

FAMILY LAW AND PRACTICE

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**FINANCIAL PROVISION UNDER CHRISTIAN AND
OTHER MARRIAGES**

LECTURE THIRTEEN

PRESENTATION OUTLINE

- Historical Introduction & Observations
- Common Law
- Equity
- The wife's separate estate
- Restraint upon anticipation
- Statutory reforms
- Statement of Property Rights
- Matrimonial Causes Act: Sections 18, 19, 20, 21, 22, 43

HISTORICAL INTRODUCTION & OBSERVATIONS

COMMON LAW

- ❑ Medieval law looked to the husband rather than the wife for the performance of feudal dues which arose from feudal tenure.
- ❑ Consequently, upon marriage the husband gained seisin of all freehold lands which his wife held at the time of marriage, or which she subsequently acquired during marriage.
- ❑ He was also entitled to the rents and profits of them.
- ❑ The wife had no power to dispose of realty during marriage, nor could the husband alone dispose of it for more than his own interest.

COMMON LAW Cont'd

- ❑ They could, however, dispose of the whole estate together by each of them levying a fine.
- ❑ In such cases the court would examine the wife separately to ensure that her consent had been freely given.
- ❑ If the husband died before the wife, she immediately resumed the right to all her freeholds ;
- ❑ If she predeceased him, her estates of inheritance descended to her heir, subject to the husband's right to retain seisin as tenant by the courtesy of England.

EQUITY

- ❑ Equity generally followed the law.
- ❑ In only one case was there a marked difference: whilst the husband was entitled to a life interest in his deceased wife's equitable freehold as a tenant by the courtesy, the wife was not entitled to dower in her deceased husband's equitable freeholds until the passage of the Dower Act in 1833.
- ❑ The husband's right to his wife's equitable interests in property was indefeasible once he had possession of it.
- ❑ But if the husband was obliged to invoke the aid of Chancery to obtain the property, the court gave the wife an 'equity to a settlement'.

EQUITY cont'd

- ❑ It applied the maxim 'He who seeks equity must do equity' and, if the property was such that the husband would have absolute power to dispose of it, it would lend him assistance only on condition that he settled an adequate part of it on his wife and children, for their maintenance.
- ❑ The most important contribution of equity to the law relating to a married woman's property was the development of the concept of the separate estate.

THE WIFE'S SEPARATE ESTATE

- ❑ By the end of the sixteenth century it was established that if property was conveyed to trustees *to the separate use* of a married, she retained in equity the same right of holding and disposing of it as if she were an unmarried woman.
- ❑ She could therefore dispose of it inter vivos or would call upon her trustees to convey the legal estate.
- ❑ Whilst the separate estate in equity did much to mitigate the harshness of the common law rule, there remained one situation it did not meet.

RESTRAINT UPON ANTICIPATION

- ❑ There was nothing to prevent a married woman from assigning her beneficial interest to her husband, thereby vesting in him the interest, which the separate use had sought to keep out of his hands.
- ❑ To circumvent this, equity developed about 1800, the concept known as the *restraint upon anticipation*.
- ❑ This could be imposed only if property was conveyed, devised or bequeathed to a woman's separate use, and, once it attached, it prevented her from anticipating and dealing with any income until it actually fell due.

RESTRAINT UPON ANTICIPATION cont'd


- ❑ The restraint on anticipation was designed to protect not only the wife but also members of her family who would be entitled to the property on her death.
- ❑ By the middle of the nineteenth century it was clear that the old rules would have to be reformed.
- ❑ More women were earning incomes of their own, either in trade, or on stage or by writing, and there were a number of scandalous cases of husbands impounding their wives' earning for the benefit of their own creditors, or even mistresses.

STATUTORY REFORMS

- ❑ No relief could be obtained by the woman whose husband deserted her and took all her property with him.
- ❑ The separate use and restraint upon anticipation were clumsy creatures which in practice only affected the property of the daughters of the rich, who would have carefully drawn marriage settlements, and would be the beneficiaries under complicated wills.
- ❑ Agitation for reform eventually produced a series of Acts of even wider scope.

STATUTORY REFORM cont'd

- ❑ **The Matrimonial Causes Act 1857:-**Sought to remedy two defects- 1) for the first time under English law the wife had the sole power to dispose of a legal interest inter vivos or by will; 2) if a wife were deserted, she could obtain a protection order to prevent her husband and his creditors seizing any property and earnings to which she became entitled after the desertion and to vest them in her as if she were a feme sole;
- ❑ **The Married Women's Property Act 1882:-** Most important of the 19th century reforms. Provided that any woman marrying after 1882 should be entitled to retain all property owned by her at the time of the marriage as her separate property and that, whenever she was married, any property acquired by a married woman after 1882 should be held in the same way.
- ❑ Note this Act in particular did not confer on married Ghanaian women any right, which women under customary law did not already possess at that time.

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- ❑ The Property Legislation of 1925
 - ❑ The Law Reform(Married Women and Tortfeasors) Act 1935
 - ❑ The Married Women (Restraint upon Anticipation) Act 1949

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SETTLEMENT OF PROPERTY RIGHTS

- ❑ What are property rights:- Property has been defined in various terms, and according Halsbury Laws of England 3rd Ed, “Property may be roughly described as comprising all forms of property movable or immovable, corporeal or incorporeal, other than freehold estates and interests in land(which may include chattels affixed to land(a) and its appurtenances.
- ❑ According to the Dictionary of English Law “.....in its largest sense *property* signifies things or rights considered as having money value, especially with reference to transfer or succession, and to their capacity for being injured.

DEFINITIONS

- ❑ 'Property' also signifies a beneficial right in or to a thing. Sometimes the term is used as equivalent to ownership: examples of immovable property are land and buildings.
- ❑ Rights is defined by the same dictionary as: *"that which is so directed in the protection and advantage of an individual. It has been described as a liberty of doing or possessing something consistent with the law"*.
- ❑ Thus **property rights** can be described as the liberty of possession, it involves a person invested with a definite interest or entitled to any movable or immovable property consistent with the law.

ASCERTAINMENT OF PROPERTY RIGHTS

Self (Individual) Acquired Property

- ❑ A man as well as a woman, has the right to own property in his or her own capacity.
 - ✓ These could be property acquired on their individual efforts or received as personal gifts or inherited.
 - ✓ Thus marriage has no effect whatsoever on such property which the parties acquire in their rights, either before or during the subsistence of the marriage.

Nature of Jointly Acquired Property

- ❑ Under customary law, there is nothing like joint interest in property between parties to a marriage.

ASCERTAINMENT OF PROPERTY RIGHTS cont'd

- ❑ In *Ribeiro v Ribeiro* {1989-90} 2 GLR 109 the Supreme Court was sharply divided in its opinion on the question of property rights between spouses.
- ❑ The primary issue of contention was whether section 20 of the MCA could be used to re-allocate the property of either spouse.
- ❑ The majority decision expressed an affirmative answer whilst the minority view was vehemently opposed to that idea.


S 21 of MCA

- ❑ The power of the court to ascertain the ownership of the property of either spouse is contained in section 21 of Act 367 which states

“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 other, the court shall transfer or conveyance of the interest to the party entitled to it upon such terms as the court thinks just and equitable.”

S 21 OF MCA cont'd

- ❑ It is this section which preserves the long established principle of separation of property in the laws of Ghana.
- ❑ It connotes that ' married people have no community of goods, but each hath his or her particular property'.
- ❑ Further, that each spouse retains what he or she acquired before and during marriage: that each can freely dispose of that property and be entitled to the income therefrom.
- ❑ This rule was of customary law origin.

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- ❑ The law governing property adjustment and financial provisions on divorce is set out in part three of the MCA which was drafted in accordance with the recommendations of the English Law Commission which contained the following drafting hints:
 - ✓ *The distinction in nomenclature between maintenance, alimony and periodical or lump sum payment should be abolished. All should be described as “financial provision” except alimony pending suit which should be renamed ‘maintenance pending suit’.*
 - ✓ *There should be no distinction between the powers of the court in relation to husbands and wives, or petitioners and respondents.*



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- ✓ *All forms of periodical financial provisions, but not maintenance pending suit, should be capable of being secured, and, if secured, of being awarded for the life of the payee or until he or she remarries whichever be the shorter.*
- ✓ *All periodical financial provision should cease on the remarrying of the payee and not to be capable of being revived.*
- ✓ *The court should be empowered to award a lump sum payment not only in respect of the future but also to enable the payee to discharge liabilities reasonably incurred prior to the institution of the suit.... And to order any lump sums to be payable by installment.*



- ❑ This explains the introduction of the expression “ financial provision” in section 43 of Act 367, between spouses upon dissolution of their marriage.
- ❑ Then also under the Act the expression “either party to the marriage” is used to refer to a husband or a wife.
- ❑ Section 18 of MCA directs the court to exercise any of the range of powers to order financial provision. These are wide-ranging and far-reaching.

S 19 & 22

- ❑ Sections 19 and 22 govern the award of financial provisions for a party to the marriage and/or a child of the household.
- ❑ Section 19 is not based on any proprietary interest or on the fact that the petitioner owns the property.
- ❑ For example, a non-working spouse may be awarded this kind of provision for taking care of the home and any other contributions that the spouse would have made to the developments of the family.

Section 20 of MCA

- ❑ Section 20 governs the power of the court to order a transfer of property as settlement of property rights or as part of financial provisions.
- ❑ Section 20(1) states that:
“The court may order either party to the marriage to pay 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 installments.*

Section 20 of MCA cont'd

- ❑ Section 20 rests in the court a discretion to determine what share(if any) a spouse has in matrimonial property upon the dissolution of the marriage.
- ❑ Based on this the court may have ample jurisdiction upon divorce or nullity to order a spouse:
 - ✓ To pay a sum of money to the other; or,
 - ✓ To contribute movable or immovable property to the other spouse.



- ✓ i.e. the section empowers the court to adjust the property rights of the parties (to transfer property from one spouse to the other) irrespective of who has the proprietary interest, in recognition of that spouse's (the latter's) contribution either financially or otherwise (i.e. to the welfare of the family).
- ✓ Such an award must however be just and equitable.
- Section 21 relates to the powers of the court to ascertain ownership of the movable and immovable assets of the parties to the marriage.

SECTION 21(1) OF MCA

Section 21(1) provides:

- (1) *“where 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 court shall order transfer or conveyance of the interest to the party entitled to it upon such terms as the court thinks just and equitable.”*
- (2) *“when a transfer or conveyance of movable or immovable property is ordered by the court and the party ordered to make the transfer or conveyance is either unable or unwilling to do so, the court may order the registrar of the court to execute the appropriate transfer or conveyance on the part of that party”.*




- ❑ Thus section 21 only provides that upon nullity or divorce, the court has power to transfer property back to the party entitled to it, i.e. here proof of proprietary interest is very important.
- ❑ In the discharge of these functions the court is armed with two important auxiliary powers under section 25 and 26 whereby it can by order restrain either party to the marriage;
 - a) From leaving the jurisdiction until it is satisfied that he has made adequate provision to satisfy an award the court might make; and



b) From permitting the disposition of his asset or rescind such disposition if satisfied that it was made with the intention of defeating a financial claim.

- ❑ It must be noted that provisions under the Matrimonial Causes Act apply to any kind of marriage whether Ordinance or Customary.
- ❑ Secondly, it urges the Court to consider what may be deemed to be reasonable provision having regard to “the standard of living of the parties and their circumstances”.

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- ❑ The Court are further required to exercise its powers so as to place the parties.....

“...in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other”.

- ❑ The criteria by which the court may order financial provisions under Act 367 fall short of adequate guidance or guidelines.

Principles Governing Courts' Discretionary Powers

- ❑ Judicial wisdom, however, has warned against the dangers of loose discretionary power in a number of decided cases.
- ❑ One is that the absence of guidance on the exercise of a discretionary power may be worse than any conflict precepts.
- ❑ In another case, absolute discretion has been called a *ruthless master, more destructive of freedom than any of man's other inventions.*
- ❑ *In a third example, a wide discretionary power, like "policy" has been described as an unruly horse and once you get astride you never know where it will carry you'.*



- ❑ It is no wonder what Francois JSC in the Riberio's case was prompted to say that *"no court would consider loose discretionary powers as conferring a right to distribute a spouse's property"*.
- ❑ However, commenting on the lack of guidance in section 20 of Act 367, Abban JA(as he then was) in Achiampong v Achiampong offered a view on the intention of the legislature to have been as follows:
- ❑ *"It may be observed that under the English Matrimonial Causes Act, the court is directed to have regard to various criteria laid down in the Act. They include:*



- a) *The income of the parties*
 - b) *Their financial needs,*
 - c) *Their standard of living*
 - d) *Their age and duration of the marriage*
 - e) *Their physical and mental conditions, and*
 - f) *Their contribution to the welfare of the marriage and any contribution made by each looking after the home or caring for the family.”*
- It has been suggested by Ekow Daniels that the direction given to the court under section 19 to discharge its duty “as it thinks and equitable” however inadequate that may be, can be made to work in the meantime, according to the guidelines given by Lindley LJ.



- ❑ However, the Courts have applied the principle that, 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 the 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.

Substantial Contribution

- ❑ Substantial Financial Contribution:-One principle which the courts have normally used as a yardstick in determining the interest of a spouse in a matrimonial property is proof of substantial contribution. *Bentsi-Enchill v. Bentsi-Enchill*.
- ❑ Non-financial contribution:- contribution by a spouse which may not take the form of direct cash payments or direct financial contribution to the improvements of the property but one in which the parties might have agreed that the wife for instance, uses her money to take care of household expenses.

Non-financial contribution

- ✓ This may sometimes even include the payment of school fees etc. thus freeing the man to concentrate on the acquisition of the matrimonial property. *Achiampong v. Achiampong*
- ❑ Assistance offered in kind towards Husband's business: *Mary Oparebea v. S.A Mensah*
- ❑ Services rendered for the welfare of the marriage: *Bentsi-Enchill case*

DEVELOPMENT OF RELEVANT GHANAIAN CASE-LAW

- ❑ Property acquired with the assistance of a wife was regarded as the sole property of the husband. The customary law position was that the wife and children had a domestic responsibility of assisting the husband/father with his business and as such the wife could not claim any interest in any property she assisted her husband to acquire.
- ❑ In *Quartey v. Martey* [1959] GLR 377, Ollennu J. (as he then was) held at 380 that: *“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 the children. The right of the wife and the children is a right to maintenance and support from the husband and father.”*


SUBSTANTIAL CONTRIBUTION PRINCIPLE

- ❑ In Yeboah v. Yeboah [1974] 2 GLR 114, Hayfron-Benjamin J (as he then was) held that there was no positive customary law preventing the creation of joint interest by persons not related by blood.
- ❑ The current position of the law regarding joint property is that substantial contribution by a spouse to the acquisition of property during the subsistence of the marriage would entitle that spouse to an interest in the property.
- ❑ Headnote 3 of the court's holding stated thus:
“The wife was a joint owner of the house with the husband because judging from the factors attending the acquisition of the house and the conduct of the parties subsequent to the acquisition, it was clear that they intended to own jointly the matrimonial home. Where the matrimonial home was held to be held jointly by husband and wife as joint owners, it would be improper to treat the property as a subject of mathematical division of the supposed value of the house. What the court could do in such a case was to make what would seem to be a fair agreement for the parties.”

Abebrese v. Kaah and Others

[1976] 2 GLR 46

- ❑ the wife contributed substantially to building the matrimonial home. The husband had provided the purchase money for the land. She paid for the timber, and contributed to buying sand and iron sheets. She also supervised work done by labourers and helped to carry water to the site. However, she had not kept account of her contribution. The husband died intestate and his successor purported to sell the house. The court held that although the wife could not state in terms of cash how much her contribution towards the building was, it was clearly substantial.
- ❑ The court pointed out that the ordinary incidents of commerce had no application in the ordinary relations between husband and wife and the wife's evidence as to the size of her contribution and her intention in so contributing would be accepted.

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- ❑ Anang v. Tago [1989 -90] 2 GLR 8 , it was held at 11 that:

“ ... where a wife made contributions towards the requirements of a matrimonial home in the belief that the contribution was to assist in the joint acquisition of property, the court of equity would take steps to ensure that belief materialised. That would prevent husbands from unjustly enriching themselves at the expense of innocent wives, particularly where there was evidence of some agreement for joint acquisition of property.”



- ❑ Even though it has been held that the ordinary incidents of commerce do not apply in marital relations and that the courts will not employ mathematical division to determine each spouse's share in the property, the courts currently apply the equality is equity principle.
- ❑ In Mensah v. Mensah [1998-1999] SCGLR 350, the court applied the equality is equity principle to determine which proportions the couple's joint property would be shared. Bamford-Addo JSC held at 355 thus:
"... the principle that property jointly acquired during marriage becomes joint property of the parties applies and such property should be shared equally on divorce; because the ordinary incidents of commerce has no application in marital relations between husband and wife who jointly acquired property during marriage."

Boafo v. Boafo [2005-2006]

SCGLR 705

- ❑ In delivering the judgment of the court dismissing the appeal, Dr. Date-Bah JSC referred to the decision in Mensah v. Mensah and further explained the position of the court. At 711, he said:
- ❑ “On the facts of Mensah v. Mensah (supra), the Supreme Court (per Bamford-Addo JSC) held that equal sharing was what would amount to a “just and equitable” sharing. The view of Denning LJ (as he then was), in Rimmer v. Rimmer [1952] 1 QB 63 at 73 that on the facts of that case equality is equity seems to have inspired the learned Supreme Court Judge’s approach. ... Denning LJ’s view was that where it is clear that the matrimonial home or furniture common use belongs to one or the other of the married couple, then the courts would respect the proprietary rights of the particular spouse. But where it not clear to whom the beneficial interest belongs or in what proportions, then the equitable maxim of equality is equity would be applied. The spirit of Bamford-Addo JSC’s judgment in Mensah v. Mensah appears to be that the principle of the equitable sharing of joint property would ordinarily entail applying the equitable principle, unless one spouse can prove separate proprietorship or agreement or a different proportion of ownership.



- ❑ It is therefore apparent that the Ghanaian Courts have accepted this equality is equity principle in the sharing of marital properties upon divorce.
- ❑ The death knell has been sung to the substantial contribution principle, making way for the equitable distribution as provided for under article 22 (3) of the Constitution 1992.

CONSTITUTION OF THE REPUBLIC OF GHANA, 1992

□ ARTICLE 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 (22) of this article-*
 - *spouses shall have equal access to property jointly acquired during marriage;*
 - *assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage*

REVIEW OF CASE-LAW

- ❑ Bentsi-Enchill v Bentsi-Enchill [1976]2 GLR. 303
- ❑ Gregory v. Tandoh IV & Hansen [2010] SCGLR 971
- ❑ Mensah v. Mensah [1998-1999] SCGLR 350
- ❑ Boafo v. Boafo [2005-2006] SCGLR 705
- ❑ Ribeiro v. Ribeiro [1989-1990] 2 GLR 09
- ❑ Achiampong V Achiampong (1982- 1983) G.L.R.D. 104 C.A.
- ❑ Clerk v. Clerk[1981] GLR 583
- ❑ Berchie-Badu v. Berchie-Badu [1987-88]2 GLR 260
- ❑ Reindorf v. Reindorf[1974]2 GLR 38

UNREPORTED CASES

- ❑ Grace Brown v. Ebenezer Ako Brown
[24/03/2010] Suit No. E6/12/07
- ❑ Mercy Ansong v. Francis Kwadwo Frimpong
[17/03/06] H1/147/05 CA
- ❑ Wilhelm Amesman v. Angelina Amesman [Civil
Appeal No: 90/99] 11th May 2000 [11/5/00]
- ❑ Nana Ama Amponsah v. Franklyn Amoah
Nyamaah[11/22/2009] CA No. 54/10/2008
- ❑ Mrs. Manna Abudu v. Mr. Micheal Abudu &
Getrude Oppong
- ❑ Gladys Mensah v. Stephen Mensah {Civil
Appeal No. J4/20/2011} 22nd February 2011
- ❑ Christiana Quartson vs. Pious Pope Quartson
{Civil Appeal} No. J4/8/2012 dated 31st
October,2012