

# MATRIMONIAL PROPERTY DIVISION AT MARRIAGE BREAKDOWN: THE WAY FORWARD

E. A. Archampong\*

## INTRODUCTION

When Ghana's 1992 Constitution came into force, it provided that a law be enacted to regulate the property rights of spouses.<sup>1</sup> Over a decade and a half after the enactment of the Constitution, there is now a Property Rights of Spouses Bill yet to become law.<sup>2</sup> This paper analyzes cases on matrimonial property division<sup>3</sup> upon marriage breakdown in Ghana from 1959 to 2004 from a gender perspective. It aims, by looking into the past, to advance current debate on spousal property rights such that greater gender equality is achieved. This paper has a narrow focus because it isolates matrimonial property distribution, one of the issues associated with the breakdown of marriage, for analysis. The broad picture is that there is a connection between matrimonial property issues and child and spousal support issues at marriage breakdown which cannot be ignored. Mossman has described these legal categories as, "forming an overall package for family members upon divorce," and noted that the categories impact one another.<sup>4</sup> Thus, the issues examined here on matrimonial property rights upon marriage breakdown, also impact provision for child and spousal support in Ghana.<sup>5</sup>

This paper is in four sections:

- i. The first section discusses the need for a gender equality perspective in matrimonial property distribution for spouses. It then draws on conceptions of gender equality from feminist legal theory as a basis for generating the definition of equality adopted in the paper.
- ii. The second section subjects Ghana's law on matrimonial property distribution upon marriage breakdown to discussion and analysis. It highlights trends reflected in how judges have interpreted the law.

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\* Lecturer, Faculty of Law, Kwame Nkrumah University of Science and Technology, Kumasi, Ghana. This paper is developed from unpublished research undertaken by the author at Osgoode Hall Law School, York University Canada for the award of PhD (Law), 2006. The author is grateful for comments received on this paper presented at a Faculty Seminar Series, Faculty of Law, KNUST, 2008 and to the American Association of University Women for an International Fellow scholarship that supported this research.

<sup>1</sup> 1992 Constitution of the Republic of Ghana, Article 22(2).

<sup>2</sup> See Judith Cobbina, "The Attorney General's Department Calling for More Education on the Property Rights of Spouses Bill," *WOMEC Ghana*, online: <http://www.womec.org/topstories9.html>.

<sup>3</sup> Matrimonial property division and matrimonial property distribution are used interchangeably in this work.

<sup>4</sup> Mary Jane Mossman, *Families and the Law in Canada: Cases and Commentary* (Toronto: Emond Montgomery Publications Limited, 2004) at 370.

<sup>5</sup> This has been identified as an area for a subsequent study.

- iii. The third section critiques and proposes ways of improving the law and its application to achieve greater gender equality for spouses in matrimonial property distribution.
- iv. The fourth section is the conclusion.

## I. GENDER EQUALITY PERSPECTIVES

The work of Ghanaian scholars, and gender advocates on women's rights, all clearly establish that the Ghanaian woman's status is generally lower than that of her male counterpart in most areas of Ghanaian life.<sup>6</sup> Socio-cultural practices, political and economic conditions adversely affect women's rights in Ghana.<sup>7</sup> Efforts to correct this imbalance have led to policies on girl child education,<sup>8</sup> and the enactment of laws against child marriages,<sup>9</sup> child labour,<sup>10</sup> *trokosi*,<sup>11</sup> widowhood rites<sup>12</sup> and the passage of the Intestate Succession Law.<sup>13</sup> Given that matrimonial property division takes place against the background of the context of Ghanaian life and the socialization of the Ghanaian people, there is a need to ensure that socio-cultural biases against women's rights do not filter through matrimonial property law and its interpretation by judges to create a disparity in the share of matrimonial property

<sup>6</sup> See generally Akua Kuenyehia, "The Impact of Structural Adjustment Programs on Women's International Human Rights: The Example of Ghana" in Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 422; Akua Kuenyehia, "Distribution of Matrimonial Property on Dissolution of Marriage: A Re-Appraisal" (1990-92) 18 U.G.L.J. 94; Akua Kuenyehia, "Women and Family Law in Ghana: An Appraisal of Property Rights of Married Women" (1986-1990) 17 U.G.L.J. 72; Takyiwa Manuh, "Wives, Children, and Intestate Succession in Ghana" in African Feminism: The Politics of Survival in Sub-Saharan Africa, Gwendolyn Mikell, ed., (Philadelphia: University of Pennsylvania Press, 1997); Takyiwa Manuh, *Law and the Status of Women in Ghana* (Addis Ababa: African Training and Research Center for Women (ATRCW), 1984); Takyiwa Manuh, "Women, State and Society under the PNDC" in Mansah Prah, ed., *Women's Studies with a Focus on Ghana: Selected Readings* (Schriesheim, Germany: Books on African Studies, Jerry Bedu-Addo, 1995) at 117; See Elizabeth Ardayfio-Schandorf, "Violence against Women: The Ghanaian case" (Paper presented to the Expert Group Meeting on "Violence against women: a statistical overview, challenges and gaps in data collection and methodology and approaches for overcoming them," 11 - 14 April 2005, Geneva, Switzerland, organized by UN Division for the Advancement of Women in collaboration with Economic Commission for Europe (ECE) and World Health Organization (WHO)), online: <<http://www.un.org/womenwatch/daw/egm/vaw-stat-2005/docs/expert-papers/Ardayfio.pdf>> where the author stated, "Traditional values, cultural norms as well as socializing processes, all appear to bestow a low status on the girl child and low status on Ghanaian women."

<sup>7</sup> *Ibid.*

<sup>8</sup> See Elizabeth Archampong, *The Impact of Child Labour Laws in Ghana: A Critical Assessment*, (LLM Thesis, Queen's University, 2001) [unpublished] at 115-117 on the establishment and activities of the Girl Child Education Unit of the Ministry of Education.

<sup>9</sup> The Children's Act, 1998 (Act 560) at section 14 has fixed the minimum age of marriage at eighteen years with the exception of children between sixteen and eighteen years who obtain parental consent.

<sup>10</sup> *Ibid.* at section 12 protects children from exploitative child labour, and sections 87-92 of same which regulate children's work in Ghana's formal and informal sectors.

<sup>11</sup> *Trokosi* is a form of religious bondage involving mostly young virgin girls, who are sent to live and serve in the shrine of a fetish priest as reparation for crimes committed by members of their families: see Robert Kwame Ameh, "Reconciling Human Rights and Traditional Practices: The Anti-Trokosi Campaign in Ghana" (2004) 19(2) C. J.L.S. 23 and Hilary Gbedemah, "Trokosi: Twentieth Century Female Bondage-A Ghanaian Case Study" in Johanna Bond, ed., *Voices of African Women: Women's Rights in Ghana, Uganda, and Tanzania* (Durham, North Carolina: Carolina Academic Press, 2005) at 83. In 1998, the Criminal Code (Amendment) Act of 1998 (Act 554) clause 17 amended the Criminal Code, 1960 (Act 29) by inserting clause 17 as section 314A to ban the practice of "customary servitude" (*trokosi*). The 1992 Constitution, at Article 14, provides that "[e]very person has a right to personal liberty" and at Article 16, provides that, "No person shall be held in slavery and servitude or be required to perform forced labour."

<sup>12</sup> Act 554, *ibid.*, makes widowhood practices that adversely affect women's rights illegal.

<sup>13</sup> The Intestate Succession Law, 1985 (P.N.D.C.L. 111) was passed to ensure that spouses', especially women's, property rights are respected upon their spouses' death intestate.

that women receive, compared to men, upon marriage breakdown. Presumptively, the wealth that spouses generate in marriage involves the contributions in different forms by both spouses to the family, which makes the acquisition of wealth/property possible. Consequently, it is important that when it becomes necessary to divide such property a spouse is not adversely affected by reason only of that spouse's gender. Thus, there is a need for matrimonial property law that achieves gender equality.

#### (a) Feminist Legal Theoretical Approaches

Feminist legal theoretical approaches have impacted conceptions of gender equality, hence their use in this work to map equality. In as much as other theoretical approaches may prove useful in this work, feminist legal theory is useful because it tends to dig beneath the surface of the law, highlighting the various interests and conflicts that shape even the most ordinary legal standards. Feminist legal theory, because it assumes that gender is central to our lives, considers ways in which gender influences both the development and impact of law on men and women.<sup>14</sup> This focus on gender and the law offers a sound background for tackling issues affecting women in matrimonial property division. The issues and major concepts identified and discussed from the feminist legal theory literature help formulate a working definition<sup>15</sup> of equality for this work. This definition is subsequently applied to analysis of decisions on matrimonial property division.

#### (b) Equality

Equality tends to be a rather elusive concept and different feminist legal theorists offer different definitions of the concept and approaches to achieving it. Feminist legal theory has developed through different stages since legal scholars began generating this theoretical approach in the early 1970s.<sup>16</sup> Chamallas identifies three stages in the development of feminist legal theory: "the Equality Stage of the 1970s, the Difference Stage of the 1980s and the Diversity Stage of the 1990s."<sup>17</sup> The work

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<sup>14</sup> Martha Chamallas, *Introduction to Feminist Legal Theory* (New York: Aspen Law & Business, 1999) at 1.

<sup>15</sup> Taleh Sayed and David Bruce, "Police Corruption: Towards a Working Definition" (1998) 7:1 *African Security Review*, online: <<http://www.iss.org.za/Pubs/ASR/7No1/SayedBruce.html>>, at para.5, noted that instead of trying to provide a "universally satisfying" definition of police corruption they had attempted to provide a working definition:

...this article will seek to formulate a working definition, something that can serve as a tool to guide further study of the problem of police corruption. What is sought is a flexible yet precise and practical definition, one that is able to distinguish between what is and what is not police corruption while still remaining in touch with and relevant to the more general, public usage of the term. In addition, the purpose in attempting to define police corruption is also to raise some of the major problems encountered in such an attempt. One of the aims of this article is to problematise and discuss a range of issues that invariably crop up when trying to understand the concept of corruption. By broaching such topics, it seeks to show that, in many areas, there are no straightforward answers. In their absence, concerns such as public perceptions, effects on the criminal justice system and the need to appreciate possible differences in the causes of behaviour in order to devise strategies for change, may serve as aids in better understanding and distinguishing between different forms of police behaviour. (Emphasis mine)

<sup>16</sup> D. Kelly Weisberg, ed., *Feminist Legal Theory: Foundations* (Philadelphia: Temple University Press, 1993) [Weisberg] at xv.

<sup>17</sup> Chamallas, *supra* note 14 at 23.

arly women lawyers reflected a push for a liberal approach to law and its application, and extended to their feminist scholarship which theorized about equality as the need for men and women to be treated alike because the sexes were the same in law.<sup>18</sup> The formal equality approach was thus adopted and it remains the main feminist influence on law.<sup>19</sup> Proponents of this approach, mainly liberal feminists, support a sameness-theory of sex equality that requires that laws be gender neutral and a single standard used for all.<sup>20</sup> They called for women's access to all public institutions, benefits and opportunities on the same terms as men."<sup>21</sup>

### Formal Equality

Sometimes called sameness feminism, the formal equality approach accepted the traditional version of law and was concerned with the extent to which women were included in that legal standard.<sup>22</sup> The formal equality approach has achieved some level of success advocating for identical treatment of men and women, but analysis of its effect on women's lives shows that it does not always lead to equality in the context of legislation on women.<sup>23</sup> Formal equality sometimes only scratched the surface of women's problems, ultimately failing to enable women achieve equality with men in ways that reflected women's day-to-day lives. Inclusion of women in areas where they were previously excluded no longer seemed the only meaning of equality.<sup>24</sup>

### Substantive Equality

The problems identified with the formal equality approach have led to legal feminists seeking other routes to equality for women. Their focus has gone beyond

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Weisberg, *supra* note 16 at xvi-xvii. This is described as an understanding of equality in the Aristotelian sense, which requires that likes be treated alike, and unlikes treated differently. This theory of equality was developed by Aristotle in his *Nicomachean Ethics*; see Kathleen E. Mahoney, "Canadian Approaches to Equality Rights and Gender Equity in the Courts" in Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 437 at 442 and accompanying notes.

Chamallas, *supra* note 14 at 44.

*Ibid.* at 35 where the author referred to the work of liberal feminists as the establishment of "a system of 'formal' equality, in the sense of requiring that the form of the law be gender neutral - that, on its face, the law makes no distinction between the sexes."

*Ibid.* at 24.

In this sense formal equality opened doors for women, through its challenge of gender classifications women gained access to formerly male-dominated jobs and education and "no-fault" replaced a fault-based system of divorce: *ibid.* at 32-46.

See *ibid.* at 25 where Chamallas stated, "the enthusiasm for legal reform along equality lines gradually gave way to a realization that this effort would not cure the substantive equality that beset most women's lives."

*Ibid.* at 44. Some of the arguments challenging the formal equality approach's (in) ability to achieve "real" equality in its effect are that: The formal equality approach does not acknowledge that women's experiences are different from men's and that these differences sometimes lead to unequal results for women even when gender neutral laws are applied. MacKinnon has challenged the formal equality approach as fighting for women's sameness with men when that sameness is male; she observed, "...man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure." In MacKinnon's view "gender neutrality is thus simply the male standard," so that gender neutral provisions only serve to continue a man's advantaged position in society: see Catherine MacKinnon, *Difference and Dominance: On Sex Discrimination* in Weisberg, *supra* note 16 at 276-278.

ensuring that law applies to both men and women on the same terms, to law that achieves equality for women based on the positive impact it has on women's daily lives. This is the substantive equality approach, concerned with the *effect* of legal rules. Advocated by radical and cultural feminists, it calls for acknowledging the differences in the way rules impact the sexes and seeks to eliminate unfair gender related outcome of rules.<sup>25</sup> The shift to a substantive equality approach has led to theorizing about law with a focus on achieving equality that has a "real" positive impact for women. Substantive equality has been manifested in laws that address women's difference from men, sometimes applying rules differently in order to eliminate particular disadvantages women experience in a male dominated society.<sup>26</sup>

The substantive equality approach to law has been criticized for being likely to create the backlash that sometimes occurs when law treats women differently because such laws ostracize women. For example, the cultural feminists' portrait of women as naturally emotional, domestic and caring can lead to the resurrection of barriers to women's inclusion in public and economic spheres. Also radical feminists have been critiqued as painting women as victimized by sex, for instance in the way they attack pornography when some women may actually experience sex as liberating.

#### (e) Contemporary Concepts of Gender Equality

Contemporary feminist legal theory has been described as "blended,"<sup>27</sup> combining the concepts of formal and substantive equality in different ways. It includes Littleton's "equality as acceptance" model which states that "the difference between human beings...perceived or real... biologically or socially based... should not be permitted to make a difference in the lived-out equality for those persons."<sup>28</sup> Third world feminism (postcolonial legal feminist theories), developed by women in the South and women of colour in the North responds to particular historical context and tends to be based on a long history of violent nationalist struggle.<sup>29</sup> Its advocates in theorizing about gender equality, reject the application of western feminist theories to their communities and societies without acknowledgment that beyond oppression based on gender and class, third world women also battle oppression based on race and imperialism.<sup>30</sup> Postmodern feminist legal scholarship question "the existence of universal truth" and has "developed a new understanding of th

<sup>25</sup> Katherine T. Bartlett and Angela P. Harris, *Gender and Law: Theory, Doctrine, Commentary*, 2<sup>nd</sup> ed. (New York: Aspen Law & Business, 1998) at 262-62.

<sup>26</sup> An example of the incorporation of the substantive equality approach into Ghanaian law is Article 27(1) of the 1992 Constitution on women's rights, which provides for special care for mothers before and after childbirth.

<sup>27</sup> Chamallas, *supra* note 14 at 71.

<sup>28</sup> Christine A. Littleton, "Reconstructing Sexual Equality" (1987) 75 Cal. L. Rev. 1279 at 1284-1285.

<sup>29</sup> This is not to say that there are no differences among feminists in the North: see Hilary Charlesworth and Christin M. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (New York, Manchester: Juris Publishing/Manchester University Press, 2000) at 46, fn. 134.

<sup>30</sup> *Ibid.* See also Cheryl Johnson-Odim, "Common theme, different contexts" in C. Mohanty, A. Russo and L. Torre eds., *Third World Women and the Politics of Feminism* (Bloomington: Indiana University Press, 1991) at 314.

individual."<sup>31</sup> It includes "anti-essentialist" or "post-essentialist" feminists who reject conceptions of women as all having common experiences and attributes.<sup>32</sup>

#### f) Defining Gender Equality in Matrimonial Property Division

Drawing on insights from analysis of feminist legal theory on gender equality, this study adopts a substantive equality approach to matrimonial property legislation in Ghana. Substantive equality advocates acknowledging the ways in which women's experiences are different from that of their male counterparts. In promoting women's equality rights, substantive equality favours giving women 'a leg up' where necessary to ensure that women catch up with, and are equal to, their historically advantaged male counterparts. As MacKinnon has argued, merely placing all on an equal footing ensures that only men, who already have the advantage, are further advantaged, and real equality is not achieved.<sup>33</sup> This study also adopts the third world (postcolonial) and postmodern acknowledgment of the differences among the world's women, so that the change envisaged in Ghanaian matrimonial property legislation takes account of the specific circumstance that characterizes gender roles upon marriage breakdown. Consequently, this study defines equality as recognizing and giving similar significance to each spouse's contribution (whether by money or work or otherwise in the context of the matrimonial relationship) to the acquisition of property of the marriage.

This definition of equality acknowledges that spouses may assume different roles and responsibilities for the smooth running of their family affairs. However, these different roles and responsibilities, and the fact that a male or female spouse undertakes them, should not make them any less significant as contributions to the acquisition of matrimonial property. Specifically, women's contribution to matrimonial property should be recognized as being just as significant as that of their male counterparts. A woman's work, as the spouse invariably responsible for childcare and household management, helps the family to acquire property. Equality, in this sense, identifies and seeks to eliminate the difference in how Ghanaian society perceives men and women's roles and responsibilities in marriage and therefore their contribution to the acquisition of property in marriage. For the Ghanaian woman, this means the elimination of any possibility that upon marriage breakdown, her share of matrimonial property will be compromised by societal attitudes that *contrive* to keep her contribution to the acquisition of matrimonial property, *hidden*. The next section applies this theoretical framework to the law by assessing the relevant legal provisions on matrimonial property distribution upon marriage breakdown from a gender equality perspective. The relevant provisions

<sup>31</sup> For example, see Mary Jo Frug, *Postmodern Legal Feminism* (New York: Routledge, 1992) 126. See also Katherine T. Bartlett, "Gender Law" (1994) 1 Duke J. of Gender L. & Pol'y 1 at 14 explaining the postmodern view of the individual.

<sup>32</sup> See Bartlett, *ibid*, and *supra* note 25 at 1007-9 for a discussion of seven connotations or meaning of the term "essentialism." See also Chamallas' discussion of works by "anti-essentialist" or "post-essentialist" feminists who are "committed to including the perspectives of multiple groups of women...and who do not regard any form of oppression as necessarily more important or invidious than any other..." (*supra* note 14 at 86-98).

<sup>33</sup> See MacKinnon, *supra* note 24 at 276.

are in the 1992 Constitution, the Matrimonial Causes Act, 1971 Act 367 [hereafter MCA] and customary and Islamic law rules on matrimonial property.

## II. LAW AND CASES ON MATRIMONIAL PROPERTY DIVISION

### (a) Statutory Provisions

Ghana's matrimonial property law on property distribution upon marriage breakdown involves the following provisions: The 1992 Constitution Article 22 contains the following provisions on the property rights of spouses:

- 22 (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 realization 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.<sup>34</sup>

Parliament has not yet enacted legislation to regulate the property rights of spouses in fulfilment of Article 22(2). However, it is evident that work is ongoing to enact such legislation.<sup>35</sup> In terms of statutory law on matrimonial property,<sup>36</sup> the provisions of the MCA relevant to analysis of matrimonial property distribution upon marriage breakdown are in Part III, which is headed "Financial Provision, Child Custody and Other Relief," at sections 20 and 21. Section 20 provides that:

- 20 (1) The court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such movable or immovable property as *settlement of property rights* or *in lieu thereof* or as part of financial provision *as the court thinks just and equitable*.
- (2) Payments and conveyances under this section may be ordered to be made in gross or by instalments.<sup>37</sup>

<sup>34</sup> 1992 Constitution of the Republic of Ghana, article 22. (emphasis mine).

<sup>35</sup> See *supra* note 2.

<sup>36</sup> Matrimonial property distribution upon marriage breakdown, for Ghanaians married under the Marriage Ordinance, 1881 (Rev. 1951), was governed by English law on matrimonial causes until the MCA was enacted in 1971. The MCA ended Ghana's "reliance" on English law on matrimonial property and became the most important legislation dealing with spouses' property rights upon marriage breakdown.

The MCA integrates the law of matrimonial causes to the extent that it can be applied, with some modifications, to all forms of marriage in Ghana.<sup>4</sup> The statute applies to *all* monogamous marriages, meaning that civil and church marriages contracted under the Marriage Ordinance can only be dissolved in a court and in accordance with the provisions of the MCA: Section 41(1) of the MCA states, "This Act shall apply to all monogamous marriages. In the case of polygamous marriages, that is, customary and Islamic marriages, the MCA applies *only on application* by one of the spouses: Section 41(2) of the MCA states, "On application by a party to a marriage other than a monogamous marriage, the court shall apply the provisions of this Act to that marriage..." Thus, parties in polygamous marriages can have their marriages dissolved extra-judicially, under customary or Islamic law rules, unless they choose to apply to court under the MCA

<sup>37</sup> Emphasis mine.

Under this regime, the court has power to settle property rights of spouses either having one spouse make a payment to the other or having one spouse convey property to the other. The court can order these payments to be made in gross or instalments. Wanitzek has noted that the court's power to alter the spouses' property rights is a relatively recent innovation in both English and Ghanaian law.<sup>38</sup> Section 21(1) provides that,

When a decree of 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 courts shall order transfer or conveyance of the interest to the party entitled to it upon such terms as the court thinks just and equitable.

This provision empowers the court to determine disputes, "between spouses or ex-spouses as to who holds, at the date of action, a particular property right."<sup>39</sup> The court can order transfer of property between spouses upon divorce where one spouse holds property that belongs to the other. The MCA also provides for the award of "maintenance pending suit or financial provision," to either spouse at section 19. And, at section 22, there is provision for custody and financial provision for children.

#### d) Customary and Islamic Law

Generally, spouses who marry under customary and Islamic law have their matrimonial property issues dealt with by these laws. However, with the promulgation of the MCA, when such spouses apply to court they can be subject to the MCA. Thus, a party to a marriage contracted under customary or Islamic law can apply to the state courts to have that marriage dissolved, and matrimonial issues arising from that dissolution, dealt with under the MCA. In such cases, the court is required to apply not only the provisions of the MCA but also take account of the spouses' personal laws on divorce and matrimonial causes. Section 41(2) of the MCA provides that,

On application by a party to a marriage other than a monogamous marriage, the court shall apply the provisions of this Act to that marriage, and in so doing, subject to the requirements of justice, equity and good conscience, the court may –

- (a) have regard to the peculiar incidents of that marriage in determining appropriate relief, financial provision and child custody arrangements;

<sup>38</sup> Ulrike Wanitzek, "Integration of Personal Laws in 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 87. The earlier position was that the spouse whose name was on the title deeds to a property got to keep that property upon marriage breakdown.

<sup>39</sup> *Ibid.*

- (b) grant any form of relief recognized by the personal law of the parties to the proceedings, either in addition to or in substitution for the matrimonial reliefs afforded by this Act.<sup>40</sup>

Thus, the MCA has priority however, a judge can also apply customary or Islamic law rules in dealing with divorce and matrimonial causes involving polygamous marriages. These personal laws of the parties are to be applied as section 41(2) of the MCA provides, "subject to the requirements of justice, equity and good conscience."

The most recognized customary law rule on matrimonial property is the rule established in *Quartey v. Martey*.<sup>41</sup> The rule as stated by Justice Ollennu in the said case is:

...by customary law it is a 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, and any property which the man acquires with such proceeds, are by customary law the individual property of the man.* It is not the joint property of the man and the wife and/or children. The right of the wife and the children is a right to maintenance and support from the husband and father....I must hold that, in the absence of strong evidence to the contrary, any property a man acquires with the assistance or joint effort of his wife, is the individual property of the husband and not joint property of the husband and the wife.<sup>42</sup>

Consequently, in *Quartey v. Martey*, Justice Ollennu dismissed the wife's claim that she was entitled to a share of matrimonial property. The spouses in that case

<sup>40</sup> In dealing with divorce, the facts recognized under the personal law of the parties which are considered sufficient to justify a divorce must be taken into account. Section 41(3) states that,

(3) In the application of section 2(1) of this Act to a marriage other than a monogamous marriage, the court shall have regard to any facts recognized by the personal law of the parties as sufficient to justify a divorce, including in the case of a customary law marriage (but without prejudice to the foregoing) the following:-

- (a) willful neglect to maintain a wife or child;
- (b) impotence;
- (c) barrenness or sterility
- (d) intercourse prohibited under that personal law on account of consanguinity, affinity or other relationship;
- (e) persistent false allegations of infidelity by one spouse against another;

Provided that this subsection shall have effect subject to the requirements of justice, equity and good conscience.

<sup>41</sup> [1959] GLR 377 (H.C.).

<sup>42</sup> *Ibid.* at 380.

had been married under customary law.<sup>43</sup> And upon the death of the husband, the wife brought the instant action against her husband's administrators claiming a one-third share of her husband's cattle, house and money because she had assisted her husband to acquire these properties. Justice Ollennu stated the above noted customary law rule and, by reason of it, denied the wife's claim to a share of the properties.

In Islamic marriages, matrimonial property is governed by rules from the Koran.<sup>44</sup> Reviewing the law governing property rights of spouses under Muslim (Islamic) law, the Ghana Law Reform Commission noted that "under Islamic law, divorce is not at all a condition for the distribution of property between spouses. Property is distributed between spouses only in cases of death."<sup>45</sup> The Ghana Law Reform Commission observed that in Muslim communities divorce is generally initiated by the husband; the wife can only ask her husband to release her from the marriage. It noted that in some cases, upon divorce, (part of) the dowry paid to the wife upon marriage has to be repaid to the husband, and the wife only has a right to maintenance, which is "given for residence, clothing, food, and general care, and depending on the type of divorce, as well as a suitable obligatory gift."<sup>46</sup> Further, Islamic law (add customary marriage) allows women, married or otherwise, to hold property in their own names and to dispose of it independently. Women retain their separate estates, and remain mistresses of their dowries and any goods acquired by inheritance or by gift or by the fruit of their own labour and investment. However, since the Marriage of Mohammedans Ordinance 1907, Cap 129 does not provide for distribution of property upon divorce, it is the Koran which governs such issues.<sup>47</sup>

### (c) Cases and Trends

The availability of Ghanaian law reports offers an opportunity to study application of the above noted matrimonial property law in cases on matrimonial property, and to identify trends reflected in these cases. Moreover, the cases in these reports reflect a recourse that Ghanaians have to a judicial system that aims to provide equal access to all.<sup>48</sup> The case law offers insight as to what pertains in Ghanaian courts, and more importantly, in the society as a whole. The analysis focuses on judgments in disputes over matrimonial property after divorce or separation;

<sup>43</sup> The report does not indicate the particular customary law (that is which ethnic group's customs) under which the spouses were married. See E.V.O. Dankwa, "Marriage Laws in Ghana" in African Centre for Democracy and Human Rights Studies (ACDHRS), *Marriage Laws in Africa* (Kerr Sereign, the Gambia: ACDHRS, 2003) at 116 where the author observed that although marriage customs varied, "for all communities, however, it is the custom of the bride which is performed."

<sup>44</sup> See Ghana Law Reform Commission (GLRC), *The Law Regulating Property Rights Between Spouses*, GLRC, 1999, Accra, at 26.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> See 1992 Constitution of the Republic of Ghana, Chapter 11 on the Judiciary.

however, reference is made to decisions on matrimonial issues arising upon the death of a spouse that are relevant to this discussion of the law on spouses' property rights upon marriage breakdown.<sup>49</sup> Selection of cases for review in this study involved several steps. First, all Ghanaian law reports published for each year since Ghana's independence were located. This yielded law reports from 1959 to 2004 as at 2006. Second, the headnotes (summary) of each case reported in each of these reports were read, and those cases that involved matrimonial property issues were identified. Third, each case that dealt with matrimonial property issues was read, and those that dealt with matrimonial property issues arising upon divorce or separation were selected. This final selection also included a few cases involving matrimonial property issues using upon the death of a spouse because they established rules that also impact spouses upon marriage breakdown.<sup>50</sup> This study's reference to reported cases only does eliminate cases involving disputes over matrimonial property resolved through customary arbitration in Ghanaian traditional communities.<sup>51</sup> The cases reviewed help illustrate the importance attached to women's contribution to the family, and consequently their right to share in matrimonial property upon marriage breakdown. Ultimately, these cases are an indication of the extent of women's equality with their male counterparts in Ghana, as reflected in the right to share in the power and prestige attached to property.

The following trends were identified in reviewing judges' reasoning and decisions in the matrimonial property cases identified: The earliest rule on spousal property rights, for those married under customary law, was established in the case of *Quarley v. Martey* in 1959. The rule it established has been described as the rule that sums up Ghana's law on ownership rights in property for which both a husband and wife worked, where no intention has been evidenced concerning its ownership.<sup>52</sup> From 1959 through the 1960s, no case was located on matrimonial property distribution for spouses whether married under customary law, the Ordinance or under Mohammedan Ordinance. In that period, property distribution for marriages contracted under Islamic law was governed by rules in the Koran and for marriages contracted under the Marriage Ordinance, 1881, the applicable law was English

<sup>49</sup> See Appendix A for table of relevant cases on matrimonial property distribution compiled from Ghanaian law reports from 1959 to 2004. See also Elizabeth Archampong, *Reforming Ghana's Matrimonial Property Law to Achieve Greater Gender Equality upon Marriage Breakdown* (PhD dissertation, Osgoode Hall Law School, 2006) [unpublished] for an expansive analysis of the cases noted in Appendix A.

<sup>50</sup> In all 23 cases were identified: see *ibid.*

<sup>51</sup> An analysis of the customary arbitration process is a subject for the focus of future research as Ghanaians resort to arbitration both at custom, and pursuant to the formal judicial system. Although this writer did not find readily available data on customary arbitration, it is often the case that women turn to family and community elders for resolution of their matrimonial property issues because these elders are more accessible to them than the courts which administers the MCA. The prohibitive cost of going to court prevents more cases on matrimonial property coming before the courts, thus limiting the number of cases that get reported: See Federación Internacional de Abogados (FIDA), *Intestate Succession. Women and the Law Series*, Ghana Legal Literacy Project (Accra, Ghana: FIDA, 1991).

<sup>52</sup> Rosemary Ofei-Aboagye, *Ghanaian Women: Equality and Empowerment* (D. JUR. Dissertation, Osgoode Hall Law School 1994) [unpublished] at 148.

law on matrimonial causes in force at the time in England.<sup>53</sup> Also noted is the fact that cases from the 1970s, through to the present, have generally modified, if not technically overruled, the rule in *Quartey v. Martey*. In fact, Dankwa has stated that, "[t]he earlier position that 'whatever a wife helps her husband to acquire is the sole property of the husband' is no longer good law despite Ollennu's forthright statement in *Quartey v. Martey* in support of Sarbah's stance."<sup>54</sup> Since its pronouncement Ghana's judges have mostly distinguished the rule in cases involving matrimonial property distribution upon marriage breakdown.<sup>55</sup>

Another trend of note is that Ghanaian judges have not solely applied the MCA as the governing law on matrimonial causes; rather they have developed a "substantial contribution" principle. The Ghana Law Reform Commission has described the principle of substantial contribution thus,

[A] spouse claiming a portion or all of the matrimonial property jointly acquired property upon dissolution of the marriage must show either an agreement between the parties giving him/her a beneficial interest or evidence of contribution towards the acquisition of property, such as direct financial improvements, renovations, extensions, or, applying her income or time for the benefit of the family so as to enable the husband (or other spouse) to acquire the property in question.<sup>56</sup>

Thus, in *Quartey v. Armar*<sup>57</sup> where interest in the two houses the spouses had acquired was disputed, working with the principle of substantial contribution, Justice Edusei did not consider the wife to have contributed substantially to the first disputed house because she did not prove that she was financially capable of paying the lump sum paid on that house. The husband was the higher wage earner and therefore considered as being capable of paying for the home, and thus entitled to ownership of the first house. The second disputed house in that case was held to jointly belong to the spouses since the wife was able to prove that she had also contributed financially to building and extending that house. Thus, it took the wife proving that she had contributed financially, and substantially, to the second house for Justice Edusei to hold that she was entitled to an equal share of the second house.

<sup>53</sup> Wanjitzek, *supra* note 38 at 81 stated "[b]efore the MCA was enacted, the courts had to exercise jurisdiction in matrimonial causes 'in conformity with the law and practice for the time being in force in England,' citing section 17 Courts Ordinance 7/1935, Cap 4, saved by section 154(3) Courts Act 1960, CA 9 and by section 93(2) Courts Decree, NLCD 84. See also William E. Offei, *Family Law in Ghana*, 2<sup>nd</sup> ed., (Accra: Sebawie Publishers, 2001) at 2-5 for discussion of the English statutes on matrimonial causes that have applied in Ghana.

The Matrimonial Causes Act, 1965 and the Matrimonial Proceedings and Property Act, 1970 (came into effect in Ghana on 1<sup>st</sup> January, 1971) were the last two English statutes applicable in Ghana before the MCA was enacted. Wanjitzek, *ibid.* at 82 observed that in as much as the Memorandum to the MCA claimed that the MCA was "distinctively Ghanaian" and was to mark the end of Ghana's reliance on English law, "the language of the Act was based, in most of its provisions, on English law." Section 41(1) of the MCA provides that, "any English statute relating to matrimonial causes which was in force in Ghana immediately before the commencement of this Act shall cease to apply."

<sup>54</sup> Dankwa, *supra* note 43 at 102.

<sup>55</sup> See *Abebrese v. Kaah* [1976] 2 GLR 46.

<sup>56</sup> GLRC, *supra* note 44 at 20.

<sup>57</sup> [1971] 2 GLR 231.

A further trend is that for customary law marriages, it seems that the substantial contribution principle has developed as the judges' way of modifying the rule in *Quartey v. Martey*, which clearly lags behind in acknowledging that most often it is the contributions both spouses make during marriage that enables the family to generate wealth. For Ordinance marriages, the principle appears to be a way of finding a more specific or clearer means than the MCA offers for arriving at property distribution that takes account of the contributions spouses have made to property acquisition in marriage. Thus, the mere fact that property acquired in a marriage is held in the husband's name, or the fact that the husband contributed financially does not mean that the husband alone "worked" to acquire and maintain that property. The substantial contribution principle tends to recognize as substantial, contribution that is extraordinary or outstanding, and this tends to favour educated spouses, spouses who can show records of high income, and business and professional people with substantial wealth. Thus, in *Abebrese v. Kaah*<sup>58</sup>, Justice Sarkodee said of the wife, "[t]here is no doubt in my mind and I find that the plaintiff was a woman of considerable means." Offei in his *Family Law in Ghana*<sup>59</sup>, touched on the plight of "poor wives" in this statement:

It would thus be noted that in the customary law case of *Quartey v. Martey & Anor* and the Marriage Ordinance cases of *Bentsi-Enchill v. Bentsi-Enchill* and *Clerk v. Clerk* the principle was the same. In all three cases the wife did not contribute materially towards the acquisition of the property acquired by the husband during the marriage, and the Court held that the wives had no share in the property.<sup>60</sup>

Furthermore, Justice Koranteng-Addow stated in *Clerk v. Clerk*<sup>61</sup> that, "the man has property and the wife has nothing, her only assets are her children who, according to the evidence, are all well placed in life. A woman cannot ask for more."<sup>62</sup>

It is also evident from the cases that Ghanaian judges resort to English common law and principles of equity in resolving matrimonial property disputes. For example Justice Sarkodee's reasoning in *Bentsi-Enchill v. Bentsi-Enchill*<sup>63</sup> relied heavily on English common law concerning consortium, in a fashion similar to *Quartey v. Armar*<sup>64</sup> where the judge applied principles of equity and *Ogbarmey-Tetteh v. Ogbarmey-Tetteh*<sup>65</sup> and *Sykes v. Abbey*<sup>66</sup> where the Supreme Court relied on the law of trusts. Although received English law is part of Ghana's common law, the judges' resort to these principles even through the MCA has been enacted as Ghana's principal law in this area raises concern. Wanitzek has observed that,

<sup>58</sup> *Supra* note 55.

<sup>59</sup> *Supra* note 53.

<sup>60</sup> *Ibid.* at 281. Emphasis mine.

<sup>61</sup> [1981] GLR 583.

<sup>62</sup> *Ibid.* at 597. Emphasis mine.

<sup>63</sup> [1976] 2 GLR 303.

<sup>64</sup> *Supra* note 57.

<sup>65</sup> [1993-94] 1 GLR 353 (S.C.).

<sup>66</sup> [1995-96] 1 GLR 81.

...when one looks at the court decisions, one finds that property disputes between spouses at or after divorce are mostly handled as mere determinations of property rights, rather than as alterations of such rights, and that common law and equity are referred to, rather than the relevant section of the Matrimonial Causes Act. It appears that both legal representatives and courts tend to ignore the Matrimonial Causes Act in many cases by failing to utilize the possibilities offered by the Act for an innovative approach towards a just division of matrimonial assets.<sup>67</sup>

A final trend identified in the case review is that "indirect contributions" of spouses are now recognized. Judges now recognize not only direct substantial contribution, but also indirect contributions to matrimonial property. Thus, in *Yeboah v. Yeboah*<sup>68</sup>, Justice Hayfron-Benjamin took account of the wife's indirect contribution in the form of time and effort towards the acquisition of the house. He indicated that such contribution is difficult to quantify in monetary terms, and consequently held that the wife's combined direct and indirect contribution entitled her to an equal share of the house with the husband.

The observations above show that in resolving matrimonial property issues judges tend to award matrimonial property to spouses who prove that they contributed substantially to the acquisition of such property. These judges exercise a lot of judicial discretion because the MCA offers no guidance on how to determine spousal contributions to matrimonial property. This situation is problematic because judges may not necessarily interpret the law to achieve gender equality for spouses in property distribution upon marriage breakdown.

### III. CRITIQUE AND RECOMMENDATIONS

This section critiques the trends reflected in the matrimonial property cases and makes recommendations for achieving greater gender equality.

#### A. Critique

First, nowhere has the law governing matrimonial property rights upon marriage breakdown clearly defined matrimonial property, it refers to movable and immovable property but does not define the nature of property encompassed in this distinction. Although the cases leave one with an idea of what assets would be considered matrimonial property, there is still lot of room for including or excluding whatever a particular judge considers matrimonial property. It is proposed that a definition of property, for the purpose of matrimonial property distribution, be incorporated into the MCA. In this regard Ontario Canada's *Family Law Act 1990*<sup>69</sup>

<sup>67</sup> See Wanitzek, *supra* note 38 at 88.

<sup>68</sup> [1974] 2 GLR 114. In this case the wife had acquired a parcel of land before the marriage. Upon marrying, she and the husband agreed that the land be transferred into the husband's name. When the husband was transferred to London, England, the family moved there. The wife, at the husband's request, returned to Ghana to supervise the construction of a house on the land. She paid her own fare home, and for additions and alterations to the house. The parties settled in Ghana in 1964 and lived in the house, but divorced the same year. The husband commenced proceedings to eject the wife from the house, to which the wife counterclaimed for a declaration that she was a joint owner of the house due to her contribution to its erection.

<sup>69</sup> Family Law Act, R.S. O. 1990, c.F.3.

is insightful. It defines property as used in relation to family property in section 4(1) thus,

- "property" means any interest, present or future, vested or contingent, in real or personal property and includes,
- (a) property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself,
  - (b) property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, and
  - (c) in the case of a spouse's rights under a pension plan that have vested, the spouse's interest in the plan including contributions made by other persons;<sup>70</sup>

This definition has been described as an extremely broad definition of family property.<sup>71</sup> It covers leasehold interests, life interests, beneficial interests under wills or trusts, pensions, the cash surrender value of life insurance policies, severance pay entitlements, accumulated vacation pay, accumulated sick leave, worker's compensation benefits, option rights, partnership interests, business or professional goodwill, and accounts receivable.<sup>72</sup> It encompasses any kind of interest that a spouse may have in any property during marriage, exceptions being made in the case of property that does not originate from the marriage such as gifts and inheritance.

Second, Ghana's matrimonial property law is not specific enough: what is "distributed equitably" in the Constitutional provision, Article 22(3)(b); "as the court thinks just and equitable" in section 20 and "as the court thinks just and equitable" in section 21 of the MCA. Also customary and Islamic laws on matrimonial property do not tend to favour women's property rights. In short the current state of the law allows for lots of judicial discretion. Consequently, finding sections 20 and 21 of the MCA to be unhelpful, Ghanaian judges rely on principles of equity and the substantial contribution principle to interpret the law in property cases. This approach however does not augur well for the achievement of equality in the division of matrimonial property. The substantial contribution principle, in particular, is of concern for several reasons. The lower significance that society attaches to the kind of contributions women tend to make to the family, such as household management and child care, devalues, even makes "invisible," such contributions. It is therefore not surprising that the kind of "proof" that satisfies the Ghanaian courts tend to be of a financial or extraordinary nature. No wonder that in *Bentsi-Enchill v. Bentsi-Enchill*<sup>73</sup>, it was not enough that the wife had

<sup>70</sup> *Ibid.*, s. 4(1).

<sup>71</sup> Julien D. Payne and Marilyn A. Payne, *Canadian Family Law* (Toronto: Irwin Law Inc. 2001) at 300. See also Mossman, *supra* note 4 at 397.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Supra* note 63.

contributed as a wife. In the judge's view she had not proved substantial financial contribution to the acquisition of the property and so could not be granted an interest in that property. The spouses who the courts find have greater financial resources and whose names are on the title deeds, are assigned most or all interest in property acquired during marriage. These spouses tend to be men; in the instances where a wife's contribution to matrimonial property is recognized and she is assigned interest in such property, her contribution is described as exceptional and the impression is often left that she has been fortunate.

The Ghana Law Reform Commission report recommends the adoption of the substantial contribution principle. However, such an approach will not take account of the societal bias against non-financial contributions and unpaid work, and so will not eliminate the possibility of such bias filtering into judicial decisions in matrimonial property cases.

### **Recommendations**

As an alternative to the substantial contribution principle and to limit judicial discretion, this study makes three recommendations:

1. adoption of a presumption of equal contribution in the law,
2. comprehensive provisions on matrimonial property division and
3. a single, gender sensitive law governing matrimonial property division.

### **Adoption of a presumption of equal contribution in the law**

The cases reviewed show that although there is increasingly a tendency for judges to order that spouses share matrimonial property in equal halves, their focus on substantial contribution still carries the possibility of making contributions other than the financial, invisible. Incorporation of a legal presumption of equal contribution in Ghana's law will leave judges in no doubt as to how to approach matrimonial property issues. For example, Ontario's *Family Law Act, 1990* makes such a presumption; requiring that all spouses be deemed to have equally contributed to the family and therefore to matrimonial property. Section 5 of the *Family Law Act, 1990* puts it clearly, "...inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses....entitling each spouse to the equalization of the net family properties..." This statement in the *Family Law Act, 1990* forestalls any bias that may come into play in a judge's decision making, causing one form of spousal contributions to be given pre-eminence over other forms of contributions in the settlement of spouses' property rights upon divorce. It is important that the law leave no room for bias, especially in matrimonial property matters where bias tends to operate along gender lines. This approach would better ensure that the same significance is given to all contributions that spouses make to the family, and consequently to matrimonial property.

Admittedly, such a presumption will not lead to property distribution that is based on specific proportions of spouses' contributions to matrimonial property. However,

it will not leave out or devalue the significance of the different contributions that spouses make to the family. For instance, when spouses share matrimonial property equally based on a presumption of equal contribution, they may not get exactly what they each need but it is more likely that they will each receive a share of matrimonial property that better reflects their contributions in the marriage.<sup>74</sup> A calculation based on the spouses' actual contributions is likely to do injustice to the spouse whose contribution was non-monetary. The presumption of equal contribution eliminates the challenges wives tend to face when their contribution to matrimonial property is not in the form of money. Thus, spouses will no longer be left at the mercy of judges when it comes to the value to be assigned to their contributions to the family in matrimonial property distribution upon divorce. Each spouse's contribution to the family will be equally significant, entitling them to an equal share of matrimonial property at marriage breakdown.

An additional advantage to adopting a legal presumption of equal contribution is that such a presumption can be rebutted in specific circumstances, where its application would lead to injustice. For example, a spouse who does not disclose debts existing before the date of marriage, incurs debts recklessly, or intentionally depletes family property gives rise to a situation for unequal division of matrimonial property in Ontario. The same circumstances in a Ghanaian case can be cause for unequal division of matrimonial property upon divorce. Also, exceptions may have to be made in the case of short marriages.

Further, the list of circumstances for rebutting such a presumption in Ghana's law may include specific circumstances arising from situations specific to Ghanaian society. For example, exceptions different from those noted for Ontario, may arise in polygamous marriages. A possibility might be to hold a third spouse accountable for intentionally depleting matrimonial property to be shared not only by the two spouses whose marriage have broken down, but by all the spouses in that marriage.

## **2. Comprehensive provisions on matrimonial property division**

The second recommendation is that Ghana adopts more comprehensive provisions on matrimonial property division. For instance, Ontario, like Canada's other common law provinces, accepts the principle that marriage entitles each spouse to an equal share of family property, or its value, based on the legal presumption that spousal contributions are equal. Consequently, Ontario's *Family Law Act, 1990* implements this principle using an "equalization payment" approach. This

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<sup>74</sup> See American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Washington DC: Matthew Bender & Co Inc., 2002) at 734.

approach involves first calculating the value of the "net family property"<sup>75</sup> of each spouse at a defined date. Then "the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them."<sup>76</sup> What is involved here is the calculation of "debt" that one spouse may owe to the other, rather than an actual transfer of property from one spouse to another.<sup>77</sup> The result of this approach is that, "each spouse shares equally in the economic wealth of the marriage at breakdown, without any change in property ownership."<sup>78</sup> A spouse who wishes to claim a deduction under the definition of net family property" or exclusion under s. 4(2) bears the onus of proof.<sup>79</sup> Ontario's Family Law Act details specific steps for the calculation of the value of wealth generated in a marriage and for making equalization payments to spouses. Apart from the exception made in the case of the matrimonial home, Ontario's matrimonial property regime does not touch the spouses' separate property (property that does not originate from the marriage). The Ontario model has the advantage of guaranteeing spouses equal shares of matrimonial property upon divorce, making exceptions to this general result only under extreme circumstances. In contrast, while in Ontario spouses share, equally, the value of property acquired in marriage, in another Canadian province, British Columbia, they share, equally, the interest in property acquired in marriage.<sup>80</sup>

<sup>75</sup> Family Law Act, 1990, s. 4(1) states,

"net family property" means the value of all the property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,

- (a) the spouse's debts and other liabilities, and
- (b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse's debts and other liabilities, calculated as of the date of the marriage;

Valuation date is defined in the same section as follows,

"valuation date" means the earliest of the following dates:

1. The date the spouses separate and there is no reasonable prospect that they will resume cohabitation.
2. The date a divorce is granted.
3. The date the marriage is declared a nullity.
4. The date one of the spouses commences an application based on subsection 5 (3) (improvident depletion) that is subsequently granted.
5. The date before the date on which one of the spouses dies leaving the other spouse surviving. (*ibid.*, s. 4(1))

Section 4(2) provides that,

The value of the following property that a spouse owns on the valuation date does not form part of the spouse's net family property:

1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage.
2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property.
3. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages.
4. Proceeds or a right to proceeds of a policy of life insurance, as defined in the Insurance Act, that are payable on the death of the life insured.
5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced.
6. Property that the spouses have agreed by a domestic contract is not to be included in the spouse's net family property. [Emphasis mine]

<sup>76</sup> *Ibid.* section 5(1).

<sup>77</sup> See Mossman, *supra* note 4 at 402.

<sup>78</sup> *Ibid.* at 397. Spouses may contract out of this default regime in Ontario pursuant to section 2(10) of the Family Law Act, 1990.

<sup>79</sup> Family Law Act, 1990, section 4(3). Section 4(2) on exclusions is set out *supra* note 75.

<sup>80</sup> See British Columbia's Family Relations Act RSBC 1996, c. 128.

<sup>81</sup> See British Columbia's Family Relations Act RSBC 1996, c. 128.

### 3. A single, gender sensitive law governing matrimonial property division

Finally, this study recommends that Ghana adopt a single, gender sensitive law governing all matrimonial property division upon divorce or separation. This approach involves the development of rules applicable, in the same way, to all marriages in Ghana. Thus, whether a marriage is contracted under customary law or Islamic law or the Marriage Ordinance, at its dissolution matrimonial property division should follow the same rules, leading to the same result for all spouses. This approach would make all customary and religious laws on property division upon divorce redundant and unenforceable by state courts. In a manner similar to that adopted in the law of succession, where PNDCL 111 governs all intestate succession, the MCA needs to be a better unified statute, if it is to achieve greater gender equality. The single state law proposed would be based on a general rule that accords the same degree of significance to all contributions spouses make to the family during marriage. Thus, upon marriage breakdown, spouses would be presumed to have contributed equally to the family and, by reason of their equal contributions, be entitled to equal shares of property generated in the marriage.

## IV. CONCLUSION

This study has analyzed Ghana's law on matrimonial property division focusing on its interpretation by the courts in relation to the goal of gender equality. It has identified limitations in the extent to which the law, and consequently judges, recognizes the various contributions, especially non-monetary or "indirect contribution", that spouses make to the family and therefore to the generation of matrimonial property. Recommending law reform through the adoption of more comprehensive legal provisions that limit judicial discretion, it is conceded that it will take more than law reform for gender equality to be achieved in Ghana. There is also need for change in Ghanaian society for implementation of the legislative reforms proposed here to be effective. There are ways in which men and women interact in Ghana's communities and aspects of customs and practices to which Ghanaians subscribe which adversely impacts women's property rights. Consequently, it is proposed that law reform be combined with dialogue to assist the process of curbing those customary laws, traditions and practical economic realities in Ghanaian communities which work to the disadvantage of women.<sup>81</sup>

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<sup>81</sup> See the dialogue approach advocated by Robert Kwame Ameh, *supra* note 11.

## APPENDIX

### Appendix A: Cases on Matrimonial Property Division upon Marriage Breakdown

Compiled from the Ghana Law Report, Ghana Law Report Digest and Supreme  
Court of Ghana Law Report, 1959 - 2004 )

Year	Relevant Cases
1959	<i>Quartey v. Martey</i>
1960	
1961	
1962	<i>Adom v. Kwarley</i> <i>United Simpson &amp; Ayitey Co. v. Jeffrey</i>
1963	
1964	
1965	
1966	
1967	
1968	
1969	
1970	
1971	
1972	<i>Quartey v. Armar</i>
1973	
1974	<i>Reindorf v. Reindorf</i> <i>Yeboah v. Yeboah</i>
1975	<i>Mensah v. Berkoe</i>
1976	<i>Bentsi-Enchill v. Bentsi-Enchill</i> <i>Abebrese v. Kaah</i>
1977	<i>Tackie v. Baroudi</i>
1978	
1979	
1980	
1981	<i>Clerk v. Clerk</i> <i>Ramia v. Ramia</i>

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1974	<i>Reindorf v. Reindorf</i> <i>Yeboah v. Yeboah</i>
1975	<i>Mensah v. Berkoe</i>
1976	<i>Bentsi-Enchill v. Bentsi-Enchill</i> <i>Abebrese v. Kaah</i>
1977	<i>Tackie v. Baroudi</i>
1978	
1979	
1980	
1981	<i>Clerk v. Clerk</i> <i>Ramia v. Ramia</i>

1982-83	<i>Achiampong v. Achiampong</i>
1984-86	<i>Domfe v. Adu</i>
1987-88	<i>Berchie-Badu v. Berchie-Badu</i> <i>Ribeirio v. Ribeirio</i>
1989-90	<i>Ribeirio v. Ribeirio</i> <i>Ribeirio v. Ribeirio (No. 2)</i>
1991	
1992	
1993-94	<i>Oparebea v. Mensah</i> <i>Mensah v. Mensah</i> <i>Ogbarmey-Tetteh v. Ogbarmey-Tetteh</i>
1995-96	<i>Sykes v. Abbey</i>
1997	
1998-99	<i>Mensah v. Mensah</i>
2000	
2001	
2002	
2003	
2004	

The following cases: *Quartey v. Martey*, *Adom v. Kwarley* and *United Simpson & Ayitey Co. v. Jeffrey*, unlike the other cases above, did not involve matrimonial property disputes arising upon marriage breakdown. However, they are included here because they raised issues that also impact matrimonial property division upon marriage breakdown.