial Property Act 88 of 1984 of South Africa.

the other spouse. This will reflect the general situation in most marriages because in order to maintain marital harmony major family decisions are usually based on a consensus.<sup>1368</sup> The question that will need to be addressed is what will constitute these important acts for which the consent of the other spouse must be sought. A general answer to this question will be those acts considered to be so important that a unilateral action on the part of either spouse may lead to serious friction between them. Typical examples in Botswana of such acts over which consent will be required are the acquisition, disposition or mortgaging of immovable property forming part of the joint estate,<sup>1369</sup> and the buying and selling of cattle, a specie of movable property that plays a very important part in the life of Botswana.<sup>1370</sup> Apart from these, it will be up to the legislature to

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<sup>1368</sup> This fact was taken into account by the South African Law Commission in recommending the equal administration of the joint estate by spouses married in community of property. See para. 19.1 of its Report *op. cit.*

<sup>1369</sup> The Deeds Registry (Amendment) Act 1996 has taken the first step in allowing married women, irrespective of whether they are subject to the marital power, to execute deeds at the Registry without their husband's consent. See p. 553 *supra.*

<sup>1370</sup> See *The National Development Plan 8 1997/98 - 2002/3* Ministry of Finance and Development Planning, Gaborone, August 1997 at p. 243 and N.H. Fidzani "Land reform and primitive accumulation: A closer look at the Botswana tribal grazing land policy" in *Botswana Politics and Society* (Edge and Lekorwe eds.) J.L. van Schaik, Pretoria, 1998, 229 at pp. 233 - 234.

determine which other acts will come within the ambit of the consent provision. It is not far-fetched to imagine that such things as furniture and household effects, dividends, interests and proceeds of insurance policies would be included in such acts.

How is the consent of the spouses to be obtained? It is submitted that there should be a simple way in which the consent is to be obtained. It is suggested that a written consent witnessed by two competent persons should suffice for the different juristic acts. The South African example where a distinction is drawn between four types of consents will be too complicated to follow.<sup>1371</sup>

### **(iii) Protective measures in respect of the administration of the joint estate**

Since the consent provision will be aimed at protecting a spouse against the maladministration of the joint estate by the other spouse, any proposed

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See Cronje & Heaton *op. cit.* at pp. 97-100 where the following consents are enumerated: (a) prior written consent attested by two competent witnesses regarding each transaction separately; (b) written consent attested by two competent witnesses for each separate transaction; (c) written consent without any further requirements and (d) oral or tacit consent.

legislation will have to deal with the consequences of non-compliance with the consent provision. Two alternatives are open to the legislature, namely, to protect the unconsulted spouse or to protect the third party with whom the other spouse contracts. If the first alternative is adopted, the logical outcome will be to declare the resultant transaction without the necessary consent void. This, it is submitted will not only adequately protect the unconsulted spouse but it will encourage consultation between the spouses as will be envisaged by the consent provision. However, it may be argued that this will unduly disrupt commercial activities by putting too much of a burden on the third party to ascertain the marital status of the person he is dealing with and whether the necessary consent has been obtained from the other spouse. The end result of this argument will be that in the interest of the sanctity of commercial contracts, the *bona fide* third party should be protected by making the transaction valid in the absence of any knowledge on his part of a breach of the consent provision.<sup>1372</sup> Whilst this may be a desirable thing to do, it is submitted that it will unduly undermine the consent provision to the extent that it may become ineffective. If the desire is to protect the unconsulted spouse then the first alternative will be best suited for the purpose. If that were

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<sup>1372</sup>

This was the position adopted by the South African legislature when it enacted s. 15(9)(a) of the Matrimonial Property Act 88 of 1984.

the position taken by the legislature, one will reasonably expect third parties to insist that the other spouse join in the transaction in order to protect them from subsequent avoidance of the contract. As was put by a commentator on the consent provisions in the South African Matrimonial Property Act 1984, "*a certain amount of commercial inconvenience may be a price well worth paying in order to create a genuine duty to consult spouses about transactions affecting shared property.*"<sup>1373</sup> It is therefore submitted that of the two alternatives available to the legislature, it should opt for the protection of the unconsulted spouse and leave the third party to find devices to protect himself.

Since the consequence of non-compliance with the consent provision is being suggested to be one of avoidance of the transaction in question, the possibility of the joint estate suffering loss from persistent violation of the consent provision will not arise. Consequently, the protection afforded by the provision will hold until the community is terminated. In that event, in dividing the joint estate there will be no need for adjustment in favour of the unconsulted spouse for any loss that the joint estate may have

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<sup>1373</sup>N. Zaal *op. cit.*, *supra* at p. 65.

suffered as a result of the other spouse's violation of the consent provision. Furthermore, where a spouse consistently violates the consent provision, the unconsulted spouse should have recourse to the court to have the administrative powers suspended and, where need be, to ask for the division of the estate forthwith. This power to suspend the exercise of the administrative powers relating to the joint estate and the power to divide the joint estate forthwith will be drastic steps against the defaulting spouse. Consequently, provisions must be made for their exercise in a clear-cut manner when that is the only way out of the impasse the spouses find themselves.

What happens if a spouse unreasonably refuses the requisite consent? The other spouse, it is submitted, should have recourse to the court to determine the reasonableness or otherwise of such refusal. It is however, appreciated that court proceedings may be too slow to resolve differences of opinion especially where the transaction in question needs to be undertaken with a measure of urgency.<sup>1374</sup> This notwithstanding, it is submitted that the appropriate arbiter in cases of disagreement as to the

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Although the High Court Rules (Ord. 12 r. 13) provide for urgent applications to be made where this is necessary, a decision on such application may be delayed where the facts are disputed.

consent provision should be the court. The alternative of allowing the husband, for instance, to have a veto power will undermine the consensual basis of the consent provision.

### **(b) Marriage out of community of property**

As noted earlier on, the most important characteristic of marriages out of community is the concept of separate property, that is, each spouse may acquire and deal with his or her property as if he or she were single. Thus, its advantage lies in the ability of each spouse to acquire property depending on his or her economic power. This regime favours the spouse with the superior economic power, normally the husband, to the detriment of the wife, whose economic power will generally be inferior. As pointed out by the English Law Commission,<sup>1375</sup> equality of power, which separation of property achieves, does not of itself lead to equal opportunity to exercise that power. It ignores the fact that a married woman, especially if she has young children, does not in practice have the same opportunity as her husband or as an unmarried woman to acquire property.

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<sup>1375</sup>

Working Paper No. 42 *Family Property Law* (1971) at para. 0.12.

Official figures<sup>1376</sup> in Botswana show that while women account for the majority of the population,<sup>1377</sup> they do not contribute significantly to the work force. Data from the 1991 census show that in that year women accounted for just 39% of workers aged 12 years and above, less than 50% of the female population (excluding school children and the retired) was classified as labour force participants whilst 90% of their male counterparts were recognised as workers. These figures suggest that opportunities available to women to participate in economic activities which will empower them to be able to acquire their own property are few. It is therefore important that a legal mechanism be put in place to ensure that each spouse, especially the wife, is entitled to share in any matrimonial property acquired, irrespective of which spouse acquired it.<sup>1378</sup> It has been suggested above that judicial discretion, circumscribed by statutory guidelines, should be utilised in sharing matrimonial assets on

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<sup>1376</sup> See *National Report for the fourth World Conference on Women: Beijing, China 1995*, Women's Affairs Division, Ministry of Labour and Home Affairs at p. 13 citing figures from the 1991 Housing and Population Census.

<sup>1377</sup> The 1991 census shows that the population is made up of 634,000 males and 692,396 females.

<sup>1378</sup> See the views of the English Law Commission in its Working Paper No. 42 - *Family Property Law* (1971) at para. 0.14.

divorce. The basic premise being a presumption of equality, which presumption may be rebutted by the facts of individual cases.

**(c) Customary marriages**

As the primary law that governs the proprietary consequences of marriages contracted under the Marriage Act by persons subject to that law, there is a need to harmonise the rules of customary law relating to distribution of post-divorce assets with the discretion to be given to the court to readjust the property of the spouses married out of community and in community of property. In this regard it is submitted that the same discretion that is being proposed for the High Court be given to the Customary Courts. However, a drawback of this proposal will be that the presiding officers of these courts have no legal background and furthermore, lawyers are denied an audience in these courts and courts taking appeals directly from them, except with the permission of the latter courts.<sup>1379</sup> Consequently, it will be difficult to expect these courts to exercise discretion within some structured statutory criteria. For the Customary Courts to be able to administer the proposed discretion, it will be necessary that presiding

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<sup>1379</sup>

See 31 of the Customary Courts Act.

officers be given basic legal training in the running of the courts and the application and interpretation of statutes. Furthermore, consideration should be given to the appointment of legally qualified clerks to assist the lay bench with matters of law during proceedings. These suggestions are long term solutions which may not be implemented in the foreseeable future.

As an alternative solution, the Subordinate Matrimonial Courts envisaged under the MCA 1973<sup>1380</sup> should be set up as a matter of urgency. Since these courts are intended to have the same jurisdiction as the High Court, they should be presided over by a legally qualified person. Thus constituted, these courts should be able to apply the discretion envisaged under the suggested reform. However, the discretion will be exercised using the relevant customary law. Bearing in mind the inherent unfairness of the customary law rules for determining property, the court should be alert to the statutory injunction to apply customary law "*so far as it is not*

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See s. 5 of the Act which provides that the President may, on the recommendation of the Chief Justice by order published in the Gazette, appoint any judicial officer appointed by the Judicial Service Commission to hold a court, to be called "subordinate matrimonial court" for the exercise of the jurisdiction and powers conferred by the Act in respect of such areas as may be specified in such order.

*incompatible with the provision of any written law or contrary to morality humanity or natural justice.*"<sup>1381</sup> The implementation of this injunction will no doubt encourage judicial development of customary law which, although it may create a divergence between "judicial customary law" and "practised customary law",<sup>1382</sup> will nevertheless not be a bad thing if some semblance of fairness to a customary-law wife in a divorce situation is to be achieved.

As a way of reinforcing the exercise of the discretion, both the High Court and the Subordinate Matrimonial Court should expressly be empowered

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<sup>1381</sup> See s. 2 of the Customary Courts Act and s. 4(1) of the Common Law and Customary Law Act. The equivalent phrase in West Africa for the recognition of customary law, namely, "*not repugnant to natural justice, equity and good conscience*", has given rise to difficulties of interpretation. See A.E.W. Park *Sources of Nigerian Law*, London, Sweet & Maxwell, 1963, Chap. 5, A.O. Obilade *The Nigerian Legal System*, London, Sweet & Maxwell, 1979, Chap. 6 and W.C.E Daniels "The influence of equity in West African law" (1962) 11 *International and Comparative Law Quarterly* 31.

<sup>1382</sup> Phrases used by G.R. Woodman to describe judicial interpretation of customary law in West Africa: see "Some realism about customary law - the West African experience" (1969) *Wisconsin Law Review* 128. See also by the same writer, "Judicial development of customary law: The case of marriage law in Ghana and Nigeria" *op. cit., supra* and A.K.P. Kludze "Problems of intestate succession in Ghana" (1972) 9 *University of Ghana Law Journal* 89.

to apply the provisions of the MCA 1973 to customary marriages. This express power is necessary in the light of the ruling in *Mafokate v. Mafokate*<sup>1383</sup> to the effect that the provisions of the Act do not apply to customary marriages, which are regulated by customary law. In that case an action was brought before the court to dissolve a customary-law marriage. The action was framed both in terms of form and substance on the provisions of MCA 1973 whereas, in the court's view, it ought to have been based on the applicable principles of customary law. The court dismissed the action on the ground that it was erroneously grounded and misconceived. The express granting of power to utilise the provisions of the MCA 1973 in relation to customary marriages will help to eliminate the discriminatory aspects of the customary law rules for determining and dividing property on divorce.

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<sup>1383</sup>*Op. cit. supra* at p. 11 of the transcript.

## CHAPTER NINE

### CONCLUSION

This study set out to appraise the legal regimes for the determination of property rights on divorce. The objective was to analyse the present matrimonial property regimes and how they are applied to determine division of matrimonial property on divorce, to assess their efficacy as legal tools for the resolution of conflicts in that event, compare that efficacy with matrimonial regimes in comparable jurisdictions and to suggest measures to reform perceived shortcomings in the regimes. In order to do this it was necessary to determine what constituted “matrimonial property” for the purpose of the study. A definition based on co-operative or individual acquisition of property destined to be used for continuing provision for the spouses and their children, if any, was adopted. This definition was found to be inadequate in view of the fact that it did not include job-related benefits such as pensions which have currently attained significance as “property” worthy of consideration in determining property rights on divorce. The definition also did not embrace antenuptial property and property acquired by way of a gift or inheritance. It has therefore been proposed that job-related benefits should

be included in matrimonial property as delimited and be subject to the proposed power of the adjudicating court to divide matrimonial property as the justice of the case warrants. Furthermore, where antenuptial property or that acquired by way of gift or inheritance are the only possible property existing on divorce, it has been suggested that the court may exercise its discretion in redistributing these as the justice of the case may demand.

The main finding of the appraisal of the matrimonial regimes is that there is a lack of flexibility in their application in determining property rights on divorce. The available power to determine the proprietary rights of spouses on divorce has been circumscribed by a restricted interpretation as to the ownership of matrimonial property and not as to the division or distribution, based on need, of the available assets irrespective of who owns them. This state of affairs does not augur well for the realisation of the legitimate expectations of married couples, especially wives who generally find themselves in a weak economic position during the marriage. It is therefore suggested that a wide discretion, circumscribed by definitive statutory guidelines, be introduced to remedy this shortcoming in the matrimonial property regimes. It is hoped that this will

give the law the capacity of certain determination whilst retaining a degree of flexibility.

A specific shortcoming which surfaced from the appraisal of the regimes is the exercise of husbands of the marital power in marriages in community of property and its attendant restrictive consequences on wives of such marriages. The main disadvantage of this is the denial of wives of the right to partake in the administration of the joint estate. The rationale behind the conferment of the marital power on a husband has been shown to be unsupportable in the present stage of socio-economic development in Botswana. Consequently, it is suggested that the power be abolished and replaced by joint and concurrent administration of the joint estate.

It also proposed that the provisions of the MCA 1973 should be extended to customary marriages as a way of eliminating the discriminatory rules for determining property on divorce.

Finally, the reform of the matrimonial property regimes will be greatly enhanced in the context of a structured law reform programme. It is therefore suggested that a statutory body, like those existing in the

comparative jurisdictions discussed in the study, be set up. Under the auspices of such a body, periodic systematic reforms will be undertaken to ensure that law in general and matrimonial law in particular keep pace with societal changes. Botswana society has undergone tremendous socio-economic changes in recent years which has brought pressures to bear on marriages culminating in increased marital breakdowns. The law should be responsive to these changes by adapting itself to deal with the problems entailed in these changes. The existing law on matrimonial property is ill-equipped to deal with these contemporary changes. The suggested reforms are to be taken as the author's small contribution towards making matrimonial law socially responsive in order to achieve the goal of a compassionate, just and caring nation as envisaged in the national vision 2016.<sup>1384</sup>

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See *Long Term Vision For Botswana*, Gaborone, Government Printer, 1997 pp. 49-54.

## **SUMMARY OF THE PROPOSED REFORMS OF THE MATRIMONIAL PROPERTY REGIMES**

(a) The courts should be given a wide discretionary power, circumscribed by statutory guidelines, to adjust or reallocate matrimonial property on divorce irrespective of the matrimonial property system that governs the marriage.

(b) The statutory guidelines for the exercise of the judicial discretion should have, as their underlying principle, equality of sharing. Such principle may however be departed from where the circumstances of a particular case warrant it.

(c) The court should take the following factors into account in the exercise of its discretion:

(i) the contributions, directly or indirectly, financial or otherwise, of the spouses towards the welfare of the family,

(ii) the conduct of the parties in relation to each other and to the marriage,

(iii) the welfare of the children of the marriage,

(iv) the achievement of a “clean break” where appropriate and practicable and

(v) any other factor which in the opinion of the court the justice of the case warrants.

(d) The marital power should be abolished in marriages in community of property and be replaced with equal and concurrent administration of the joint estate.

(e) The provisions of the Matrimonial Causes Act 1973 should be made applicable to customary marriages when such marriages are terminated by divorce.

(f) The inclusion within the ambit of matrimonial property of job-related benefits, such as pensions, with a view of sharing them on divorce should be considered.

(g) The legislature should establish a statutory Law Reform Commission to enhance law reform in general and matrimonial law in particular.