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INTEGRATION OF PERSONAL LAWS AND THE SITUATION OF WOMEN IN GHANA: THE MATRIMONIAL CAUSES ACT OF 1971 AND ITS APPLICATION BY THE COURTS*

Ulrike Wanitzek**

Introduction

Like most other African countries, Ghana has a pluralistic legal system. Various customary laws, Islamic law, and the general law, that is based on the received English law, exist side by side. In certain areas, these laws have been integrated, which means that certain elements of the various legal systems have been combined with each other into a legal superstructure within which an interaction and coordination among the systems can take place. The weights of the legal systems within this superstructure may vary considerably. In contrast, other areas of the law (e.g. the criminal law) have been unified, which means that the plurality of laws has been reduced to uniformity. One integrating statute in the area of family law is the Matrimonial Causes Act (MCA),¹ which was enacted in 1971 to "provide for matrimonial causes and other matters

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1. Matrimonial Causes Act, No. 367 (1971) [hereinafter MCA]. The most recent example of an integrating statute, in the area of the law of succession, is the Intestate Succession Law (PNDC 111, 1985).

connected therewith,"² both for monogamous and, with eventual modifications, for potentially polygamous marriages.³

The extension of the Act to polygamous, i.e. customary and Islamic, marriages has been viewed as "revolutionary," as "a bold step which will enable the reliefs and benefits afforded by [the MCA] to be made available to persons married under customary law or to the children of such marriages." And the purpose of the MCA was stated generally to be to "help build a unified system of marriage laws" and to "give customary marriages the same recognition as is given to . . . marriages under the Ordinance." Moreover, the Act was particularly intended to "give some security and protection to women married under customary laws, and not to make them feel inferior to those who are married under the Ordinance."⁴ These formulations were presumably used loosely in the Parliamentary Debates to refer to the law of marital relations, without distinguishing between the law of marriage and the law of matrimonial causes, and without distinguishing between unification and integration of the laws. Since the MCA actually uses an integrating approach (in the sense indicated above), rather than aiming at uniformity of the law, the term "integration" will be used in this paper.⁵

This paper examines the extent to which these purposes — i.e. the integration of the personal laws, and the improvement of the situation of women married under customary law — have been achieved in the statutory provisions of the MCA, and in court practice. The first part of the paper shows the extent of the integration of laws relating to marriage, divorce, and the legal consequences of divorce under the MCA, as applied by the courts. The second part examines the situation of women in court cases concerning divorce, settlement of matrimonial property, and financial provision for spouses. The paper argues that, despite the above-quoted official assessment of the MCA as an important step towards integration of personal laws, the degree of integration of the laws at the legislative level has been rather small. A strong pluralistic element has, therefore, been maintained in the legal system. The legislators' limited attempt at the integration of the laws, in combination with other factors discussed

2. The five parts of the Act deal with 1) divorce, 2) other matrimonial causes, 3) financial provision, child custody and other relief, 4) jurisdiction, and 5) miscellaneous and supplementary.

3. MCA § 41(1), (2) (1971).

4. Victor Owusu (then Minister of Justice and Attorney-General, Republic of Ghana), 7 PARL. DEB. (2d ser.) 5, 177, 223 (1971).

5. Although a more exhaustive discussion of the concepts of integration and unification of the laws would be desirable, this is neither possible nor necessary within this paper.

later in this paper, seems to have the effect in practice that not much use is made of the possibilities provided by the MCA to apply an integrated law. Moreover, although the MCA contains quite a number of provisions which could considerably improve the situation of women who had been married under customary law when divorce and post-divorce matters later arise, it lacks clear provision for the protection of women in the important area of the settlement of matrimonial property at divorce. The vague formulations used in the relevant section of the Act might have contributed to the courts' adherence to principles of common law and equity relating to property determinations, rather than developing fair criteria for the settlement of matrimonial property under the provisions of the MCA. Women are thus still disadvantaged because many of their contributions to the acquisition of matrimonial property, particularly those which consist of housework and child care, are not acknowledged by the courts in the settlement of disputes over matrimonial property.

I. The Extent of Integration of Personal Laws

A. The Law of Marriage

The laws of marriage do not fall under the MCA, nor have they otherwise been integrated.⁶ In May 1961, the Government of Ghana had published a White Paper on marriage, divorce, and related problems of inheritance. In 1963, a Bill on Uniform Marriage, Divorce and Inheritance rules was published but never enacted;⁷ however, the reform of the law of inheritance was realized in 1985 by the enactment of the Intestate Succession Law.⁸ Therefore, contrary to Minister Owusu's official state-

6. In comparison, the Tanzanian Law of Marriage Act, No. 5 (1971), covers both marriage and matrimonial causes.

7. See *African Conference on Local Courts and Customary Law* 26 n.1 (Proceedings, Dar es Salaam Conference, Sept. 8-18, 1963). For some details of the Bill see W.E. Ekow Daniels, *Towards the Integration of the Laws Relating to Husband and Wife in Ghana*, 2 U. GHANA L.J. 20, 56 (1965) [hereinafter *Husband and Wife*]; J.R. Crawford, *Ghana: Marriage and Divorce*, 4 AFR. L. STUD. 27, 37 (1971); and Manuh, *Law and the Status of Women in Ghana* 29 (Afr. Training & Research Centre for Women, U.N. Econ. Comm'n for Afr. 1984).

8. PNDCL 111. The case, *Ribeiro v. Ribeiro*, discussed in this article (see the references in notes 78 through 81) went on further appeal to the Supreme Court. The decision, which by a majority of three to two affirmed this decision of the High Court, has been published after this article was submitted. See (1989-90 GLRD ns. 88 and 89). For notes and comments of the case, see 17 Review of Ghana Law.

ment on building a uniform law of marriage,⁹ this has not been achieved; marriage is still governed by different systems of laws.¹⁰

Three main forms of marriage are recognized by Ghanaian law: marriage according to one of the various customary laws, marriage according to Islamic law, and marriage under the general law, of the Marriage Ordinance.¹¹ The customary and Islamic forms of marriage are potentially polygamous,¹² while marriages under the Marriage Ordinance, which can be contracted either before the registrar or in church, are monogamous.¹³

The vast majority of marriages in Ghana, i.e., about eighty-six percent, are contracted under customary law. The number of marriages contracted under the Marriage Ordinance (so-called "Ordinance marriages") and of Islamic marriages amounts in each case to less than six percent of all the marriages.¹⁴

In most cases an Ordinance marriage is preceded by a customary law marriage which, by the marriage ceremony prescribed by the Marriage Ordinance, is then converted into an Ordinance marriage.¹⁵ A customary law marriage can also be merely "blessed in church" without raising the implication of its validity under the Ordinance. In other words, it remains a customary law marriage.¹⁶ A conversion of an Ordinance marriage into a customary marriage between the spouses is not possible.¹⁷

As mentioned above, one of the problems the Act sought to redress was the unequal status of Ordinance marriages and customary law mar-

9. See Owusu, *supra* note 4.

10. See also Anthony N. Allott & H.F. Morris, *Legislation: Ghana. Courts Act, 1971; Wills Act, 1971; Matrimonial Causes Act 1971*, 16 J. AFR. L. 59, 80 (No. 1, 1972) [hereinafter *Legislation*].

11. 14 LAWS OF THE GOLD COAST 127 (1881, rev. 1951).

12. The marriage may be either potentially or actually polygamous. "Polygamous" is used in the sense of polygynous.

13. The essential elements of the different forms of marriage are discussed, for instance, by Daniels, *Husband and Wife*, *supra* note 7; by Kofi Oti Adinkrah, *The Essentials of a Customary Marriage: A New Approach*, 12 REV. GHANA L. 40 (1980); and by Manuh, *supra* note 7.

14. See the 1960 Census (Republic of Ghana (1970) at 44); Kofi Oti Adinkrah, *Ghana's Marriage Ordinance: An Inquiry into a Legal Transplant for Social Change*, 18 AFR. L.S. 1, nn.67A, 68 (referring to the 1970 Census) (1980) [hereinafter *Inquiry*]; and Gaisie & J.C. de Graft-Johnson, *THE POPULATION OF GHANA* 48 (1976). These statistical figures should be taken with a certain precaution because statistical data of this kind is not always reliable, due to the lack of comprehensive registration of births, marriages, etc.

15. The time interval between the two can vary between a few days and several years. On problems of conflict between the two forms of marriage and problems of conversion see *Husband and Wife*, *supra* note 7, at 26.

16. See e.g. Appomasi v. Bremawuo and Another (1980) Ghana Law Reports 278.

17. K. Opoku, *THE LAW OF MARRIAGE IN GHANA: A STUDY IN LEGAL PLURALISM* 51 (1976).

riages.¹⁸ However, an Ordinance marriage is still considered by the public to have higher prestige than a customary marriage. The law itself seems to place Ordinance marriages above customary law marriages.¹⁹ Such prejudices against couples married under customary law can probably be reduced only by a more comprehensive integrating law, which covers not only matrimonial causes, as the MCA does, but also the law relating to marriage and the effects of marriage.²⁰ Since the concepts of marriage, kinship and the family differ widely between customary law, Islamic law, and the general law, such a comprehensive law would have to take care of these different concepts and the ensuing problems in relation to, for example, the traditional participation of the extended family in marriage and divorce matters in a modern context.

B. Divorce and Legal Consequences of Divorce: The Matrimonial Causes Act of 1971 (Act 367)

Unlike the laws of marriage, the laws of matrimonial causes, which include divorce and the legal consequences of divorce, have been the subject of an integrating statute: the Matrimonial Causes Act of 1971 (MCA).²¹ As already stated, this Act integrates the laws of matrimonial causes in so far as it can be applied, with certain modifications, to all forms of marriage.

The MCA applies to *all* monogamous marriages, which means that civil and church marriages contracted under the Marriage Ordinance can only be dissolved in a court and according to the provisions of the MCA. The Act applies to polygamous — that is, customary and Islamic — marriages²² *only on application* by one of the spouses.²³ This means that polygamous marriages can still be dissolved out of court, or by the District Court under customary or Islamic law (§ 37(1)(f) Courts Act 1971, Act 372). A question raised in this context is whether the court can assume jurisdiction to grant relief under the MCA in the case of a polygamous marriage, merely by the fact that a party to a customary law marriage

18. See PARL. DEB. *supra* note 4, at 222.

19. *Inquiry*, *supra* note 14, at 17; E.C. Ekow Daniels, *Notes and Comments: Defenses to Breach of Promise of Marriage*, 8 REV. GHANA L. 55 (1976) [hereinafter *Defenses*].

20. As is the case with the Tanzanian Law of Marriage Act of 1971.

21. See the Introduction *supra*.

22. The exact formulation in MCA § 41(2) is: "a marriage other than a monogamous marriage"; and in § 43: "'monogamous marriage' does not include a potentially polygamous marriage."

23. In comparison, the Tanzanian Law of Marriage Act [LMA] made judicial divorce obligatory for all forms of marriage. LMA, § 12.

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 MCA to the case.²⁴ In *Adjei v. Foriwaa*,²⁵ the former view was expressed and it was held that before the enacting of the MCA the High Court could only be requested to ascertain whether there was a valid customary marriage or whether such a marriage had been dissolved according to custom. But by virtue of § 41(2) of the MCA, any party to a polygamous marriage who seeks a relief from the High Court "must be deemed to have made an application to the court to apply the provisions of this Act to the marriage."²⁶

Subject to "the requirements of justice, equity and good conscience," the court, in cases of polygamous marriages, may "have regard to the peculiar incidents of that marriage in determining appropriate relief, financial provision and child custody arrangements," and it may "grant any form of relief recognized by the personal law of the parties, either in addition to, or in substitution for, the matrimonial reliefs afforded by this Act" (MCA § 41(2)). In the case of divorce, any facts recognized under the personal law of the parties as sufficient to justify a divorce must be taken into account (MCA § 41(3)). These provisions have been criticized for not clarifying the particular circumstances under which the court can grant certain kinds of relief.²⁷ Another question raised in this context is whether a party whose customary law marriage has already been dissolved extra-judicially can nevertheless still come within the ambit of this provision and raise post-divorce claims under the MCA in the court. One assumes so, taking into account the goal of the MCA to improve the situation of customary law wives, but so far there is no authority on this question.²⁸

24. W.C. Ekow Daniels, *Notes and Comments: Dissolution of Customary Law Marriages by the Court*, 9 REV. GHANA L. 71, 76 (1977) [hereinafter *Dissolution*].

25. Kumasi High Court (Mar. 18, 1980). Unless otherwise indicated, cases are unreported.

26. This view is in favor of the party applying to the court under the MCA, who is usually the wife (see *infra*). Research has not disclosed a case in which the husband pleaded against the application of the MCA, for example, because customary law would have been more advantageous to him. See also Gordon R. Woodman, *The Adaptation of Customary Law to the Matrimonial Causes Act, 1971*, 13-14 RE. GHANA L. 218, 219 (1982) [hereinafter *Adaptation*].

27. *Dissolution*, *supra* note 24, at 76.

28. In *Adai v. Sackey* (Accra High Court, Apr. 9, 1986) and *Domfe v. Adu* (Court of Appeals, July 15, 1985, digested in (1984-86) Ghana Law Reports Digest [hereinafter GLRD] n. 77), the marriage was already dissolved extra-judicially under customary law and only post-divorce matters were claimed. But these cases cannot be used as authority in the above question because the court applied not the MCA, but the English law of trusts, in combination with customary law in the first-mentioned case. The reasons for not applying the MCA were not indicated.

Only the High Court and the Circuit Court have unlimited jurisdiction in matters under the MCA (MCA § 43), but not the District Courts, which are the courts of the lowest instance.²⁹ Although in cases of undefended action, the Chief Justice may transfer a case to a District Court, most cases are disputed and therefore under the jurisdiction of the High Court and the Circuit Court.³⁰ Therefore parties who, for various reasons such as distance, costs, etc., find it difficult to go to the higher court are excluded from the benefits of the MCA.

In conclusion, both the limitation of jurisdiction to the higher courts, and the applicability of the MCA only on application by a party to the marriage represent major obstacles to the Act's integrating effect. Moreover, the Act does not provide for an integration of the laws relating to marriage. All this is contradictory to the intention of the Act, as pronounced by the then Minister of Justice and Attorney-General, Mr. Victor Owusu. In the second reading of the Bill in Parliament, he asserted that the intention was to help unify the marriage laws and "give some security and protection to women married under customary laws."³¹ However, one has to look at the legal situation in which the new Act was made in order to understand this rather half-hearted effort at integration and reform of the law.

Before 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."³² But it was considered to be problematic that a foreign law which had been and continued being developed in a foreign state under different cultural, social, economic and political circumstances was applicable in Ghana.³³ The Memorandum to the MCA deplores the fact that "more than a decade after achieving sovereignty and independence, Ghana is still dependent on Britain for its law of marital relations." England had enacted sweeping divorce law reforms in the 1960s, including the English Divorce Reform Act of 1969 and the Matrimonial Proceedings and Property Act of 1970, which came into

29. In comparison under the Tanzanian Law of Marriage Act, 1971, all courts (apart from the Court of Appeal) have concurrent original jurisdiction in matrimonial proceedings. LMA, § 76.

30. See also W.C. Ekow Daniels, *The Legal Position of Women Under Our Marriage Laws*, 9 U. GHANA L.J. 39, 58 (1972) [hereinafter *Legal Position*]. I did not come across any such case of transfer to the D.C. during my research.

31. PARL. DEB., *supra* note 4, at 223.

32. S. 17 Courts Ordinance, 7/1935, Cap. 4, saved by § 154(3) Courts Act 1960, CA 9; and by ¶ 93(2) Courts Decree, NLCD 84.

33. See *Husband and Wife*, *supra* note 7, at 45.

effect in Ghana on 1st January, 1971. This "occurred without consideration by any Ghanaian of whether the changes were appropriate."³⁴ The Minister of Justice and the Attorney-General, when introducing the Matrimonial Causes Bill to the Parliament, stated that "Ghana cannot abdicate its control over this very important field of legislation." The Minister therefore appealed to the House to give the present Bill its full support, "in the knowledge that we are hereby taking a further important step towards freeing ourselves from dependence on foreign laws, admittedly a belated step after nearly 15 years of independence."³⁵

The Act was declared in the Memorandum to be "distinctively Ghanaian," and to be intended to "provide a law of matrimonial causes which is in consonance with Ghanaian circumstances and Ghanaian traditions." The Memorandum continues that "it is hoped that the courts will view this Bill as a purely Ghanaian enactment and will not attempt to find its meaning or develop its concepts in relation to non-Ghanaian conditions."³⁶ However, the language of the Act was based, in most of its provisions, on the English law.³⁷ These statements seem to indicate that the most important point behind this statute was to enact a Ghanaian law in order to end dependence on the English legislator. Integration and Ghanaian law reform were apparently not of primary concern.

The "revolutionary" provision contained in MCA § 41(2), making the Act applicable to customary and Islamic marriages on application by a party to the marriage, was originally not included in the Law Reform Commission's draft but added later by the Minister of Justice and Attorney-General. This seems a further indication that integration and reform were not at the centre of this legislative undertaking.³⁸

Another reason for the half-hearted approach at integration may finally lie in the following. The customary law marriage, which is by far the most-used form of marriage in Ghana, is considered to be the proper Ghanaian form of marriage, while the Ordinance marriage is seen as the "white man's system of marriage." The Matrimonial Causes Bill was criticized by some MPs for dealing nearly exclusively "with the white man's system of marriage which is non-Ghanaian, while the majority of men in this country marry in the traditional way." It was considered best to keep the two systems apart because

34. Memorandum, Matrimonial Causes Bill, ¶ 1.

35. PARL. DEB., *supra* note 4, at 172.

36. Memorandum, Matrimonial Causes Bill, ¶ 3.

37. See also *Legislation*, *supra* note 10, at 12.

38. See PARL. DEB., *supra* note 4, at 222.

it is dangerous that the institutions which we, by our own customs and traditions, have come to accept but which are governed by fixed notions, should be equated with notions which are foreign and borrowed. The monogamous system of marriage is an imposed one. But since we accepted the Christian doctrine . . . and we have accepted those notions, we must seek to make quite clear and distinct that if we want to contract a monogamous marriage we must be guided by those notions. But if we want to accept the polygamous system of marriage, then we should be guided by the notions and principles of that system. To try to mix the waters of these two rivers . . . [would be] dangerous for this society.³⁹

This opposition to an integration of the customary laws and the general law relating to marital relations might have had another basis in the former English legal view, as expressed in *Hyde v. Hyde*,⁴⁰ that the courts had no jurisdiction over the dissolution of, and other matrimonial relief for spouses of, polygamous marriages. The reason behind this view in England had been that a polygamous marriage was not seen as a marriage but as a lower-ranking kind of union.⁴¹ This legal view still had considerable influence in Ghana when the MCA was about to be enacted.⁴² The differential treatment afforded to the two types of marriage might, therefore, have been a further factor for the legislator's reluctant attitude towards integration.

C. *The Practical Relevance of the Matrimonial Causes Act for Customary Law Marriages*

In order to find out the extent to which the MCA has been applied to customary law marriages in practice, I evaluated seventy-three cases decided by the High Court and by the Court of Appeal. These cases concerned divorce and other matrimonial causes, like custody and maintenance for children, financial provision for spouses, and the settlement of matrimonial property disputes. Most of the cases are from the period between September 1971 (when the MCA came into force) and February 1989 (when most of this research was done in Ghana).⁴³ Included in this

39. *Id.* at 186, 189.

40. (1866) L.R. 1 P. & D. 130; Peter M. Bromley & Lowe, *FAMILY LAW* 61 (1987) [hereinafter *FAMILY LAW*].

41. This principle was undermined by English courts only from the 1960s on and was statutorily abolished by the English Matrimonial Proceedings (Polygamous Marriages) Act 1972, later repealed and re-enacted by the Matrimonial Causes Act 1973, § 47. See *FAMILY LAW*, *supra* note 40, at 57.

42. *Dissolution*, *supra* note 24, at 73.

43. Pre-1971 decisions still play a role in certain questions and will, therefore, be quoted too.

evaluation are (a) cases reported and digested in the Ghana Law Reports (GLR) and the Ghana Law Reports Digest (GLRD) since 1971; and (b) unreported cases, mainly from the 1980s.⁴⁴ The seventy-three evaluated cases are taken from a selection of family law cases which I collected and the majority of which, apart from those decided by the Court of Appeal, originate from the High Court at Accra and from the other High Court centres in the country. My statistical overview is not a systematic and comprehensive evaluation of all the matrimonial cases of all High Court centres since 1971, but we can probably assume that it is sufficient to reflect a certain trend.

Out of the seventy-three matrimonial cases evaluated, sixty-one were concerned with Ordinance marriages⁴⁵ and marriages contracted abroad,⁴⁶ nine with customary law marriages, and three with Islamic marriages.⁴⁷ Thus, although Ordinance marriages cover only a small percentage of marriages contracted in the country, they appear to be in the majority of matrimonial cases dealt with under the MCA. Customary law marriages, on the other hand, representing the vast majority of marriages in the country, appear only in a small minority of these cases; they are mostly not dealt with under the MCA.

What are the reasons for the rare application of the MCA to customary law marriages? Why are the dissolution of these marriages and the legal consequences of the dissolution not dealt with under the MCA in most cases? The first reason is probably the simple matter that judicial dissolution of customary marriages — different from Ordinance marriages — is not obligatory since in the case of these marriages, the MCA applies only on application by a party to the marriage. However, the MCA offers a number of possible advantages, particularly to women, which could

44. For reasons of time, I could not go as far back as 1971 with this evaluation.

45. In 21 of the 61 cases the form of marriage was not mentioned but one could assume that these were most probably Ordinance marriages. This assumption was based on the fact that the 21 cases differed from the cases of customary marriages in one or several of the following points. In most of the cases of customary marriages, the court mentioned expressly the applicability of the MCA to customary marriages, since this was rather the exception than the rule. In some of the cases of customary marriages, the court referred to customary reliefs either in substitution for, or in addition to, the reliefs available under the MCA. In most of the cases of customary marriages, the wife had not assumed her husband's name on marriage. It is admitted that there is a small element of uncertainty in this assumption which could only be removed by an examination of the complete case files.

46. Eleven of the 61 marriages were contracted abroad, most of them in England.

47. Because not much is to be said in this context about the number and circumstances of the cases of Islamic marriages, these will not be dealt with specifically in the following.

indeed cause them to go to court, although this is not obligatory.⁴⁸ One can therefore assume that other reasons play a role in parties' ignoring the MCA. One obstacle, which was already mentioned above, is that District Courts, which are the courts of the lowest instance and therefore closest to the people, have no jurisdiction to apply the MCA.⁴⁹ Taking a case before the High Court is a barrier too high for many people to overcome, particularly for those in rural areas, the uneducated, and the poor. These people are unable to cope with the problems of distance, poor transportation facilities, travel costs, use of an unknown court language (English), highly formalized and therefore unintelligible court procedures, court fees, and the cost of legal representation. Thus the legislator's limited effort towards integration of the laws mentioned earlier, which finds its expression in the merely optional applicability of the MCA to customary marriages and in the exclusion of the District Courts from jurisdiction under the MCA, is reflected and re-enforced in practice.

Problems relating to the realization of family law reform are common to many African countries and a further reason for the rare application of the MCA to customary marriages in Ghana.⁵⁰ The people's lack of knowledge about the possibility of applying for relief under the Act is one such factor in Ghana. Also, it is not always easy for somebody who is living in the traditional setting to escape the framework of customary law as applied in the local community, and to seek a relief in the state court which is not accepted under the local customary law. Thus a woman might not easily sue her husband in court under the general law, if this is not in line with the customary law of her local community.⁵¹

We have seen that only a few women married under customary law benefit from, or use, the MCA. Next, we look at the provisions of the

48. See *infra*. It is interesting to note in this context that in all nine cases in which customary marriages appear, the petitioners are women and apparently expect protection from the MCA which they would not get extra-judicially under customary law.

49. With the only exception for undefended cases.

50. See, e.g., B.A. Rwezaura & Ulrike Wanitzek, *Family Law Reform in Tanzania: A Socio-Legal Report*, 2 INT'L J.L. & FAM. 1, 2, 14 (1988) [hereinafter *Family Law*].

51. I made this observation during my research in the Upper East Region. P.W. Jones-Quartey makes a similar statement in relation to an Anlo-Ewe woman who would not sue their 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." P.W. Jones-Quartey, *The Effects of the Maintenance of Children Act on Akan and Ewe Notions of Paternal Responsibility*, in DOMESTIC RIGHTS AND DUTIES IN SOUTHERN GHANA (Christine Oppong ed. 1974). On the other hand, women in other societies may well behave differently and take advantage of the state courts and the state legal system. See, e.g., *Family Law*, *supra* note 50, at 14.

MCA on divorce and legal consequences of divorce, and at the way in which the Ghanaian courts handle issues of matrimonial property and financial provisions. This is to show the extent to which the MCA could, particularly in comparison to customary law, affect an improvement on the situation of women, if more cases of customary marriages were dealt with in the courts than presently appears to be the case.

III. The Legal Situation of Women in Divorce Under The Matrimonial Causes Act

A. Divorce

Either party to a marriage can present to the court a petition for divorce (MCA § 1(1)). The petition cannot be presented within two years from the date of the marriage, except for cases of substantial hardship (MCA § 9(1), (2)). Divorce can be granted only on the ground that the marriage has broken down beyond reconciliation (MCA § 1(2)).⁵² The facts which may indicate an irreparable breakdown of marriage are listed in MCA § 2(1)(a)-(f), and additional facts relevant in case of a customary marriage are listed in MCA § 41(3).⁵³ The MCA, unlike some of the customary laws, allows the wife to initiate the divorce. She can get a divorce on the basis of the breakdown principle, rather than depending on the willingness of the two families involved to pronounce, or agree to, the divorce, and particularly on the ability and readiness of her own family to return the bridewealth.⁵⁴

52. See *Donkor v. Donkor* (1982-83) GLRD 124 on the requirements of evidence of breakdown of marriage.

53. For an exhaustive discussion of the grounds for divorce see M.O. Adesanya, *Divorce in Ghana and Nigeria: A Comparative Study in Legislative Reform*, 8 REV. GHANA L. 91 (1976). The breakdown principle of the MCA was combined with customary law grounds for divorce in the following cases: In *Fuah v. Appoh* (Accra H.C., Aug. 4, 1986), the court combined, as provided for by MCA § 41(3)(a), the breakdown principle of the MCA with the customary law ground for divorce of "wilful neglect to maintain wife or child" which, in this case, had arisen out of the husband's second polygamous marriage (the husband's second marriage had caused the breakdown of the first marriage also in *Mensah v. Berkoe* (1975) 2 GLR 347); and in *Abobor v. Abobor* (Accra H.C., Feb. 16, 1987), with the principle that "under customary law it is permitted, when the living together of the couple has become impossible, to dissolve the marriage." See also S.Y. Bimpong-Buta, *Proof of Breakdown of Marriage*, 11 REV. GHANA L. 131-3 (1979).

54. See *Legal Position*, *supra* note 30, at 60.

*B. Settlement of Matrimonial Property*⁵⁵

1. Court Powers to Determine and Settle Property Rights

In matters of matrimonial property two types of issues must be distinguished. The first issue is the *determination* of a dispute between spouses or ex-spouses as to who holds, at the date of action, a particular property right. The procedural obstacles to such actions between spouses which existed earlier in English law were removed by the Married Women's Property Act 1882 in England, and by the corresponding Married Women's Property Ordinance 1890 (Cap. 131) in Ghana.⁵⁶ Since the enactment of the Matrimonial Causes Act in 1971, MCA § 21(1) ("conveyance of title") provides a convenient procedure for conveyance of title and divorce or nullity in instances where there are simultaneous proceedings. 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, it shall order, upon such terms as it thinks just and equitable, the transfer or conveyance of the interest to the party entitled to it. Furthermore, common law and equity contain a number of principles relevant to the determination of property disputes of any kind, not just those between married parties, which were applied to matrimonial property disputes before the MCA was enacted, and which continue to be applied side by side with the Act as shown below.

The second type of issue in matters of matrimonial property is the *alteration* of the parties' property rights. In a relatively recent innovation in both English and Ghanaian law, the courts are empowered in matrimonial proceedings to alter the spouses' property rights, as is provided for in MCA § 20 ("property settlement"). Under this section, the court can 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. The court can order the payment to be made either in gross or by installments.

In practice, one should assume that this second process of altering parties' property rights tends to supersede the first process of merely

55. I am grateful to Professor Gordon R. Woodman for many clarifications which helped me write this section.

56. The latter was repealed in 1973 by NRCD 228 probably because MCA §§ 20 and 21 are now apt to deal with this type of case.

determining their property rights. However, 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. Even where MCA § 20 is the *expressis verbis* referred to, the argumentation is often more or less the same as that applied to the mere determination of property rights under common law and equity.⁵⁷

Apart from the court's recently acquired and often ignored powers under MCA § 20 to order the settlement of property rights, the law regarding property rights is as follows under common law and equity: under the common law, a person to whom property is conveyed always becomes the owner thereof. However, in certain exceptional circumstances, equity considers it unconscionable for a legal owner to take the benefits of property. It compels the legal owner to hold it in trust for another person. The various types of such trusts which appear in the court decisions are the following:

a. Parties' Agreement on Joint Ownership/Implied or Resulting Trust

The parties can agree upon their joint ownership or upon the beneficial ownership of the property by one or both of them. Where it is concluded that it was the implied intention of the parties that the owner holds the property in trust for the other party, the other party has a beneficial interest in the property. The parties' intention might be expressed in the conveyance which states in whom the legal title or the beneficial title is to vest.⁵⁸ Where no written document exists, as is probably more often the case, or where the conveyance is silent as to who is the beneficial owner, parol evidence can be admitted as to the parties' intention at the time of acquisition of the property. Generally, the requirements of evidence are reduced in the case of a married couple:

57. See e.g., *Achiampong v. Achiampong* (C.A., Jan. 26, 1983), digested in 104 GLRD (1982-83).

58. W.C. Ekow Daniels, *The Ascertainment of Property Rights Between Husband and Wife*, 10 REV. GHANA L. 137, 145 (1978) [hereinafter *Ascertainment*]; see also FAMILY LAW, *supra* note 40, at 530.

Once the court found, as in the instant case, that the transaction was such that the parties must have intended it to be binding, the court had to give effect to it even though there was no carefully formulated agreement. In the case of husband and wife, the strictness usually required where the parties were strangers could be dispensed with.⁵⁹

b. Presumption of Implied or Resulting Trust: Inference from Parties' Conduct

In the absence of any evidence establishing the parties' intention, an inference can be drawn from their conduct. Equity presumes that the parties intended that the one who has acquired the legal title was to hold it in trust for the one who provided the resources, or to hold a share in trust for the one who provided a proportionate part of the resources. As indicated, the presumption can be rebutted by producing evidence that this was not in fact the parties' intention. The circumstances or the manner of acquisition of the property are looked at, particularly (apart from some other factors⁶⁰) the amount of contribution or assistance of each spouse. Where property is purchased by contributions from both spouses, but the legal title is conveyed to only one of them (in practice usually the husband), a presumption of implied or resulting trust (in favor of the wife) arises. The contribution by the wife must be "substantial" in order to be recognized, and it may consist of direct or indirect financial contributions: for example, if a wife helped in the husband's business without receiving wages, or if the wife paid for the household upkeep. Also, the wife's contribution does not have to be entirely financial.⁶¹

On the amount of the wife's entitlement, Ghanaian courts follow Lord Denning's holding in *Nixon v. Nixon*,⁶² that if husband and wife acquired a shop and business after they married, and if they acquired it by their

59. *Achiampong v. Achiampong* (C.A., Jan. 26, 1983), digested in 104 GLRD 257, 260 (1982-83).

60. Other factors might include circumstances where there is a gratuitous ("voluntary") conveyance, or where property is purchased by someone other than the party to whom the legal title is transferred ("purchase in the name of another"). Gordon R. Woodman, *Purchase of a Husband in the Name of His Wife — Deviousness or Generosity?*, 13-14 REV. GHANA L. 185, 195 (1982) [hereinafter *Purchase*].

61. See *Ascertainment*, *supra* note 58, at 146; *Yeboah v. Yeboah*, 2 GLR 114, 125 (Accra H.C., July 20, 1971, 1974) (indirect contribution "in time and effort"). See also, on the "substantial contribution", *Jaouhari v. Jaouhari* (Accra H.C., May 5, 1981); *Abobor v. Abobor* (Accra H.C., Feb. 16, 1987); *Adai v. Sackey* (Accra H.C., Apr. 9, 1986).

62. (1969) 3 All E.R. CA 1133, 1136. See also *Yeboah v. Yeboah*, 2 GLR 114 (Accra H.C., July 20, 1971, 1974).

joint efforts, it was their joint property, regardless of the fact that the property was in the husband's name. "In such a case [he said], when she works in the business afterwards, she becomes virtually a partner in it — so far as the two of them are concerned — and she is entitled, *prima facie*, to an equal share in it." Further reference has been made to *Rimmer v. Rimmer*⁶³ with regard to the shares which should be granted to husband and wife:

It seems to me that the only general principles which emerge from our decisions are, first, that cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property, and secondly, that the old-established doctrine that equity leans towards equality is peculiarly applicable to disputes between husband and wife, where the facts, as a whole, permit of its application.⁶⁴

c. Presumption of Advancement

Another equitable presumption sometimes referred to in disputes over matrimonial property is the presumption of advancement, which may counteract the above-discussed presumption of implied or resulting trust. In certain situations it is considered more likely that the party who provided the purchase price intended to confer a benefit on the other party; for instance, where the party who provides the resources is the husband of the other.⁶⁵ In this case it is presumed that the provider of the property, contrary to the usual presumption, had a generous intention. This presumption too is rebuttable by evidence of a contrary intention.

In *Ramia v. Ramia*,⁶⁶ the husband and wife had married first customarily and then under the Marriage of Mohammedans Ordinance. After their separation, the husband brought an action to have the wife convey a house to him which he had built for her and which was registered in her name. He claimed to have retained the equitable interest in the property as beneficiary of the estate, and that the wife held the legal estate in trust for him. The wife rejected this claim and asked the court to apply the presumption of advancement in her favor, which the husband contradicted

63. (1953) 1 Q.B. 63, 76 (Romer LJ).

64. See also *Smith v. Baker*, (1970) 2 All E.R. 826, 829, with similar conclusion by Widgery, LJ.

65. But not if this is the wife of the other party. The presumption also arises where the party who provides the resources is the lawful father of, or stands *in loco parentis* to, the other.

66. *Ramia v. Ramia*, 20 GLRD 4 (C.A., Apr. 14, 1981).

because, among others, it applied only to monogamous marriages. The court found the doctrine of advancement so well entrenched in the Ghanaian legal system that any attempt to limit its application exclusively to monogamous marriages, in a society essentially polygamous, was untenable. The court said:

The doctrine . . . is equitable, based not on the type of marriage contracted by the parties but on 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.⁶⁷

2. Courts Determining Instead of Altering Matrimonial Property Rights

Above are discussed the principles according to which property disputes are decided. This section will illustrate how these doctrines of common law and equity in the determination of property have been applied by the Ghanaian courts to the disadvantage of women, while the provision of the MCA for the alteration of matrimonial property, which could have led to fairer results, has been continually ignored.

First to be discussed are two cases in which the wife actually received an adequate share in the matrimonial property because she fulfilled the criteria of a "substantial contribution." At the same time, however, these cases show the shortcomings of these criteria when compared with other cases.

In *Achiampong v. Achiampong*,⁶⁸ the parties married in 1971 under the Marriage Ordinance. The husband was a foreign service officer in the Ministry of Foreign Affairs and the wife was a graduate teacher in the Ministry of Education. The husband bought a house on hire purchase terms and, over a number of years, monthly installments had to be paid. The wife had originally intended to buy her own estate house with her savings and a loan. But the husband requested her to give up this idea because it would be a constraint on their budget if they had to pay monthly installments on two estate houses. He suggested utilizing her

67. *Id.* at 13; reference to *Pettitt v. Pettitt* (1970) A.C. 777. For a discussion of *Ramia* and further references, see *Purchase*, *supra* note 60, at 195-9.

68. *Achiampong v. Achiampong*, 104 GLRD 257, 260 (C.A., Jan. 26, 1983).

savings and part of her monthly salary to help with the maintenance and upkeep of the household. This enabled the husband to use a major part of his salary to pay the monthly installments. The wife raised a loan from her employer in order to make extensions to the house and, on her husband's suggestion, sold her car so that the husband could use the proceeds to defray the wedding expenses.

When the marriage was dissolved in 1979, the wife claimed joint ownership of the estate house under MCA § 20(1). The High Court made a declaration that the wife had a beneficial interest in the house in equal shares with the husband. The husband's appeal against this decision was dismissed by the Court of Appeal. The Court of Appeal found that there was an agreement between the spouses that the wife was to have a beneficial interest in the house, the legal owner of which was the husband. Even if there were no such agreement, said the court, "the circumstances surrounding the acquisition of those properties and the conduct of both parties was such that equity and good conscience would not have permitted either of them to claim exclusive beneficial interest in the properties and leave the other destitute." This argument was based on the finding that the wife had contributed substantially to the acquisition of the house. The result was, therefore, in favor of the wife whose right in the house, in equal shares with the husband, was acknowledged.

This decision is one of the few in which MCA § 20 is referred to by the court *expressis verbis*, and in which it is stated that MCA § 20 gives "a discretion to the court to *alter* the proprietary rights of the spouses if in doing so it would be just and equitable" (emphasis added). However, despite this clear statement, the court later in its decision refers to the English common law and equity principles on the mere *determination* of property, i.e., a decision based on the agreement of the parties on a beneficial interest, or alternatively on the presumption of resulting trust on the basis of a "substantial contribution" in money or money's worth, made by the wife.

An equally positive decision, based on the same principles of presumption of implied or resulting trust because of the wife's "substantial contribution," but delivered in the case of a customary law marriage, was taken by both the High Court and the Court of Appeal in *Domfe v. Adu*.⁶⁹ The couple in this case was married under customary law and operated a joint business. The wife had provided the initial capital and

69. *Domfe v. Adu*, 77 GLRD (1984-5) (C.A., July 15, 1985).

travelled extensively, buying goods for the shop, which was kept by the husband. The business prospered and, out of the profits, they built one house for their child, acquired two other houses and seven cars, built up a substantial inventory for the shop and a large balance in their joint account. The husband was educated while the wife was illiterate. The marriage was dissolved under customary law, out of court, on the husband's initiative. Since he refused to give the wife any share in the business or the properties they had acquired, the wife brought an action in the High Court, claiming an equal share in the properties. The evidence showed that the parties had established a joint business, that the wife had contributed substantially toward its establishment, and that the parties jointly operated the business. The court therefore found that even though the business was registered in the husband's name as the sole owner, he held it in trust for both himself and the wife as the real beneficiaries of the business.

With these two decisions of the Court of Appeal in favor of the wife, one might ask, what then is the problem, if any at all, for women in disputes over matrimonial property. The problem, despite the positive decisions in the instant cases, is three-pronged: (1) that in cases of customary marriages even a straight-forward and financial contribution by the wife does not usually count (contrary to *Domfe v. Adu*); (2) that the contributions made by a woman as housewife and mother to the acquisition of the matrimonial property are not accepted as a "substantial contribution"; and (3) that many women are not able to provide required evidence of their contribution. In the following, examples of these three groups of cases will be given.

a. The Contributions Made by a Customary Law Wife

The disadvantages to the wife under the actual approach of the courts merely to determine the property rights, as opposed to the alteration of ownership, are particularly evident when one looks at customary law marriages.⁷⁰ Where the marriage was contracted under customary law, the courts often refer to the rule in *Quartey v. Martey*:

[B]y 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

70. *Domfe v. Adu, id.*, is an exception.

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 the children. The right of the wife and the children is a right of maintenance and support from the husband and father.⁷¹

Based on this purportedly customary law argument,⁷² property claims by wives married under customary law have often been rejected, even where the claim would have been justified under common law and equity (and even after the decision in *Domfe v. Adu* was delivered by the Court of Appeal). Thus, in *Jonas v. Ofori*, a couple was married under Ga customary law. The husband had started building a house before the couple married. At divorce, the wife claimed joint ownership in the house because she contributed to the construction of parts of the house. While the husband was away on the high seas working with the State Fishing Corporation, the wife, with her mother's assistance, supervised and partially financed the building of an extension to the house and of the water system. She also used her own money to look after the children. For lack of evidence, the court did not accept these statements; apart from that, it generally held:

The customary position is that a wife does not acquire joint ownership with husband in properties which she has helped him to acquire. The position might be slightly different if they had agreed to put up the house jointly in which case it would not matter if the marriage was under the Ordinance or customary . . . Whatever assistance the [wife] had given was not substantial; it had been given in return for the comfort and security the [husband] gave to her and her children in the home.⁷³

In *Abobor v. Abobor*,⁷⁴ a couple was married under Ewe customary law in 1966. They had five children. The husband had a second wife. The wife claimed joint ownership in the landed matrimonial property, consisting of three houses. The court held that there was no doubt that the wife was a hard-working woman and that she carried out various business activities. However, it thought that the evidence did "not show satisfactorily how much she earned through these activities though it cannot be denied that some of her earnings went into helping to keep the

71. *Quartey v. Martey*, (1959) GLRD 377, 380 (Accra H.C., Nov. 17, 1959).

72. For criticism of this argument, see *Ascertainment*, *supra* note 58, at 137.

73. *Jones v. Ofori*, (Accra H.C., Jan. 11, 1988); see also *Abobor v. Abobor* (Accra H.C., Feb. 16, 1987); as an earlier example see, e.g., *Clerk v. Clerk*, (1968) C.C. 99. See the critical case note by Albert J. Fiadjoe (1969).

74. *Abobor v. Abobor* (Accra H.C., Feb. 16, 1987).

family.” She bought building materials and supervised the construction works on the building. Although the court accepted that she looked after the household and all its needs and that, as a salary earner and business woman, she contributed to the household, it found she had not contributed enough to make the property joint property. She and her co-wife

kept [only] to their wifely duties; neither became entitled to any share of the [husband’s] properties [which] belonged exclusively to the [husband]. . . . The English law position as accepted also under the customary law is that a wife does not share property with the husband merely on the fact that she had provided wifely duties. By custom, neither the wife nor the children acquire any proprietary interest in the husband’s farm or buildings merely because they had helped him to cultivate the farms or put up the houses [T]his is a customary duty they owe him⁷⁵

b. The Contribution as a Housewife and Mother

As was shown above, the “substantial contribution” by the wife to the acquisition of matrimonial property plays a central role in the determination of property disputes according to common law and equity. By their definition of a “substantial contribution,” the courts, however, undermine the wife’s rights in the matrimonial property in many cases. The mere contribution by a wife as a housewife and mother was, in the cases evaluated, never considered to entitle the wife to a share in the matrimonial property, whether under common law or customary law.

In *Gyang v. Gyang*,⁷⁶ a couple married in England in 1972 and had one child. They separated in 1976. The matrimonial home was obtained by the husband, apparently without the financial support from the wife. The court held:

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.

In *Clerk v. Clerk*⁷⁷ the couple had married in 1929 and were now eighty and seventy years old respectively. They had been living apart for the past fifteen years and had several adult children. The wife applied

75. *Id.*

76. *Gyang v. Gyang* (Accra H.C., Jan. 30, 1987).

77. *Clerk v. Clerk*, 55 GLRD 160 (Accra H.C., Mar. 29, 1980, 1981).

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 refused her claim. It found that her entitlement to a share in the matrimonial property 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 a woman who had a job or would have worked," she did not get a share in the matrimonial property.

On the other hand, in *Ribeiro v. Ribeiro*⁷⁸ the High Court came very near to recognizing housework as a relevant contribution, but the Court of Appeal did not take the same view of the case. A couple had been married customarily for thirty-four years. The wife had been a housewife throughout the marriage and had looked after both her own children that she had with her husband, and the husband's other children that he had by other women. The husband was thus able to concentrate fully on his business. While he had not owned property before they married, during the subsistence of the marriage he had become a well-known printer and owned a printing press, landed properties comprising more than ten houses, stocks, and shares in various establishments. The marriage was dissolved in 1981. The husband had married another woman in the meantime and had conveyed three of his houses to her. The former wife claimed maintenance and "one of the houses . . . for her accommodation." This house was one of the three which the husband had conveyed to his new wife. 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 respondent in looking after the home, the children, some of whom were not the children of the marriage, entitle her to enjoyment of the houses which her husband acquired during the marriage.⁷⁹

The High Court therefore made an order to rescind the conveyance to the new wife of the house which the former wife wanted to have for her accommodation. The husband had to convey this house to the former wife "by way of settlement," and he had to pay a lump sum of Cedi 150,000 to the former wife as financial provision. The arguments and formulations used by the court give the impression that it had a property

78. *Ribeiro v. Ribeiro* (Accra H.C., Feb. 11, 1987) (C.A., July 28, 1988).

79. *Ribeiro* (Accra H.C., Feb. 11, 1987).

settlement in mind. If this were so, the decision would have been somewhat revolutionary in the sense that it granted the wife a share in the matrimonial property on the basis of her mere housework and childcare. But the Court of Appeal did not, as already stated, take the same view of the case.

The husband appealed to the Court of Appeal against the decision made below, and contended that there had been no legal basis for giving the house to the wife since there was no evidence showing that the wife made any substantial financial contribution towards its acquisition. Therefore, he contended, his liability was only to maintain the wife by making adequate financial provision, which might include accommodation, clothing, and feeding. He further submitted that the High Court should have given the wife, if at all, one of the houses still owned by the husband, not one of the properties conveyed to the new wife. The Court of Appeal thought, however, that the High Court had been right in its decision, and therefore dismissed the appeal.

The unfortunate aspect of this case is that the appeal court did not look at the case as a case of property settlement, but one of a mere financial provision. It responded to the point made by the husband's counsel:

[T]he 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 divorce⁸⁰

This view might have been partially due to the principles of the adversarial system under which the court cannot grant anything which was not requested. This gives the advocate a key role to play in the legal treatment of a case. It is astonishing that the wife's counsel in this case did not clarify this point and did not clearly apply for a property settlement. Apparently, the Court of Appeal would have been ready to grant the wife something more:

[H]aving regard to the wealth of the appellant and the circumstances of the wife-petitioner who was in her old age and who was entirely without means of support, it appears to me that the C 150,000 lump sum awarded her for maintenance for the rest of her life was woefully inadequate. She deserved something much better than this. But since

80. *Ribeiro*, 12 (C.A., July 28, 1988).

there was no cross-appeal, it would not be wise to interfere with the award.⁸¹

One cannot think of a more obvious case in which the wife “deserved something much better,” i.e. not only a right of accommodation and a lump sum, but a share in the matrimonial property. The Court of Appeal itself stated a very convincing basis for the granting of a share in the matrimonial property, but its decision did not reflect this. The Court assessed the case in the following way:⁸²

At the beginning of their married life, the appellant had no properties, not even a single plot of land. Then the appellant obviously set out to work hard. But the wife remained a full-time housewife throughout the marriage. She had never been required to earn money during her married life and she had neither trade, profession nor calling. She was made to devote all her energy and life serving the appellant, looking after the home and the children, including the children whom the appellant had outside the marriage.

Through her devotedness to duty as a housewife, and her various other invaluable services rendered to the appellant, prosperity smiled broadly on the appellant. So, at the time when the decree of divorce was pronounced, the appellant had amassed wealth which by Ghanaian standard could qualify him for the appellation of “a rich man.” His houses alone numbered ten, two of which were in London Quite apart from landed properties, he owned thousands of stocks and shares in a bank and in a certain company. He also owned a press — Arrow Press — which was a going concern and from which he had been earning, to put it mildly, an appreciable income. On top of it all, he had been engaged in other businesses.

In view of all this material wealth, was it too much to ask the appellant to accommodate such a devoted wife-petitioner just in one of the several houses acquired during the marriage, undoubtedly, with the indirect contribution and assistance from the wife-petitioner?

It seems to me that it was the height of ungratefulness and greediness on the part of the appellant to deny the wife-petitioner just one house where she could lay her weary limbs in the evening of her life, having devoted the best years of her life to serving and looking after him. No court of equity looking at the circumstances of this case, would permit the appellant to have his own way. If the appellant could shower about

81. *Id.* at 15.

82. Because of its importance, the argumentation of the C.A. will be quoted in detail.

three houses on a woman who was only his mistress and who had never struggled with him, as the wife-petitioner did, then what was his justification in law or in equity for complaining about the order which had the effect of asking him to make available just one house for the accommodation of the person who struggled with him to acquire those houses? It is hard to understand why the Court did not use this case to clarify the question that her contributions as a housewife and mother could justify her share in the matrimonial property. One wonders whether the Court of Appeal could not at least have stated in an *obiter dictum*, that a division of matrimonial property would have been justified, had there only been a cross-appeal and application for it by the wife and her counsel.

c. Problems of Evidence

In *Otoo v. Otoo*,⁸³ a couple had been married customarily for nineteen years before they married under the Marriage Ordinance in 1972. They had six adult or near adult children. The husband worked with the Social Security and National Insurance Trust, and the wife was employed as a saleswoman and was also a trader. The husband acquired a house with a loan from his employer. The wife stated that: (1) she made contributions towards the building, (2) the husband did not give her any housekeeping money, but (3) he asked her to pay the children's school fees, and (4) she paid money to the workmen engaged in the building. The first three statements were not contested by the husband, but the final statement was. The wife stated she did not get any receipts from the workers, but informed her husband each time she paid money to them. The husband did not refund to her these payments, and she did not expect it because he had told her that he was building the house for her and the children. In the divorce proceedings, the wife claimed a half share in the said house, the matrimonial home. The High Court refused her a share, stating:

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 payment 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.

The Court also stated that as the wife could neither produce any receipts nor mention the names of the workers to whom she had paid the money,

83. *Otoo v. Otoo*, 9 (Accra H.C., June 26, 1984).

she had no concrete evidence that she had actually paid money to the workers. The Court was therefore satisfied that the wife “did not contribute for the purchase of the matrimonial home.”

Similarly, in *Adai v. Sackey*⁸⁴ the wife was not able to produce sufficient evidence of her contributions. The couple had been customarily married for nearly fifty years. The marriage was dissolved under customary law, out of court, and the wife claimed a house as her share in the matrimonial property. She stated 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 farms to put up . . . the house in dispute in Accra.” The court, however, found that there was no evidence to support these allegations. It therefore 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 did not get any share in the matrimonial property.⁸⁵

The deplorable situation arising from the cases discussed in this section can certainly be circumvented under MCA § 20, as it has indeed been by somewhat similar provisions of the English Matrimonial Proceedings and Property Act of 1970/Matrimonial Causes Act of 1973 (§§ 23, 24, 25). Section 20 of the MCA confers on the courts the power and duty to order property rights to be changed in divorce cases where this seems necessary for justice. It is regrettable that the courts in Ghana hardly make use of this possibility, and they are not urged to do so by the advocates. It could, for instance, help to overcome the distinction between “substantial contribution” and “mere housework and childcare.” Looking at the wide range of women’s activities in the productive and reproductive sectors that contribute to the well-being of the family, such a distinction does not appear to make much sense.

Before a conclusion can be drawn from the decisions discussed in this section, it is important to examine what financial provisions and other awards have been granted to wives, particularly to those whose claim for a share in the matrimonial property has been rejected.

84. *Adai v. Sackey* (Accra H.C., Apr. 9, 1986).

85. But she was only granted a right to live in the house with her children subject to good behavior for her life or until she remarries; see also below. Problems of evidence as to the wife’s rights in the matrimonial property also arise in *Abobor*, *supra* note 74, and *Odoteye v. Odoteye*, 61 GLRD (1984-86).

C. *Financial and Other Provision for Spouses or Former Spouses*

1. Statutory Provision for Financial Relief

During marriage, either party may petition the court for an order for maintenance on the ground that the other party has “willfully neglected to provide, or to make a proper contribution towards, reasonable maintenance . . . for the petitioner. . . .” (MCA § 16(1)).⁸⁶ For instance, a wife who has been deserted by her husband can base her claim on this provision. A wife is not deemed to have wilfully neglected her husband unless it is reasonable to expect her to provide or contribute towards his maintenance. The assessment criteria include any impairment of the husband’s earning capacity, the husband’s resources, the earning capacity and resources of the wife, and any other circumstances relating to the financial position of the parties (MCA § 16(2)).

Under § 19 of the MCA, the court can award maintenance while a matrimonial suit is pending or financial provision to either party on dissolution of the marriage.⁸⁷ Section 20 of the MCA on property settlement (see above) can also apply to financial provision. The court has to consider the parties’ standard of living and their life circumstances.⁸⁸ It may rescind or vary an order in respect of maintenance pending suit or financial provision (MCA § 17(1)). The right to financial provision ends upon remarriage of the entitled person, upon his or her death, or upon the death of the obliged person.⁸⁹

86. Furthermore, under Criminal Code (Act 29), § 79(1), a husband is obliged to “supply the necessities of health and life to his wife who is under his control.”

87. No order of financial provision for a spouse may be made subsequent to a decree of divorce if the decree contains an express waiver of financial provision; or provides for a money or property settlement in lieu of financial provision, and that settlement has been executed; or does not grant liberty to apply for financial provision in the future. See MCA § 27(2).

88. In *Ribeiro* the court held that under modern conditions it was not possible to attain the requirement that the wife should have the same standard of life as she had immediately before the divorce; the court stated instead that one had also to look at the existing conditions. Finally it held that the conduct of the party should be taken into consideration. *Ribeiro v. Ribeiro*, 3 (Accra H.C., Feb. 11, 1987). See the discussion on these points by W.C. Ekow Daniels, *Marital Family Law and Social Policy*, in *ESSAYS IN GHANAIAN LAW: SUPREME COURT CENTENARY PUBLICATION 1876-1976* 92, 110 (Daniels & Woodman eds. 1976) [hereinafter *Marital Family Law*].

89. For security for payment see MCA § 23; orders of restraint etc.: MCA § 25; orders relating to assets: MCA § 26.

2. Monthly Allowances and Lump Sum Payments

a. Monthly Allowances

Under the MCA, monthly allowances have been awarded to a wife in only a few cases, and even these are rather limited in their effect.⁹⁰ This is different from cases relating to maintenance of children, where frequent orders for periodic payments have been made.⁹¹ In *Abobor v. Abobor*⁹² and *Ahmed v. Ahmed*,⁹³ a monthly maintenance might, therefore, have been awarded to the wife, because of the existence of a child or children (it was awarded to the wife and the child or children)). In another case, the period during which monthly allowances were to be paid was limited.⁹⁴ It seems that the courts would generally rather try to avoid monthly payments, probably because they are aware of complications in the enforcement of such awards.

b. Lump Sum Payments

Financial provision at or after divorce is in most cases granted, not as periodic monthly payments but in a lump sum. The lump-sum payment is considered to have "the advantage of enabling the payee to invest it and use the income to live on," and to "enable the wife to meet any

90. In earlier cases, the amount awarded has been assessed by some courts according to the "one-third rule" (see also *ESSAYS IN GHANAIAN LAW: SUPREME COURT CENTENARY PUBLICATION 1876-1976 286* (Daniels & Woodman eds. 1976)). The incomes of both parties were added and divided by three; the wife's income was deducted from the dividend and the balance was the share which the husband had to pay. *Clerk v. Clerk*, 55 GLRD (Accra H.C., Mar. 29, 1980, 1981).

91. Maintenance for children was awarded in a number of cases on a regular monthly basis (*Fuah v. Appoh* (Accra H.C., July 4, 1986): Cedi 2,000 per month for three children in 1986; *Mensah v. Berkoe* (Kumasi H.C., July 19, 1975): Cedi 60 per month in 1975). In some cases the court tried to find solutions which make sure that the children get support even if the father does not pay regularly, e.g. in *Jonas v. Ofori* (Accra H.C., Jan. 11, 1986), where the maintenance consists of the children's right to stay in one room of one of the husband's houses, while the remaining rooms are to be let out and the proceeds therefrom paid to the wife for the maintenance of the children.

92. *Abobor v. Abobor* (Accra H.C., Feb. 16, 1987).

93. *Ahmed v. Ahmed* (Accra H.C., Oct. 4, 1988).

94. In *Addai v. Addai* (Accra H.C., Sept. 16, 1983), the court found that it was the responsibility of the husband to provide financial reward to the wife on divorce, especially when she had no means of her own. The wife in this case was a housewife; the court found that 15 years was too long for her to return to her profession, particularly since the wife was already about 50 years old and "things had changed". While the wife stayed in the matrimonial home, the husband therefore had to pay Cedi 400 per week; thereafter he had to pay the cost for her accommodation plus a lump sum financial reward of Cedi 15,000.

liabilities as expenses already reasonably incurred in maintaining herself or any child of the marriage. It will also help to remove the bitterness . . . so often associated with periodical payments"; and, finally, "once made, it could not be varied in the light of changing circumstances such as subsequent remarriage of the wife."⁹⁵

The lump sum payment can have different functions. It may serve as compensation in those cases where the wife is neither granted a property right nor a right to stay in the matrimonial home. In cases where the courts do not find that any "substantial" contribution to the acquisition of the matrimonial property was made by the wife, they do admit that she has made "some" contribution. In such cases she is then often granted a lump sum to compensate her for her "unsubstantial" contribution to the acquisition of the matrimonial property. It was held, for example, in *Gyang v. Gyang*:⁹⁶

She has lost the comfort and security of a house she has helped to build. I award her a lump sum compensation of C 150,000 to enable her to settle down fully to her new way of life.⁹⁷

In *Okang v. Okang*⁹⁸ it was held:

Since she has helped in a way in the acquisition of a property she no longer hopes to enjoy, I think she is entitled to some money to help her resettle in her new life. He [the husband], I believe, would have continued to support her out of his meagre resources. In the circumstances I will order that the [husband] pay the [wife] C 6,000 by way of lump sum provision.

These formulations reveal the second function of the lump sum payment, i.e., to "help the wife to resettle in her new life." This contains an element of maintenance but is usually, as the formulations show, limited to a period of adjustment to the new conditions of life as a divorced woman.

The third function of the lump sum payment becomes evident when the lump sum is referred to as "customary compensation." Following § 41(2) of the MCA, under which the court may "grant any form of relief recognized by the personal law of the parties, either in addition to, or in substitution for, the matrimonial reliefs afforded by this Act," several

95. *Aikins v. Aikins*, (1979) GLR 223, 225 (Sekondi H.C., June 22, 1978).

96. *Gyang v. Gyang* (Accra H.C., Jan. 30, 1987).

97. Her claim for half a share in the house had been rejected. Similar decisions: *Cloguh v. Cloguh* (Accra H.C., Aug. 1, 1986); *Abadji v. Abadji* (Accra H.C., Nov. 29, 1985).

98. *Okang v. Okang*, 6 (Accra H.C., Sept. 3, 1985).

cases have awarded the so-called “send-off” money, which exists under certain customary laws. This was done in *Abobor v. Abobor*,⁹⁹ in combination with the above mentioned aspects of the lump sum payment as compensation for contributions made, as well as maintenance for a period of adjustment. The court said:

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 . . . C 60,000 as a lump sum financial provision.

Similarly, in *Jonas v. Ofori*¹⁰⁰ the court refers both to the customary compensation upon dissolution of marriage, and to MCA § 19 on financial provision for the spouse. The customary lump sum compensation was thus awarded without reference to who was the guilty party in the divorce.¹⁰¹ In opposition to these decisions is *Adai v. Sackey*, where the marriage had been dissolved customarily out of court and the wife claimed send-off money in court, the court refused her claim, stating:

The [wife] insists that no send-off was paid to her. If that was so then it was her own fault. The proper place to claim send-off is at the place or time of the dissolution of the marriage. At that meeting the elders go into the matter and decide who is at fault for the breakdown of the marriage . . . [U]nder customary law the guilty party is not entitled to any send-off. I find that in the circumstances no send-off was payable.¹⁰²

The function of “send-off” money as a financial relief “to enable the wife to settle down in her new way of life,” which was acknowledged in the other cases quoted above, was not considered in this case. Instead, the court insisted on some rather outdated, purportedly “customary” criteria. The court also seemed to consider the decision of the informal

99. *Abobor v. Abobor*, 5 (Accra H.C., Feb. 16, 1987).

100. *Jonas v. Sackey* (Accra H.C., Jan. 11, 1988).

101. See also *Mensah v. Berkoe* (Kumasi H.C., July 29, 1975).

102. *Adai v. Sackey*, 3 (Accra H.C., Apr. 9, 1986).

forum of elders to be final and binding upon the parties concerned, a matter which would be worthwhile exploring elsewhere.

3. Wife's Right to Stay in the Matrimonial Home

In some cases in which the wife was not granted a share in the matrimonial property (and particularly not in the matrimonial home) because it was found that she had not contributed substantially to the acquisition of the property, the wife was at least allowed to stay in the matrimonial home — either until she had found some other accommodation, until she remarried, or for her lifetime.¹⁰³ In *Addai v. Addai*,¹⁰⁴ the wife was awarded neither a share in the matrimonial home nor a right to continue living there (apparently because the husband was given live-in priority).¹⁰⁵ The husband, however, had to find a place for the wife to stay “for life or until she remarries” because “a grown-up girl or a married woman is not the responsibility for the parents. . . . It is the responsibility of the husband to find her a suitable accommodation.”

Conclusion

From the foregoing discussion the following conclusions may be drawn regarding the potential situation of women under the MCA. The question considered in Part II of this paper was: Assuming that more women who are married under customary law made use of the possibility to apply for divorce, property settlement and financial provision under the MCA, what would they gain in comparison to their situation under customary law? Although it is difficult to give a general answer, the mere fact that the MCA: (1) provides for divorce on the application of husband *or* wife under the breakdown principle, (2) provides for the settlement of matrimonial property, and (3) provides for financial provision for a spouse, is beneficial to women because these rights are not available under most of the various customary laws. However, it is regrettable that, when consid-

103. See *id.* and *Abobor v. Abobor* (Accra H.C., Feb. 16, 1987).

104. *Addai v. Addai* (Accra H.C., Sept. 16, 1983).

105. Similar results are in *Fuah v. Appoh* (Accra H.C., July 4, 1986): neither a share in the matrimonial property nor a right to stay in the matrimonial home was granted; and *Adjei v. Foriwa* (Kumasi H.C., Mar. 18, 1980): the court examines both English law and customary law (in the case of a customary law marriage) and finds that under both laws the wife and children have no right to stay in the matrimonial home. Gordon R. Woodman provides a discussion of the relationship and content of common law and customary law in this question; and he suggests to also look at the law of intestate succession on the right to stay in the matrimonial home. See *Adaptation*, *supra* note 26, at 220.

ering the settlement of matrimonial property, the courts do not really put this benefit into practice. Maybe the courts' reluctance to apply MCA § 20 is due partly to the vague formulations used in it. If so, legislators should have provided a clearer statutory basis for the right of the divorced wife in a fair share of the matrimonial property. The courts, left with the difficult task of filling the vague provision of MCA § 20 with substantive criteria suitable for the settlement of matrimonial property, appear to keep to the old and well-known principles of common law and equity relating to the determination of property disputes, rather than developing criteria for a fair division of matrimonial assets under MCA § 20. In particular, one would wish that they pay more attention to the role of a woman as housewife and mother, which in many cases includes farm labor and other heavy work. Under contemporary social and economic conditions, it does not seem to be justifiable to ignore a wife's — sometimes nearly life-long — care for the home and family. It would appear to be arbitrary if, in a money economy like Ghana's, one accords certain activities their money's worth while denying it to others. A refusal to attach a monetary value to housework results, as B.A. Rwezaura has rightly pointed out, in "a false distinction between money and services, especially where the latter can be freely bought or sold A housewife's work . . . saves the money for the family which would otherwise go to meet the salaries of a housekeeper and a nanny" ¹⁰⁶

Although the courts often grant a lump sum compensation to the wife for her contribution, this is not usually done for "mere" housework in cases where this contribution is not considered to be "substantial." Furthermore, the amount of the lump sum does not always represent a fair reward for the wife's work done for the benefit of the husband and the family. It is suggested that not only the courts but also the advocates could play an important role in promoting this important point and in developing acceptable criteria for the assessment of housework and the computation of the resulting share in the matrimonial property.

With regard to the rare use of the MCA in cases of customary marriages (discussed in Part I above), a number of measures could be considered to improve the situation. Extending the jurisdiction for the

106. B.A. Rwezaura, *Division of Matrimonial Assets Under the Tanzania Marriage Law*, 17 VERFASSUNG UND RECHT IN UBERSEE 177, 181 (1984). See the decision of the Court of Appeal of Tanzania in *Bi. Hawa Mohamed v. Ally Sefu* (Civ. App. 9/83, Nov. 29, 1983), where the court decided that in determining the extent of contribution made by the wife towards acquiring the matrimonial assets, the wife's domestic work must be taken into account.

application of the MCA in defended cases to District Courts, for the reasons mentioned above, is one suggestion. Educating magistrates, advocates and the public, particularly women, on the reliefs possible under the MCA is another.

Understandably, the integration and reform of the law relating to marriage and matrimonial causes may not have received priority legislative and judicial treatment in the past, in view of other, apparently more important issues of concern. More emphasis has been put on the economic situation of widows after their husbands' deaths intestate, than on that of divorced wives. Cases of succession and inheritance among the matrilineal communities of Ghana, in which widows struggle against the claims of their late husbands' extended families, have been quite numerous. The legislature has finally tried to solve this problem by the enactment of the Intestate Succession Law of 1985 (PNDCL 111). Now, with the succession legislation out of the way, it is hoped that the Law Reform Commission, the courts, the advocates, and the women and their organizations can and will work together in the future for an improvement in the situation of women at and after divorce.

