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CHAPTER 1: GENERAL INTRODUCTION

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“... the social pattern in Nigeria is undergoing rapid change which brings in its train new values. For our laws to retain their essential qualities, they must reflect the prevailing values from time to time.”¹

1.1 BACKGROUND OF THE STUDY

It is pertinent to state that Nigerian family law is founded on the English common law tradition which forms a significant part of Nigerian law.² Consequently, whenever there is a dispute between spouses over the ownership of property upon the breakdown of marriage,³ “... the courts have recourse to the ordinary rules of property law.”⁴

Customary law marriage was the usual practice in Nigeria before British colonial rule.⁵ Under this type of marriage, a female spouse is not entitled to the settlement of property⁶ or the transfer of property⁷ on the breakdown of marriage apart from her personal effects.⁸ With the introduction of civil marriage in Nigeria by the enactment of the Marriage Act of 1914⁹ and the Matrimonial Causes Act No 18 of 1970¹⁰ (which was

¹ Nwogugu, *Family Law in Nigeria 2nd ed*, 248.

² This is by virtue of British colonialism and imperialism which started in 1862 when Lagos was created a British Colony. See generally Abdulmumini, 2011 *Emory International Law Review*, 881 at 882, 886; Okemuyiwa, 2012 <http://ssrn.com/abstract=2102829>, 1

³ See 1.7 below for the meaning of the term “breakdown of marriage”. The breakdown of civil marriage upon which property can be settled in Nigeria between spouses includes: a decree of judicial separation; a decree of nullity of marriage; or a decree of dissolution of marriage. See ss 72, 75(4) and 114(1)(a) and (b) (which defines matrimonial causes) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria 2004.

⁴ Umukoro, 2006 *Commercial and Property Law Journal*, 117 at 117; Lowe and Douglas, *Bromley’s Family Law*, 150.

⁵ See Ezeilo, <http://www.muslimpersonallaw.co.za/inheritedocs/lawandpractices%20in%20nigeria.pdf> 1; Muna, 2011 *Indiana Journal of Global Legal Studies*, 87 at 88.

⁶ See 1.7 below for the meaning of the term “settlement of property” as used in this study.

⁷ See 1.7 below for the meaning of the term “transfer of property”.

⁸ See Ashiru, 2007 *Journal of African Law*, 316 at 320 - 321; Onuoha, 2008 *International Journal of Not-for-Profit Law*, 79 at 82 – 83; Edu, “Women and Property Rights under Customary Law” in Oho and Edu ed., *Women, Law & Family*, 145.

⁹ The Marriage Act is wholly an Act of British colonial heritage. It was enacted in 1914 and applied throughout Nigeria at the time of the amalgamation of the Northern and Southern Protectorates in Nigeria. It was then called the Marriage Ordinance No 18 of 1914. It repealed the Marriage Ordinance 1908 which applied to the Protectorate of Southern Nigeria and the Marriage Proclamation No 1 of 1907 (Laws of the Protectorate of Northern Nigeria, 1910). Nwogugu points out that, although with minor amendments, the Marriage Ordinance No 18 of 1914 still continues to regulate the celebration of monogamous marriages in Nigeria. See Nwogugu, *Family Law in Nigeria*, 38. It was initially cited as the Marriage Act of 1914, Cap 115 Laws of the Federation of Nigeria 1958 and later as Cap 218 Laws of the Federation of Nigeria, 1990. It is at present cited as the Marriage Act of 1914 Cap M6 Laws of the Federation of Nigeria, 2004. It is noted that since the enactment of this Act, it has never been reviewed or wholly amended to reflect present realities. Although there was an attempt by the Nigerian Law Reform Commission to review it in 1979, that attempt never saw the light of day. See Nigerian Law Reform Commission, *The Draft Bill on a Marriage Act – Law Reform No 2, November 1981*, 15 – 57. See also Nwogugu, *Family Law in Nigeria*,

patterned after the laws of Australia and England)¹¹ together with the combined effect of the provisions of the Married Women's Property Act, 1882¹² which clothed married women with the right to own their own separate property¹³ as if they were *feme sole*,¹⁴ however, wives are now entitled to the ownership and settlement of property.¹⁵

Notwithstanding this shift in focus from customary to civil marriages with their proprietary consequences, the ordinary rules of property law, which were in most cases applied by Nigerian courts, did not work the desired justice as they were based on the establishment of legal ownership.¹⁶

A spouse who claims an interest in property must show cogent evidence of a financial contribution to its purchase.¹⁷ In a number of cases,¹⁸ Nigerian courts have held that, where a spouse (in most cases the wife) does not contribute financially towards the acquisition of a property, her claim for an interest in such property purchased by the

<http://www.muslimpersonallaw.co.za/inheritedocs/lawandpractices%20in%20nigeria.pdf>, 1 at 18. It is noted that one of the tasks of the Commission was to review the Marriage Act, and it submitted its report in October 1984 to the Federal Government of Nigeria. At the time of this research, the Draft Bill is yet to become a law in Nigeria. Of particular relevance to this thesis is the limited scope of the Commission's work which did not include the issue of settlement or redistribution of property upon the breakdown of marriage. The Commission considered some of the provisions of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 as they relate to void and voidable marriages amongst other things but s 72 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 was not tampered with.

¹⁰ The Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 became part of Nigerian laws by way of a Decree. It was originally cited as The Matrimonial Causes Decree of 1970. It is now cited as the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004. As at 1970, the Decree applied throughout the Federation by virtue of s 116(1) of the Matrimonial Causes Decree of 1970. S 116 (1) of the Decree was subsequently omitted in Cap 220 of the Laws of the Federation of Nigeria 1990 and Cap M7 of the Laws of the Federation of Nigeria 2004. This Act makes provisions for matrimonial causes as defined by the interpretation section (s 114) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹¹ Adekile, 2009 <http://ssrn.com/abstract=1503384>, 1 at 5.

¹² [45 & 46 Vict. Cap 75].

¹³ See the meaning of "separate property" in 1.7 below.

¹⁴ Unmarried or a single woman.

¹⁵ See s 1(1) of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75]; s 72 of the Matrimonial Causes Act No 18 of 1970 Cap M7 of the Laws of the Federation of Nigeria, 2004.

¹⁶ Umukoro, 2006 *Commercial and Property Law Journal*, 116 at 118.

¹⁷ See *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 4; *Essien v Essien* [2009] 9 NWLR (Pt 1146) 306 at 331 – 332. See also Ashiru, 2007 *Journal of African Law*, 316 at 322.

¹⁸ See *Egunjobi v Egunjobi* (1976) 2 FNLR 78; *Kafi v Kafi* [1986] 3 NWLR (Pt 27) 175; *Nwanya v Nwanya* [1987] 3 NWLR (Pt 62) 697; *Sodipe v Sodipe* (1990) 5 WRN 98.

male spouse will fail upon marriage breakdown.¹⁹ In handing down such judgements, reliance is placed on the English common law and the decisions in foreign cases²⁰ which no longer represent the extant position of law in those countries on account of the constant changes and developments in the principles of matrimonial property law.

Umukoro²¹ captures the position of the law in Nigeria *vis-à-vis* the practice in other countries. According to him, under the English common law as it is applicable to Nigeria:

“... a spouse laying claim to an interest in the matrimonial property²² upon divorce must establish facts showing evidence of direct financial contribution to the acquisition or development of the property or agreement to that effect. This is notwithstanding that in most jurisdictions in settling matrimonial property, the courts are enjoined by statutes to apply the principle of equity and justice to the circumstances of each case, the reason being that marriage contract is different from every form of business partnership where parties are under a duty to keep records of daily business transactions and give accounts.”²³

It is not a matter of debate that disputes concerning the settlement and transfer of property upon a marriage breakdown most often give rise to litigation, especially in countries with advanced or well-defined matrimonial property regimes which recognise the various rights and contributions of spouses in relation to such property.²⁴ While in some countries the divorce courts have wide powers under the statute to redistribute property as they deem just and equitable taking cognisance of statutory guidelines,²⁵ in others the way and manner in which property is redistributed or divided upon marriage breakdown are regulated by statute, thereby allowing courts little or no discretion to

¹⁹ The Nigerian courts do this by holding that the property rights between married spouses are completely separate. For a spouse to succeed under this regime, she must prove, on a preponderance of probability, that she is a joint owner of the property in question or that her financial contribution was substantial towards the purchase or development of the property. See *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 4; *Essien v Essien* [2009] 9 NWLR (Pt 1146) 306 at 331 – 332.

²⁰ Such cases include: *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) and *Gissing v Gissing* [1971] AC 886 (HL) which were decided before the enactment of the English Matrimonial Causes Act Cap 18 of 1973.

²¹ 2006 *Commercial and Property Law Journal*, 116 at 118 – 119.

²² See the meaning of matrimonial property in 1.7 below as used in the Nigerian context.

²³ Umukoro, 2006 *Commercial and Property Law Journal*, 116 at 118 – 119.

²⁴ See National Association of Women and the Law, <http://nawl.ca/en/money/when-a-relationship-ends-know-your-rights-and-responsibilities>.

²⁵ Australia and England are the countries in focus in relation to the powers of the courts to redistribute property on marriage breakdown subject to statutory guidelines.

interfere in the redistribution of property.²⁶

In Nigeria, there is a complete separation of property between the spouses as the concept of matrimonial property does not exist.²⁷ At the breakdown of marriage, Nigerian courts do not redistribute the property of spouses²⁸ and neither does the extant law contain any guidelines for doing so.²⁹ Although section 72 of the Matrimonial Causes Act No 18 of 1970³⁰ grants the court the power to make a property settlement order, it is submitted that the inability of a statutory wife to lay claims for a beneficial entitlement to property (by way of a redistribution order) without proof of a financial contribution upon civil marriage breakdown is akin to the position of a customary law wife in Nigeria,³¹ who is deprived of her property rights on the basis of gender discrimination.³² This calls for a serious scrutiny of the property rights of a husband and a wife on civil marriage breakdown.³³

The law, as it is in Nigeria today, and the attitude of the courts in the settlement of property upon marriage breakdown can be viewed as discriminatory, unconstitutional within the ambit and the interpretation of the Nigerian Constitution, and it does not reflect modern practices in other countries of the world.³⁴

²⁶ South Africa is a classic example. The courts, however, have a wide discretion to redistribute property upon divorce in customary marriages by virtue of section 8(4)(a) and (b) of the Recognition of Customary Marriages Act 120 of 1998. In *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) at 172 B – D, it was held that, in customary marriages, the courts have the discretionary powers to redistribute the assets of spouses upon divorce notwithstanding the applicable matrimonial property system. See 5.5.3.1 below.

²⁷ See Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 13.

²⁸ Unlike Australian and English courts, Nigerian courts do not have the power to redistribute property on divorce. The law provides only for a property settlement order pursuant to s 72 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

²⁹ See Etomi and Asia, 2015 global.practicallaw.com/6-613-4665, 1 at 4.

³⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

³¹ It is noted that a spouse (wife) married under customary law cannot approach the court for an order to either compel her divorced husband to settle part of his property on her as it is the case under civil marriage; or for an order to transfer the husband's property or a part of it to her upon the breakdown of the customary marriage.

³² See *Dawodu v Danmole* (1962) 2 SCNLR 215; *Onyibor Anekwe & Anor v Mrs. Maria Nweke* 2014 Legalpedia SC L43L. See also Onuoha, 2008 *International Journal of Not-for-Profit Law*, 79 at 82 – 83; Muna, 2011 *Indiana Journal of Global Legal Studies*, 87 at 100 – 101.

³³ See Ashiru, 2007 *Journal of African Law*, 316 at 331.

³⁴ Muna, 2011 *Indiana Journal of Global Legal Studies*, 87 at 92 has urged the courts to interpret the law in order to advance gender equality in the society. See also Ashiru, 2007 *Journal of African Law*, 316 at 331; Izunwa, 2015 *Journal of Law and Conflict Resolution*, 31 at 37.

A rethink of the property rights of spouses on civil marriage breakdown in Nigeria will require a legislative framework which is devoid of discrimination and unfairness.³⁵ It is submitted that there is a need to advance a matrimonial property law which will recognise the beneficial entitlement of spouses to matrimonial property, provide compensation for any reasonable loss caused by the marriage, and ensure that the financial benefits of the marriage are shared (by way of an alteration of property interest or a redistribution order) on a just and equitable basis. Not only will such a law reflect the current trend in the marital relationships between spouses in Nigeria, but it would also be in tune with the global progressive changes in the field of matrimonial property law.³⁶

1.2 PROBLEM STATEMENT AND CONTEXT OF THE STUDY

1.2.1 Problem Statement

In the Nigerian legal system, statutory provisions and judicial attitude to the property rights of spouses on the breakdown of civil marriage have not been in tune with modern realities as is seen in other countries. In respect of the property of spouses, and, especially, the “matrimonial property”, marriage is hardly a partnership of equals. Nigerian family law creates a distinction between the financial and non-financial contributions of spouses in the determination of the beneficial interest of a spouse to property. The law does not also vest in the courts the power to redistribute the “matrimonial property” on the breakdown of civil marriage. This leads to the conclusion that the property settlement provision and its application in Nigeria discriminate against the financially weaker spouse (usually the wife), as Nigerian courts apply strict property law to determine the proprietary interests of spouses. In this regard, the need for a reconsideration of the present matrimonial property rights arrangement between a husband and a wife in a civil marriage in Nigeria is proposed.

1.2.2 Context of the Study

The study is approached from the perspective both of equality between spouses in

³⁵ See Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 22 – 24.

³⁶ See Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 24.

marriages³⁷ and of gender justice.³⁸ The notion of equality implies the need for an equal right to resources and opportunities within marriage. It is noted that, in Nigeria, the constitutional provision on equality "... represents an important expansion in the area of legal protection for human rights."³⁹ In the Nigerian legal system, "[e]quality before the law is achieved where persons in similar circumstances are treated similarly ...,"⁴⁰ where men and women have equal opportunities and are given equal conditions for the realisation of their full potential. "Equality" is thus the parameter adopted by the society to treat differences. It ensures that the law is not unfairly used to the advantage or disadvantage of certain persons and that, similar rules should be applied to similar situations.

It is argued that, in Nigeria, women do not possess equal status with men⁴¹ and are inferior to their male counterparts.⁴² The root of this discriminatory tendency lies in customs which discriminate against women in terms of their property rights⁴³ despite the

³⁷ The preamble to the Constitution of the Federal Republic of Nigeria (CFRN), 1999, states clearly that Federal Republic of Nigeria is built "... on the principles of freedom, equality and justice ..." for all persons. The CFRN 1999 declared its supremacy in s 1(1) in the following words: "This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria." It proceeds, in s 1(3), to declare: "If any law is inconsistent with the provision of this Constitution, this Constitution shall prevail, and that other law shall to the extent of its inconsistency be void." It is argued that any law (whether customary law or a law made by any legislative enactment) which is discriminatory in nature and disentitles a citizen on the ground of sex to any right which ordinarily and necessarily accrues to such a citizen cannot withstand a constitutional challenge. Ngwanke, 2002 *CJWL/RFD*, 143 at 143 argues that any "... culture that attributes superiority to one sex over the other exposes the sex that is considered inferior to various forms of discrimination." S 18(3) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act No 2 of 1983 Cap A9 Laws of the Federation of Nigeria, 2004 charged the Nigerian Government to take reasonable steps to eliminate all forms of discrimination against women and to protect their rights as contained in international conventions.

³⁸ Gender justice in this sense implies an egalitarian society where equal opportunities without restrictions are accorded to men and women. See Ogbomah, *A Reflection on African Customary Law and Gender Justice: A Perspective of the Nigerian Legal System*, 32.

³⁹ Akande, Akande: *Introduction to the Constitution of the Federal Republic of Nigeria 1999*, 106.

⁴⁰ Akande, Akande: *Introduction to the Constitution of the Federal Republic of Nigeria 1999*, 107.

⁴¹ See Akande, "Women and the Law" in Obilade ed., *Women in Law*, 6 – 27.

⁴² See Omage, 2013 *European Scientific Journal*, 324 at 326; Edu, "Women and Property Rights under Customary Law" in Oho and Edu ed., *Women, Law & Family*, 136.

⁴³ See Ashiru, 2007 *Journal of African Law*, 316 at 331; Onuoha, 2008 *International Journal of Not-for-Profit Law*, 79 at 80, 82 – 83; Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 22; Muna, 2011 *Indiana Journal of Global Legal Studies*, 87 at 101; Edu, "Women and Property Rights under Customary Law" in Oho and Edu ed., *Women, Law & Family*, 144. For instance, in *Mojekwu v Mojekwu* [1997] 7 NWLR (Pt 512) 283 at 304 – 305, the Court of Appeal declared the "Oliekpe" custom of the Nnewi people of Nigeria as discriminatory. This custom allows a brother to inherit his late brother's estate to the exclusion of the latter's wife and female children. In the words of Tobi JCA: "Is such a custom consistent

provisions of section 18(3) of the Evidence Act No 18 of 2011 which states: “In any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience.”

Furthermore, in section 42(1)(a) of the Constitution of the Federal Republic of Nigeria, 1999⁴⁴, every citizen, whether a male or a female, has the right not to be discriminated against on the grounds of sex and religion amongst other things and must not “... be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other ... sex, religions ... are not made subject.”⁴⁵

Notwithstanding the above provisions, the inherent discrimination between female and male persons continues to rear its head in the property rights of spouses upon the

with equity and fair play in an egalitarian society such as ours where the civilised sociology does not discriminate against women? Day after day, month after month and year after year, we hear of and read about customs which discriminate against the women folk in this country. They are regarded as inferior to the men folk. Why should it be so? All human beings - male and female - are born into a free world, and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis (sic) to a society built on the tenets of democracy which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi ‘Oliekpe’ custom relied upon by the appellant, are not consistent with our civilised world in which we all live today, including the appellant. In my humble view, it is the monopoly of GOD to determine the sex of a baby and not the parents. Although the scientific world disagrees with this divine truth, I believe that GOD, the creator of human beings is also the final authority of who should be male or female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty GOD himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the ‘Oliekpe’ custom of Nnewi is repugnant to natural justice, equity and good conscience.” It is noted that the repugnancy issue was raised and decided *suo motu* by the Court of Appeal. On appeal to the Supreme Court, the apex court did not allow the pronouncement to stand and proceeded to disapprove of it as unwarranted in the circumstances of the case. It held that “... the court below was in error to raise, deal and decide the issue concerning the repugnancy of ‘oli-ekpe’ custom of Nnewi *suo motu* without hearing from the parties.” See *Mojekwu v Iwuchukwu* [2004] 11 NWLR (Pt 883) 196. See also *Akinubi v Akinubi* (1997) 46 LRCN 137; and *Ukeje v Ukeje* (2014) All FWLR (Pt 730) 1323 where the Supreme Court pronounced a similar custom as discriminatory and unconstitutional and upheld the right of a girl child to inherit properties.

⁴⁴ Cap C23 Laws of the Federation of Nigeria, 2004.

⁴⁵ Alemika, 2010 *University of Maiduguri Law Journal*, 25 at 28 states that discrimination against women, which is endemic in most societies, is a violation of their human rights. According to Muna, 2011 *Indiana Journal of Global Legal Studies*, 87 at 101, “[t]he discrimination of women is rooted in inequality, male domination, poverty, aggression, misogyny, and entrenched customs and myths. The real solution to the problem is eradication of customs that undermine the dignity of women.”

breakdown of their marriage.⁴⁶ Alemika⁴⁷ observes that such cultural and societal practices hinder the actualisation of the rights of women in the society.

It is equally noted that the courts' interpretation of sections 72⁴⁸ and 73⁴⁹ of the Matrimonial Causes Act No 18 of 1970⁵⁰ has always been to the disadvantage of women,⁵¹ especially those who are financially weaker on dissolution of marriage.⁵² The practical application of the law on settlement of property in Nigeria has prevented women in most cases from claiming a beneficial entitlement to their husbands' property on the breakdown of marriage.⁵³ They are, thus, left uncompensated for reasonable losses suffered or which they might be capable of suffering on the dissolution of

⁴⁶ See *Onwuchekwa v Onwuchekwa & Obuekwe* [1991] 5 NWLR (Pt 194) 739, where the female spouse could not establish her financial contribution to the marriage and was left empty-handed. See also Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 23.

⁴⁷ 2010 *University of Maiduguri Law Journal*, 25.

⁴⁸ S 72 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 deals with the power of a court in proceedings with respect to settlement of property. S 72(1) provides: "The court may in proceeding under this Act by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of the marriage, such settlement of property to which the parties are or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of each case."

⁴⁹ S 73 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 deals with the general powers of the court in respect of financial provisions for spouses (maintenance, custody and settlements). Of particular relevance to this thesis is s 73(1)(j) which empowers the court to discharge the order made pursuant to s 72 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 if the spouse in whose favour the property settlement was made remarries or upon any other just cause for doing so. A literal interpretation of this provision simply reveals that the type of settlement of property contemplated by the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 in Nigeria is not "settlement of property," as in the transfer of ownership to a spouse, but only a right to use and enjoy subject to the occurrence of an event or events. It is equally noted that in most cases the courts would order a lump sum payment to the female spouse rather than settle or transfer a property to her. In *Sodipe v Sodipe* (1990) 5 WRN 98, there was no evidence of direct financial contribution; the court, however, having valued the matrimonial property to worth ₦10, 000, 000 (Ten Million Naira), casually ordered a lump sum payment of ₦200, 000 (Two Hundred Thousand Naira) to a wife who had spent 43 whole years in the marriage. See also *Okala v Okala* (1973) ECSNLR 67 and *Sotomi v Sotomi* (1976) 2 FNLR 164. Compare these cases with the cases of *Kafi v Kafi* [1986] 3 NWLR (Pt 27) 175; *Akinboni v Akinboni* [2002] 5 NWLR (Pt 761) 564 where the courts made orders for settlement of property albeit with conditions.

⁵⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

⁵¹ Ashiru, 2007 *Journal of African Law*, 316 at 329.

⁵² See Ashiru, 2007 *Journal of African Law*, 316 at 319; Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 15 – 16.

⁵³ See Ashiru, 2007 *Journal of African Law*, 316 at 329. Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 15 – 16 observes that s 72 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 "... is not meant for economic empowerment. It appears it is not designed to assist a spouse to obtain equal access to property acquired by the other by creating the concept of marital or matrimonial property as found in other jurisdictions."

marriage.⁵⁴ Nigerian women are also unrewarded for all the indirect financial contributions which they had made to the purchase or development of any property directly linked to their male spouses.⁵⁵

The woman's role as a homemaker and her obligations towards the welfare of the family are not taken into consideration in determining the question of whether or not they are beneficially entitled to any property.⁵⁶ The reasons for this are not farfetched as the extant law does not explicitly empower the courts to redistribute the property of spouses or to alter their property interest upon the breakdown of marriage on a just and equitable basis. Nigerian courts have also failed either to apply the golden rule or mischief rule of interpretation⁵⁷ to sections 72 and 73 of the Matrimonial Causes Act No 18 of 1970.⁵⁸ It is submitted that the decisions arising from these sections are not aimed at ensuring equality and gender justice.

When confronted by a similar provision, Australian courts⁵⁹ were able to transfer property from one spouse to the other under section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) and, thus, recognise the redistributive powers of the court within the ambit of that provision notwithstanding the fact that it was not expressly stated in the statute.⁶⁰

There is a complete absence of the concept of matrimonial property in Nigeria.⁶¹ The property rights of spouses on marriage breakdown are determined in the same manner

⁵⁴ See Ashiru, 2007 *Journal of African Law*, 316 at 328 – 329; Omoyemen 2010 <http://www.pambazuka.org/gender-minorities/assessing-women%E2%80%99s-rights-nigeria>. According to Anyanwu, *Working Paper No 180*, 11 "... women are more prone to poverty due principally to low education and lack of opportunity to own assets such as land." Waite & Gallagher, in *Utah Divorce Orientation*, 110 observes that women bear more of the financial losses than men on the breakdown of marriage as a result of unequal wages and more financial commitment to the physical custody of children on marriage breakdown. See also Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 22.

⁵⁵ See *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 4; *Essien v Essien* [2009] 9 NWLR (Pt 1146) 306 at 331 – 332.

⁵⁶ See 85 below.

⁵⁷ See *The State v Governor of Osun State & Ors.* (2006) LPELR-11771(CA) 1 at 14 – 16 on the interpretation of statutes. See generally, Etudaiye & Etudaiye, 2012 *The Journal of Jurisprudence*, 225 – 252. See also fn 167 at 53 below.

⁵⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

⁵⁹ See *Lansell v Lansell* (1964) 110 CLR 353 at 362.

⁶⁰ See 4.2.2 below.

⁶¹ See Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 13 – 14.

as those of persons in a commercial transaction.⁶² Strict property law applies.⁶³ The courts have frequently held that non-financial contributions⁶⁴ by a spouse (in most cases the wife), for example by tending to the house, the payment of bills and rates, attending to the business of the man, do not entitle the wife to a share in the property purchased solely by the man, even though it may relieve the man of some domestic and financial burdens and may enable his business to flourish.⁶⁵ This requirement of the law in the area of the settlement of property, according to Arinze-Umobi,⁶⁶ "... is not only wrong, absurd, negative and unnatural, but also discriminatory and does not reflect the position between the spouses for it runs contrary to the flow of matrimonial relationships."

To this day, the social reality of the domestic and mothering roles of wives in Nigeria means that they remain in a totally dependent position with no rights in matrimonial property if the marriage ends, unless they can show evidence of a substantial financial contribution to the purchase such property.⁶⁷ The Nigerian position is far different from what obtains in other countries under study, especially in England and Australia,⁶⁸ and to a limited extent in South Africa⁶⁹ where the wife's domestic service is one of the factors to be considered by the courts in the redistribution of the spouses' property upon divorce.

The property system which operates in the marital relationship between spouses in civil

⁶² See *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 4; *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 19 – 25; *Essien v Essien* [2009] 9 NWLR (Pt 1146) 306 at 331 – 332. See also Ashiru, 2007 *Journal of African Law*, 316 at 322.

⁶³ See 2.7.2 below.

⁶⁴ This type of contribution is also known as indirect contribution. Quansah, *Determining Matrimonial Property Rights of Spouses on Divorce: An Appraisal of the Legal Regimes in Botswana*, 450 - 451 argues that there is need to take indirect contributions into consideration in the determination of the rights of spouses to matrimonial property rights on divorce. The author points out that such "... indirect contribution is progressively being given prominence in other jurisdictions in the determination of disputes over matrimonial property."

⁶⁵ See *Dairo v Dairo* Suit No ID/90HD/86 of 15/7/88 (Unreported) Lagos High Court.

⁶⁶ 2004 *Unizik Law Journal*, 188 at 188.

⁶⁷ See Ashiru, 2007 *Journal of African Law*, 316 at 328 – 329.

⁶⁸ The Australian Family Law Act No 53 of 1975 (Cth) and the various laws on the property rights of spouses in England especially the Matrimonial Causes Act Cap 18 of 1973 will be appraised in this thesis.

⁶⁹ See s 7(4) of the Divorce Act 70 of 1979; *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) at 89; *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C) at 703. See also 5.5.3 below.

marriages in Nigeria is a complete separation of property,⁷⁰ and this is founded on English common law and reaffirmed by the Married Women's Property Act, 1882⁷¹ and the Married Women's Property Law, 1959⁷² which established the doctrine of separate property⁷³ between the spouses.

With the reception of the Married Women's Property Act, 1882⁷⁴ which is of English origin, "... marriage no longer had an immediate effect on entitlement to property."⁷⁵ Under the Married Women's Property Act, 1882,⁷⁶ a female spouse married under civil law in Nigeria gained the right to acquire, hold and alienate property as a *feme sole*.⁷⁷ The Married Women's Property Act, 1882⁷⁸ and the Married Women's Property Law, 1959 gave spouses to a civil marriage equal property rights.⁷⁹

It should, however, be noted that the Married Women's Property Act, 1882⁸⁰ does not regulate the redistribution or alteration of interest in matrimonial property upon the breakdown of a civil marriage.⁸¹ According to the House of Lords, in *Pettitt v Pettitt*,⁸² the aim of the Married Women's Property Act, 1882⁸³ is to determine the legal and equitable ownership of a property in dispute and not to redistribute the property of spouses as the court deems just and equitable. This is the interpretation given by

⁷⁰ See Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 13.

⁷¹ [45 & 46 Vict. Cap 75].

⁷² Cap 76 Laws of Western Region of Nigeria, 1959. This law is applicable in the States that make up the western region of Nigeria.

⁷³ The doctrine of separate property recognises the separate rights of the spouses to acquire and deal with property during the subsistence of their marriage as if they were not married. Ownership of property is in most cases ascertained by virtue of the strict principles of the law of property except where a spouse can by evidence show some financial contribution to the other spouse's property which could entitle her to some proprietary interest. See Miller, *Family Property and Financial Provision*, 3.

⁷⁴ [45 & 46 Vict. Cap 75].

⁷⁵ Bridge, in Henaghan and Atkin eds., *Family Law Policy in New Zealand*, 232.

⁷⁶ [45 & 46 Vict. Cap 75].

⁷⁷ See s 2 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75]. It is noted that Married Women's Property Act became applicable in Nigeria as a Statute of General Application. It applied to the entire country until 1958 when the Married Women's Property Law, Cap 76 Laws of Western Region of Nigeria, 1959 was enacted which applied to the Western and Mid – Western states in Nigeria. See Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 11.

⁷⁸ [45 & 46 Vict. Cap 75].

⁷⁹ See s 1(2) of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] and s 1(2) of Married Women's Property Law, Cap 76 Laws of Western Region of Nigeria, 1959. See also Onokah, *Family Law*, 273.

⁸⁰ [45 & 46 Vict. Cap 75].

⁸¹ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 393 – 395.

⁸² [1969] 2 All ER 385 (HL) at 393 – 395.

⁸³ [45 & 46 Vict. Cap 75].

Nigerian courts to the Married Women's Property Act, 1882⁸⁴ or the Married Women's Property Law, 1959⁸⁵ when confronted by property-related disputes between spouses to a civil marriage (especially upon divorce).⁸⁶

It is advanced in this thesis that that the concept of matrimonial property goes beyond the mere application of the provisions of the Married Women's Property Act, 1882⁸⁷ or the Married Women's Property Law, 1959⁸⁸ to determine legal ownership. The concept (matrimonial property) within marriage and upon its breakdown also deals with the alteration of property interests when it is deemed to be just and equitable to do so.⁸⁹

It is not to be understood that this thesis canvasses a broad exercise of judicial discretion which in most cases is fraught with uncertainties that may cause injustice.⁹⁰ Within the matrimonial property system(s) which are proposed in this study, the discretion of the courts should be retained subject to laid down statutory guidelines, and invoked only in limited cases when it is just and equitable to do so.⁹¹

It is argued that, in order to secure the economic future of spouses, there is a need for a matrimonial property regime which ensures the distribution of the property which was acquired during the marriage.⁹² Alternatively, spouses can, by their own choice, elect a suitable matrimonial property system within the proposed legal framework.⁹³ There is, thus, a need for a matrimonial property regime which will regulate the property rights of spouses while their marriage subsists and upon its breakdown and provide an avenue where a spouse is compensated for the direct and indirect contributions made to the matrimonial property and her homemaker role which afforded the other spouse the time

⁸⁴ [45 & 46 Vict. Cap 75].

⁸⁵ Cap 76 Laws of Western Region of Nigeria, 1959.

⁸⁶ See *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 82 – 84; Arinze-Umobi, 2004 *Unizik Law Journal*, 188 at 197.

⁸⁷ [45 & 46 Vict. Cap 75].

⁸⁸ Cap 76 Laws of Western Region of Nigeria, 1959.

⁸⁹ See s 79 of the Family Law Act No 53 of 1975 (Cth); s 24 of the Matrimonial Causes Act cap 18 of 1973 which give the Australian and English courts respectively the power to vary vested titles in property on the breakdown of marriage

⁹⁰ Bridge, in Henaghan and Atkin eds., *Family Law Policy in New Zealand*, 232. See also 6.3.1 below.

⁹¹ See 7.2.1.5 below.

⁹² "Matrimonial property" is viewed in this light as property acquired by spouses either jointly or individually during the subsistence of the marriage. See 1.7 below.

⁹³ See 7.2.1.3 below.

and independence to be financially buoyant.⁹⁴

1.3 RESEARCH QUESTION

The main research question which this study addresses is: Considering the fact that Nigerian family law on the settlement of property discriminates against the financially weaker spouse on the breakdown of civil marriage, how can the law be reformed to guarantee a just sharing of “matrimonial property”? In addressing this question, a number of other questions will be answered. They include:

- What is the current position of the law in Nigeria in relation to the settlement of property on civil marriage breakdown?
- Are modern practices in other countries reflected by the attitudes of Nigerian courts in determining the property rights of spouses on civil marriage breakdown?
- In what ways have the Australian and English laws on the alteration of property interest and the redistribution of property respectively developed beyond the Nigerian position?
- To what extent can the South African matrimonial property regime influence Nigerian law in the determination of the property rights of spouses in civil marriages?
- Are there lessons to be learnt by Nigeria from a comparative study of the matrimonial property laws in Australia, England and South Africa for the purposes of reform?
- Is there a need to advance the frontiers of the present legal framework on the property rights of spouses in Nigeria? If the answer is affirmative, what type of matrimonial property system(s) should then be adopted?

⁹⁴ See Ashiru, 2007 *Journal of African Law*, 316 at 331; Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 13 – 17.

1.4 PURPOSE OF THE STUDY

This study is aimed at rethinking and advancing a proper legal framework for the property rights of spouses on civil marriage breakdown in Nigeria. The objectives spelt out below will lead to the accomplishment of this aim. They include the following:

- To analyse the current position of the law in Nigeria as it relates to the settlement of property on the breakdown of civil marriage, and to establish that in Nigeria there is no special regime for dealing with matrimonial property;
- to examine and criticise judicial pronouncements centred on the provisions of the law and the attitude of the courts towards the settlement of property upon divorce for the purposes of having a better conception of how the courts have understood and interpreted the law (especially the provisions of the Matrimonial Causes Act of No 18 of 1970)⁹⁵ from the perspective of equality between spouses in marriage; and,
- by way of comparative reflection on how the property rights of spouses are determined on the breakdown of civil marriage in Australia, England and South Africa, to reveal the conservative nature of the law in Nigeria as it relates to the settlement of property and the need to advance a rethink of the legal framework.

1.5 SCOPE OF THE STUDY

This study considers how the application of the complete separation of property system, which is founded on the English common law, affects the property rights of spouses (especially female spouses) on the breakdown of civil marriage in Nigeria.

It examines the concept of the settlement of property on the breakdown of civil marriage in Nigeria with particular reference to a woman's property rights in relation to her

⁹⁵ Cap M7 Laws of the Federation of Nigeria, 2004. In order to achieve this objective, this study discusses the attitude of Nigerian judges who, in most cases, prefer to make an order for a lump sum payment to a spouse (especially the wife) upon divorce rather than settling property on the spouse. See Adesanya, *Laws of Matrimonial Causes*, 228; Ashiru, 2007 *Journal of African Law*, 316 at 319.

husband's under the law.

The matrimonial property regimes in Australia, England and South Africa are analysed for the comparative purpose of rethinking the legal framework in Nigeria in order to advance a law based on gender equality and fairness. The analyses are based on the extant laws as they exist in the countries under study and the judicial pronouncements on them, except for the repealed Australian Matrimonial Causes Act No 104 of 1959 (Cth) which is used to assess the current interpretation of section 72 of the Matrimonial Causes Act No 18 of 1970.⁹⁶

This study, however, does not extend to what happens to the property of spouses upon the death of either of them.⁹⁷ Neither does it determine the property rights of spouses under customary law, cohabitants or other partnerships not formally recognised by Nigerian law.

1.6 LIMITATION OF THE STUDY

The comparative nature of this study is challenging. It demands a good knowledge of the legal framework and how the law has been used to address the several impediments which hamper the property rights of spouses.

This study does not in a comprehensive fashion analyse the matrimonial property systems which exist in the countries under comparison as time poses a great limitation to delve into such an enterprise.

Considering the time which has been allocated to this research, it is a mountainous task to source all texts, articles from journals and the internet which have discussed the subject matter in four different countries. This study confines itself to the number of materials, both primary and secondary sources, within the reach of the researcher. It utilises these materials to do justice to the research problem and research question(s) raised by it.

⁹⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

⁹⁷ It is noted that the property rights canvassed in this thesis will also have an automatic effect upon the death of either spouse. This study, however, is aimed at the property rights of spouses upon divorce, judicial separation and the annulment of marriages.

It is noted that there is no specific Nigerian legislation or literature which deals in detail with the property rights of spouses on marriage breakdown. Unlike other jurisdictions, where there are available sources on the subject matter of this study, very few local texts and articles have highlighted either the challenges which are likely to confront a (female) spouse upon divorce or the need for a new legislative framework.⁹⁸

1.7 CONCEPTUAL CLARIFICATION OF TERMS

It is noted that some of the terms used in this study have been used differently from their ordinary usage. More so, some terms, as employed in this study, are peculiar to the comparative jurisdictions discussed. They are terms employed by specific statutes or terms which constitute the language of the law in Nigeria and other countries used for comparison. There is a need to explain the basic ones which characterise this study. Others are explained by way of footnotes where they first appear.

(a) Matrimonial Property

The term “matrimonial property”, within the context employed in this study and proposed for Nigeria, implies property (immovable or movable) acquired by either or both spouses during the marriage other than that acquired by gift, inheritance or bequest except otherwise agreed upon by the spouses. This will include, amongst other things, the income of spouses, whether derived from earnings or property, and assets which are acquired by means of either spouse’s income or gains. It will, however, exclude personal property (that is, property which is personal in nature, gifts, inheritances and bequests acquired before or during the subsistence of the marriage).

It will constitute property which is not only jointly used but also jointly owned by spouses, not necessarily as a result of the financial contributions of each spouse to its acquisition, but also as a result of the fact that the property was acquired in matrimony by either or both spouses and was to be used for their benefit as husband and wife. To establish that property is “matrimonial” in nature, therefore, its proof is not exclusively

⁹⁸ See Arinze-Umobi, 2004 *Unizik Law Journal*, 188; Umukoro, 2006 *Commercial and Property Law Journal*, 116; Ashiru, 2007 *Journal of African Law*, 316; Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1.

ties to the establishment of a direct financial contribution to the acquisition of the property in question. The indirect contributions of a spouse, whether financial or otherwise, to the acquisition of the property could possibly give rise to the construction of a beneficial interest in the property, the legal ownership of which is in the name of the other spouse.

(b) Separate Property

As understood under Nigerian family law, “separate property” implies the personal or individual property of a spouse (immovable property, movable property or intellectual property rights) acquired before or during the subsistence of the marriage. This will include: assets acquired before the commencement of the marriage; gifts, inheritances and bequest acquired during the marriage; assets which are personal in nature; and increases (gains) in the value of such assets (because they have nothing to do with spousal contribution).⁹⁹ The term “separate property” is used differently in chapter 5 of this study to indicate “... property which does not form part of a joint estate.”¹⁰⁰

(c) Joint Property

In Nigeria, “joint property” means property in which both spouses have legal and or beneficial interest, either as a result of joint financial contributions towards its acquisition or by the existence of a trust.¹⁰¹

It is noted that the term “joint property” as described above could easily be confused with the term “matrimonial property”. They are, however, not one and the same thing in the Nigerian context. In the property relationship that exists between Nigerian spouses, “joint property” does not necessarily imply “matrimonial property”. In strict terms, there is no category of property in Nigeria known as “matrimonial property”.

⁹⁹ See Boele-Woelki *et al*, *The Principles of European Family Law Regarding Property Relations Between Spouses*, 149 – 161 and 223 – 239, particularly on the distinction between acquisitions and reserved property on the one hand and community property and personal property on the other hand. The distinction of matrimonial and separate property above is an extract from the idea expressed by these authors in the book.

¹⁰⁰ See s 1 of the Matrimonial Property Act 88 of 1984. See also 5.2.1 below.

¹⁰¹ See *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 4; *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564 at 584.

Under Nigerian family law, property is said to be jointly owned by spouses if it was acquired by both spouses with each spouse making some sort of direct financial contribution to its acquisition.¹⁰² A spouse who claims an interest based on joint ownership of property is required by law to establish by detailed evidence his or her direct financial contribution to the purchase of the property or the existence of a trust.¹⁰³ This will include the tendering of receipt(s) of purchase,¹⁰⁴ the need for witnesses to testify, especially where legal title is in the name of a sole spouse,¹⁰⁵ and the proof of an express declaration of trust in favour of the claimant spouse,¹⁰⁶ etc. Anything short of the foregoing will not establish joint property ownership in Nigeria.

It is noted that the term “joint estate” as employed in chapter 5 of this study means the joint estate of spouses who are married in community of property.

(d) Settlement of Property

Although the term “settlement of property” is not defined by the Nigerian Matrimonial Causes Act No 18 of 1970,¹⁰⁷ the word “settlement” implies “... an act of bestowing or giving possession under legal sanction.”¹⁰⁸ “Settlement” can also imply the disposition of property or the act of granting it.¹⁰⁹ The term “disposition” means the transfer or “... relinquishment to the care or possession of another.”¹¹⁰

This study takes the view that “settlement of property” as employed by section 72(1) of the Matrimonial Causes Act No 18 of 1970¹¹¹ implies simply the relinquishment of property by a spouse to the care or possession of the other spouse as part of providing maintenance for the other spouse.¹¹² This does not mean an absolute transfer of property, that is, a transfer of ownership, but a mere settlement of property on a spouse

¹⁰² See *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1.

¹⁰³ See *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 4.

¹⁰⁴ See *Mueller v Mueller* (2005) LPELR 12687 (CA) 1 at 13 – 15.

¹⁰⁵ See *Mueller v Mueller* (2005) LPELR 12687 (CA) 1 at 13 – 15.

¹⁰⁶ See *Egunjobi v Egunjobi* [1976] 2 FNL 78 at 82 – 84.

¹⁰⁷ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁰⁸ See *Mish, Merriam – Webster’s Collegiate Dictionary*, s v “settlement”.

¹⁰⁹ *The English Dictionary*, <https://en.wiktionary.org/wiki/settlement>.

¹¹⁰ *The English Dictionary*, <https://en.wiktionary.org/wiki/disposition>.

¹¹¹ Cap M7 Laws of the Federation of Nigeria, 2004.

¹¹² See *Kafi v Kafi* [1986] 3 NWLR (Pt 27) 175 at 186 – 187.

to hold the property either as a life interest, as a trustee, or subject to the occurrence of an event(s).¹¹³ By section 73(1)(j) of the Matrimonial Causes Act No 18 of 1970,¹¹⁴ therefore, the court can discharge a settlement of property order¹¹⁵ made pursuant to section 72(1) of the Matrimonial Causes Act No 18 of 1970.¹¹⁶

The term “settlement of property” as discussed under the repealed Australian Matrimonial Causes Act No 104 of 1959 (Cth), when used by the court to alter the property interest of a spouse, however, means the transfer of ownership of property from one spouse to the other.¹¹⁷

(e) Transfer of Property

“Transfer of Property” means the transfer of the legal title in property from one spouse to the other spouse. In this case, a spouse’s vested right or interest in property becomes defeasible by a deed of transfer or a deed of assignment.

(f) Legal and Beneficial Interest

A legal interest in property is a legally enforceable right to use or possess property, while a beneficial interest in property is an interest in the economic benefit of a property.

(g) Property Adjustment Order

A “property adjustment order” is a discretionary order of court to vary the established (proven) interest of spouses in a property, thereby either making an order for a “transfer of property” or an order for the “settlement of property” from one spouse to the other spouse. When the English court adjusts the property rights of spouses, it varies their interest in property by way of a redistribution order. This term is mostly employed when

¹¹³ *Kafi v Kafi* [1986] 3 NWLR (Pt 27) 175 at 187. See also *Akinboni v Akinboni* [2002] 5 NWLR (Pt 761) 564. This view can be contrasted with the recommendation of the Law Commission in England on statutory co-ownership. See Bromley, *Bromley’s Family Law*, 420 – 421. Bromley, *Bromley’s Family Law*, 420 has argued that the disposition of such property “... would have to be a beneficial and absolute interest in possession and not ... a life interest or one held by one of the spouses as a trustee.”

¹¹⁴ Cap M7 Laws of the Federation of Nigeria, 2004.

¹¹⁵ A court discharges a settlement of property order made which provides maintenance to a spouse by way of dismissing the order.

¹¹⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

¹¹⁷ See 4.2.2 below.

discussing English law.¹¹⁸

(h) Property Order, Property Alteration Order and Alteration of Property Interest

A “property order” means an order for the transfer of the legal ownership in property from one spouse to the other spouse, while a “property alteration order” means an order of court which alters the right of a spouse to his or her property. When this order is made under the Family Law Act No 53 of 1975 (Cth), a spouse is mandated, by the exercise of judicial discretion, to transfer his or her interest in property to the other spouse.¹¹⁹ The term “alteration of property interest” is, thus, employed.

(i) Financial Agreements, Nuptial Agreements, Marital Property Agreements and Nuptial Contracts

These terms mean and serve the same purpose. They are used variably depending on the country under discussion. For instance, the term “financial agreement” is used in Australia, “nuptial agreement” or “marital property agreement” is used in England, while “nuptial contract” is used in South Africa. Except where otherwise indicated, the term applies to both antenuptial and postnuptial contracts.

(j) Antenuptial or Postnuptial Settlements

The term “antenuptial or postnuptial settlement” as used under Nigerian, Australian and English law does not mean the same thing as an “antenuptial or postnuptial contract” as construed under South African law. An “antenuptial or postnuptial settlement” is a disposition of property made e.g. by a third party, to either or both spouses before or after their marriage. The disposition, which may take the form of a gift of property, makes future or continuing provision for either or both spouses or for their children.¹²⁰

(k) Marriage Breakdown/Breakdown of Marriage

Reference to the term “marriage breakdown” or “the breakdown of marriage” as

¹¹⁸ See 3.5.2 below.

¹¹⁹ See 4.3.3 below.

¹²⁰ See 2.6; 3.1; 4.2.3 and 4.3.5 below.

employed in this study includes: dissolution of marriage (divorce); nullity of marriage; or judicial separation.

1.8 LITERATURE REVIEW

Sagay¹²¹ notes that the powers conferred on Nigerian courts in pursuance of section 72 of the Matrimonial Causes Act No 18 of 1970,¹²² which powers are frequently exercised in the United Kingdom¹²³ and Australia,¹²⁴ are rarely exercised by Nigerian Courts. This study, however, takes the view that the provisions of the English Matrimonial Causes Act Cap 18 of 1973, upon which the courts have arrived at their decisions, are different from the provision of section 72 of the Matrimonial Causes Act No 18 of 1970¹²⁵ in Nigeria. The old English cases of *Watchel v Watchel*¹²⁶ and *H v H*¹²⁷ were decided based on the Matrimonial Causes Act Cap 18 of 1973.¹²⁸ The statutory considerations which guided the courts in those cases are not extant under Nigerian law. Miller's¹²⁹ statement gives credence to this argument when he states that, in England between

¹²¹ *Nigerian Family Law: Principles, Cases, Statutes & Commentaries*, 462.

¹²² Cap M7 Laws of the Federation of Nigeria, 2004.

¹²³ See *Watchel v Watchel* [1973] 1 All ER 829 (CA); *H v H* [1975] 1 All ER 367 (CA). It is noted that in *Watchel v Watchel* [1973] 1 All ER 829 (CA); *H v H* [1975] 1 All ER 367 (CA) full time housewives were held to have made contributions toward the home and their husbands' businesses and their acts were taken into consideration in transferring property to them.

¹²⁴ See s 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth); s 79 of the Family Law Act No 53 of 1975 (Cth); *Smee v Smee* (1965) 7 FLR 321; *Sanders v Sanders* (1967) 116 CLR 366. See also 4.2.2 below.

¹²⁵ Cap M7 Laws of the Federation of Nigeria, 2004.

¹²⁶ [1973] 1 All ER 829 (CA).

¹²⁷ [1975] 1 All ER 367 (CA).

¹²⁸ See particularly s 24 of the Matrimonial Causes Act Cap 18 of 1973 (England) which vests the court with wide powers to adjust property between the parties by ordering:

- (a) *one party to transfer property to the other*;
- (b) a settlement of one party's property for the benefit of the other party;
- (c) the variation of an antenuptial or postnuptial settlement made on the spouses; or
- (d) the extinction or reduction of either party's interest under any such settlement.

It is observed that the Nigerian Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 does not have a similar provision as that contained in s 24(a) of the Matrimonial Causes Act of 1973 (England). It is equally noted that the principles on which the powers of the courts are exercised under s 24 of the Matrimonial Causes Act Cap 18 of 1973 (England) are set out in ss 25 and 25A of the Matrimonial Causes Act Cap 18 of 1973 (England) (as amended by the Matrimonial and Family Proceedings Act Cap 42 of 1984). The considerations include: the children; income and earning capacity of the spouses; their financial needs; the present or foreseeable obligations and responsibilities of the spouses; contributions which each spouse has made to family welfare, including a spouse's contribution as a homemaker or that which will be made in the foreseeable future in respect of the children; their age; and the length of the marriage amongst other considerations.

¹²⁹ *Family Property and Financial Provision*, v.

1974 and 1983, there was a great change of emphasis from ascertaining ownership to the reallocation of property rights upon divorce which has resulted in a number of cases.

Writing on the settlement of property provision, Tijani¹³⁰ argues that Nigerian courts are given wide discretion, and they may consider the fortunes and family responsibilities of the spouses in deciding on whom to settle the properties between the spouses.¹³¹ Just and equitable considerations guide Nigerian courts when making a property settlement order.¹³²

On his own part, Nwogugu¹³³ states that in Nigeria any property can be settled (whether real or personal). The author¹³⁴ is, however, of the opinion that it is unlikely that a settlement will be ordered by the court unless the income or property of the spouse ordered to settle property (and in Nigeria this is almost always the husband) greatly exceeds that of the other spouse.

Onokah¹³⁵ argues, with particular reference to the attitude of Nigerian courts that “[I]t is doubtful ... that courts would make an order for the settlement of property rather than make an order for a lump sum payment in favour of the wife.” Even where the facts are proved that the husband’s real assets are many and that they have been acquired by the joint assistance of the wife, Nigerian courts will be more likely to order a lump sum payment rather than make a property settlement order on the wife.¹³⁶

It is common ground among authors that Nigerian courts rarely exercise their power to settle property in cases where the housewife has not made any financial contribution towards the acquisition of the property.¹³⁷ In *Nwanya v Nwanya*,¹³⁸ the court held that, to succeed in a claim for share in a jointly acquired property, the female spouse must

¹³⁰ *Matrimonial Causes in Nigeria – Law and Practice*, 179.

¹³¹ See also Nwogugu, *Family Law in Nigeria*, 270 – 271.

¹³² Tijani, *Matrimonial Causes in Nigeria – Law and Practice*, 179.

¹³³ *Family Law in Nigeria*, 271.

¹³⁴ Nwogugu, *Family Law in Nigeria*, 271.

¹³⁵ *Family Law*, 267.

¹³⁶ See in particular *Alli v Alli* (1972) NMLR 58; *Menakaya v Menakaya* (1976) FNLR 57 and *Sotomi v Sotomi* (1976) 2 FNLR 164; *Dairo v Dairo* Suit No. ID/90HD/86 of 15/7/88 (Unreported) Lagos High Court. See also Onokah, *Family Law*, 267.

¹³⁷ See Sagay, *Nigerian Family Law: Principles, Cases, Statutes & Commentaries*, 462.

¹³⁸ [1987] 3 NWLR (Pt. 62) 697 at 699.

show evidence of her direct and substantial contribution to the acquisition of such property.

It is clear that the views of the authors cited above are not based on the concept of matrimonial property.¹³⁹ For instance, Nwogugu¹⁴⁰ did not focus his attention on “matrimonial property” in strict terms but rather on the separate or joint property of the spouse which can be established only by proof of financial contributions. It would not be wrong to submit that Nwogugu’s¹⁴¹ views on section 72(1) of the Matrimonial Causes Act No 18 of 1970¹⁴² are rightly placed as to the type of property¹⁴³ which is made subject to settlement by the court upon the breakdown of marriage. This study, however, does not focus only on the settlement of property purchased by the separate or joint efforts of the spouses but also on those properties which spouses would become entitled to by virtue of their marriage, otherwise referred to as “matrimonial property”.

The fact that the courts have the power to settle separate and co-owned property in a just and equitable manner for the benefit of both spouses, either of them or the children of the marriage¹⁴⁴ is laudable. The real centre of concern which has resulted in the financial tragedies of financially weaker spouses, mostly wives, is the absence of the concept of matrimonial property which recognises the beneficial interest of spouses in matrimonial property and the consequent inability of the courts to make orders for the redistribution or transfer of such property upon the breakdown of marriage.¹⁴⁵ This task becomes more difficult because Nigerian statutes do not recognise the term

¹³⁹ See the meaning of “matrimonial property” at 1.7 above.

¹⁴⁰ *Family Law in Nigeria*, 270 – 272.

¹⁴¹ *Family Law in Nigeria*, 271.

¹⁴² Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁴³ Nwogugu, *Family Law in Nigeria*, 271, has argued that a property which is subject to settlement by the court must be the property of one or both spouses, and that there is no restriction on the type of property which may be settled. On the type of property, he meant that both immovable (real) property and movable (personal) property may be settled.

¹⁴⁴ See s 72(1) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁴⁵ See Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 13 – 14.

“matrimonial property”.¹⁴⁶

It is noted that in Nigeria, as argued by Adekile,¹⁴⁷ the concept of matrimonial property does not operate in any of the systems of law governing marriage, whether civil, customary or Islamic law marriages. Property acquired by a spouse during marriage is, thus, not treated as “matrimonial property” or “joint property”. In the words of Adekile, “... the presumption of law is that the title both legal and equitable resides in whoever’s name is on the title deed ...”¹⁴⁸ The author argues that the requirement of strict proof of title by the production of real evidence of contribution to the property has been a major stumbling block¹⁴⁹. Adekile’s¹⁵⁰ work advances the view that the Nigerian legal structure has failed to recognise the immense contribution of women in marriages with regard to the acquisition of property and the success of the family and that this has resulted in the deprivation of the woman’s economic and social rights.

Adekile’s argument finds relevance in the article written by Ashiru, who states that Nigerian law “... discriminates against women in respect of the distribution of property on divorce.”¹⁵¹ Ashiru examines regional and international conventions¹⁵² on the elimination of gender discrimination, and she observes that, despite those instruments, women still experience discrimination in Nigeria.¹⁵³ The author is of the opinion that besides enacting laws against discrimination, “... women must also be given access to

¹⁴⁶ Nowhere is the term “matrimonial property” used or defined in the Marriage Act of 1914 Cap M6 Laws of the Federation of Nigeria, 2004 or the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁴⁷ 2010 <http://ssrn.com/abstract=1616270>, 1 at 13.

¹⁴⁸ Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 13.

¹⁴⁹ Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 17. For a spouse to be entitled to any interest in the property of the other spouse, therefore, the spouse must base his or her claim on a strict property right. The legal title is usually in the husband’s name. In most cases, the court requires the wife to show real evidence of direct financial contribution to the purchase of the property. The wife’s claim for an interest in the property will hardly be upheld by the court where this piece of evidence is missing.

¹⁵⁰ 2010 <http://ssrn.com/abstract=1616270>, 1 at 4.

¹⁵¹ Ashiru, 2007 *Journal of African Law*, 316.

¹⁵² Such instruments include: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which was ratified by Nigeria in 1985 (for 32 years now, this convention is yet to be domesticated as a part of Nigerian law); the CEDAW Optional Protocol; the African Charter on Human and Peoples’ Rights (Banjul Charter) 1981 which was signed on August 31, 1982 and ratified on June 22, 1983. This Charter has been domesticated in Nigeria as the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act No 2 of 1983 Cap 10 Laws of the Federation of Nigeria 1990. It is presently cited as the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act No 2 of 1983 Cap A9 Laws of the Federation of Nigeria 2004.

¹⁵³ Ashiru, 2007 *Journal of African Law*, 316 at 325 – 330.

justice as laws on their own do not necessarily change beliefs.”¹⁵⁴

Of particular relevance to this study is Ashiru’s viewpoint on the law which regulates the spouses’ rights to property on the breakdown of marriage in Nigeria. The author, while admitting that the law “... ignores the different economic roles that each spouse plays in marriage...”,¹⁵⁵ suggests that “Nigeria seriously needs to review her municipal laws and policies in this area and bring them into line with her obligations under international and regional instruments.”¹⁵⁶

Arinze-Umobi,¹⁵⁷ on the other hand, has argued that a law which deprives a female spouse of the right to a beneficial interest in the “matrimonial property” purchased solely by the husband, on the basis of her non-financial contributions to the property, is not only absurd but also discriminatory. This author argues that such a matrimonial property regime “... runs contrary to the flow of matrimonial relationship and the principles of equity and justice.”¹⁵⁸ According to her, Nigerian (female) spouses are at a great disadvantage, as the provision of section 72 of the Matrimonial Causes Act No 18 of 1970,¹⁵⁹ which vests the courts with extensive discretionary powers to settle property based on what is just and equitable, has been “... subjected to a discriminatory and narrow interpretation and application ...”¹⁶⁰ by the Nigerian courts.

Having considered a number of cases¹⁶¹ where Nigerian courts have exercised their powers under section 72 of the Matrimonial Causes Act No 18 of 1970,¹⁶² Arinze-Umobi¹⁶³ contends that Nigerian courts have refused to follow present economic realities to achieve that which is just and equitable with regard to the settlement of property upon divorce. Noting that the guidelines or considerations which the courts should take into consideration before making an order for the settlement of property are

¹⁵⁴ Ashiru, 2007 *Journal of African Law*, 316 at 331.

¹⁵⁵ Ashiru, 2007 *Journal of African Law*, 316 at 331.

¹⁵⁶ Ashiru, 2007 *Journal of African Law*, 316 at 331.

¹⁵⁷ 2004 *Unizik Law Journal*, 188.

¹⁵⁸ Arinze-Umobi, 2004 *Unizik Law Journal*, 188.

¹⁵⁹ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁶⁰ Arinze-Umobi, 2004 *Unizik Law Journal*, 188 at 198.

¹⁶¹ See *Egunjobi v Egunjobi* (1976) 2 FNLR 78; *Nwanya v Nwanya* [1987] 3 NWLR (Pt 62) 697 at 699, *Sodipe v Sodipe* (1990) 5 WRN 98; amongst other cases.

¹⁶² Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁶³ 2004 *Unizik Law Journal*, 188 – 198.

not spelt out in the Matrimonial Causes Act No 18 of 1970,¹⁶⁴ Arinze-Umobi¹⁶⁵ calls for a review of the law to include express guidelines for the courts while exercising the powers conferred on them by section 72 of the Matrimonial Causes Act No 18 of 1970.¹⁶⁶ This, according to the author, is to avoid a situation where such guidelines or factors are left entirely to the discretion of judges.¹⁶⁷

Similarly, Umukoro¹⁶⁸ examines, in a comparative fashion, the legislative and judicial trends in the dissolution of marriages in relation to the distribution of matrimonial property in Nigeria, Tanzania, Botswana and Sierra-Leone. He argues that the “just and equitable” requirements provided for by section 72(1) of the Matrimonial Causes Act No 18 of 1970¹⁶⁹ have not been given a true construction by the courts to reflect a protection of the property rights of both spouses and the children of the marriage.¹⁷⁰

According to him, the discretion applied by Nigerian judges in the application of section 72(1) of the Matrimonial Causes Act No 18 of 1970¹⁷¹ is too wide.¹⁷² The author calls on judges to be more liberal in their interpretation and application of section 72(1) of the Matrimonial Causes Act No 18 of 1970.¹⁷³ Although he calls for a reform of “... the law relating to the adjustment of matrimonial property upon divorce...,”¹⁷⁴ he, fails however, to specify the areas of the law which require reform. Umukoro is also silent on the exact property system adopted in Nigeria and whether such system should be revisited and considered for reform.

From the totality of the foregoing, this study addresses the lacunae which exist in the reviewed sources in order to rethink the property rights of spouses in Nigeria upon the

¹⁶⁴ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁶⁵ 2004 *Unizik Law Journal*, 188 at 198.

¹⁶⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁶⁷ Arinze-Umobi, 2004 *Unizik Law Journal*, 188 at 198.

¹⁶⁸ 2006 *Commercial and Property Law Journal*, 116 – 131.

¹⁶⁹ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁷⁰ Umukoro, 2006 *Commercial and Property Law Journal*, 122. See also *Sodipe v Sodipe* (1990) 5 WRN 98.

¹⁷¹ Cap M7 Laws of the Federation of Nigeria, 2004

¹⁷² Umukoro, 2006 *Commercial and Property Law Journal*, 123. See *Okafor v Okafor* Suit No. 0/60/71 (Unreported) cited in Umukoro, 2006 *Commercial and Property Law Journal*, 123 where the court refused to make financial provisions for a female spouse upon divorce merely because the female spouse opposed every attempt to reconcile her to her husband.

¹⁷³ Umukoro, 2006 *Commercial and Property Law Journal*, 131.

¹⁷⁴ Umukoro, 2006 *Commercial and Property Law Journal*, 131.

breakdown of civil marriage, namely relative to proceedings for a decree of dissolution of marriage (divorce), the nullity of marriage or judicial separation.¹⁷⁵

This study takes the position that the present law in Nigeria recognises the separate property rights of spouses,¹⁷⁶ as enshrined in the Married Women's Property Act, 1882,¹⁷⁷ which deals with the property rights of spouses married under the statute.¹⁷⁸ Unlike Australian and English courts, Nigerian courts do not redistribute properties on marriage breakdown;¹⁷⁹ and a transfer of property between spouses is made only on the strict principles of the law of property.¹⁸⁰ Consequently, the question that necessarily follows is whether a case for a departure from the complete separation of property system can be made.

1.8.1 Justification for Choice of Selected Countries

The need to develop and improve the domestic law in Nigeria in relation to the property rights of spouses on civil marriage breakdown has necessitated the comparative approach adopted by this study. The research question posed by this study can be addressed by considering how other countries have approached similar problems in the determination of the property rights of spouses on the breakdown of civil marriages. It is noted that, in comparative terms, the concepts adopted by the countries used for comparison in this study are not extant under Nigerian family law. The selection of

¹⁷⁵ See ss 75(4) and 114(1)(a) and (b) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁷⁶ See Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 13.

¹⁷⁷ [45 & 46 Vict. Cap 75] (amended in 1893). It should be noted that the Western Region of Nigeria, in the exercise of its constitutional legislative power, enacted the Married Women's Property Law, 1959 Cap 76 Laws of Western Nigeria, 1959. It is also noted that, before the inception of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75], the contractual relationship between spouses was governed by the English common law doctrine of legal unity of the spouses. For instance, at common law, a married woman lacks contractual capacity.

¹⁷⁸ Gbadamosi, *Reproductive Health & Rights (African Perspectives and Legal Issues in Nigeria)*, 27 points out that the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] is inapplicable in respect of marriages contracted under customary laws in Nigeria. In some States in Nigeria, like Anambra, Enugu, Ogun, Oyo and Rivers, the law did not restrict its application to a particular type of marriage. See Nwogugu, *Family Law in Nigeria*, 93 – 94. According to Nwogugu, *Family Law in Nigeria*, 93 – 94, the purpose of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] was to emancipate the married woman from most of the restrictions placed on her to contract.

¹⁷⁹ See Etomi and Asia, 2015 global.practicallaw.com/6-613-4665, 1 at 4.

¹⁸⁰ See *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 4; *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 19 – 25; *Essien v Essien* [2009] 9 NWLR (Pt 1146) 306 at 331 – 332. See also Ashiru, 2007 *Journal of African Law*, 316 at 322.

England, Australia and South Africa as countries for comparative analysis is justified below.

(a) England

The choice of English law for comparison is necessitated for the following reasons:

The Married Women's Property Act, 1882,¹⁸¹ which established the complete separation of property system, is a heritage of British colonialism. It is a received English law¹⁸² in Nigeria as it was a Statute of General Application in force in England on the first day of January, 1890.¹⁸³ The Married Women's Property Act, 1882¹⁸⁴ is an extant law in England and Nigeria. Similarly to its Nigerian counterpart, ownership of property was determined in accordance with the strict principles of the law of property,¹⁸⁵ that is, the establishment of legal title, and, except where a spouse can establish by evidence that he or she made financial contributions of some kind to the acquisition or development of the assets, the courts do not recognise the spouse's proprietary interest.¹⁸⁶ The interpretation given to the provision of this Act by the English courts leads to a better appreciation of the application of the Act in the Nigerian context.

It is noted that before the Nigerian Matrimonial Causes Act No 18 of 1970,¹⁸⁷ was enacted, if there existed any lacunae in the Nigerian Marriage Ordinance No 18 of 1914, such lacunae were filled by applying the law and practice which were in force in

¹⁸¹ [45 & 46 Vict. Cap 75].

¹⁸² English law is one of the sources of Nigerian law. The received English law includes the Common Law of England, "... doctrines of equity; statutes and subsidiary legislation." See Obilade, *The Nigerian Legal System*, 69.

¹⁸³ According to Osborne CJ in *A. G. v John Holt* (1910) 2 NLR 1 at 21, there are two tests for determining a statute of general application in Nigeria. They include "... (a) by what court is the statute applied in England?; and (b) to what Classes of the community in England does it apply?" In *IGP v Kamara* (1943) 2 WACA 185, the court, however, noted that a statute may not meet the above tests but still be regarded or treated as a statute of general application. It is also noted that it is not automatic that a Nigerian court will apply a statute because it is of general application. Such a statute may not apply if local circumstances do not permit it. In addition, if the court is convinced that applying same will produce manifest results and injustice not intended by the statute, the statute will not apply. It is also noted that the English Matrimonial Causes Act Cap 72 of 1965 was applicable to Nigeria before the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 was enacted.

¹⁸⁴ [45 & 46 Vict. Cap 75].

¹⁸⁵ Miller, *Family Property and Financial Provision*, 3.

¹⁸⁶ Miller, *Family Property and Financial Provision*, 3.

¹⁸⁷ Cap M7 Laws of the Federation of Nigeria, 2004.

England.¹⁸⁸ With the coming into force of the Matrimonial Causes Act No 18 of 1970,¹⁸⁹ the possibility of any recourse to English law ceased to be in force. Immediately after 1970, Nigerian marriage law parted ways with English law. An examination of the extant laws in England reveals that English law has gradually developed, with the English courts retaining wide discretion to make financial provisions and property adjustment orders within the ambit of the Matrimonial Causes Act Cap 18 of 1973. A comparative examination reveals that, while English law shifted its focus "... from maintenance of a wife by her husband to a process of readjustment of the whole financial position of the spouses to meet the new situation brought about by the termination of marriage",¹⁹⁰ Nigerian law has not grown in this direction.

English common law practices are still applicable to Nigerian family law, and Nigerian courts still place reliance on English cases as persuasive authorities in relation to property settlement. A comparative analysis shows that Nigerian courts should not apply the English cases "hook line and sinker," especially where there is no corresponding legislation in Nigeria to justify the application of English cases.

Equity and Trust Law, as applicable to Nigeria, is an adaptation of English law. The recent developments in English law, particularly the present intrusion of trust and other equitable doctrines in upholding the legal and beneficial interest of spouses in property,¹⁹¹ therefore, serve as useful guides to how Nigeria could develop her laws in the same field.

There is also a growing judicial recognition of nuptial agreements¹⁹² within the realm of English law. The changing attitude of English courts towards nuptial agreements, with particular emphasis on the guidelines set out by the United Kingdom Supreme Court's judgements in *Radmacher v Granatino*¹⁹³ for the enforcement of nuptial agreements,

¹⁸⁸ See s 4 of the States Courts (Federal Jurisdiction) Act Cap 177 Laws of the Federation of Nigeria, 1990.

¹⁸⁹ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁹⁰ Miller, *Family Property and Financial Provision*, 4.

¹⁹¹ See 1.7 above for the meaning of legal and beneficial interest in property.

¹⁹² The term "nuptial agreement" is used interchangeably with the terms "marital property agreement", "financial agreement" or "nuptial contract", which includes both antenuptial and postnuptial contracts. The difference in usage accounts for the country under discussion. See 1.7 above.

¹⁹³ [2011] 1 AC 534 (SC(E)).

strengthens the case for the applicability of nuptial agreements in Nigeria.

(b) Australia

Australia is a Commonwealth country, which, like Nigeria, adopts a complete separation of property system by virtue of strict English common law principles and the Married Women's Property Act, 1882¹⁹⁴ applicable to both countries. Australian law on the property rights of spouses has been selected for discussion because the Nigerian Matrimonial Causes Act No 18 of 1970,¹⁹⁵ which was hitherto a Decree, was modelled on the repealed Australian Matrimonial Causes Act No 104 of 1959 (Cth) and partly from England, viz. the Divorce Act of Cap 55 of 1969. Nigeria adopted the repealed Matrimonial Causes Act No 104 of 1959 (Cth) with slight modifications at a time when Australia had already taken steps to reform its own law.

The interpretation given to section 72 of the Matrimonial Causes Act No 18 of 1970¹⁹⁶ is queried after a similar consideration of the interpretation and application of section 86 of the repealed Matrimonial Causes Act No 104 of 1959 (Cth). An analytical description of the property rights of spouses in Australia and how they have moved from the era of the repealed Matrimonial Causes Act No 104 of 1959 (Cth) to their present regime (Family Law Act No 53 of 1975 (Cth)) is helpful in demolishing the *status quo* in Nigeria and rethinking a matrimonial property system which is both fair and serves the interest of justice between spouses.

A comparative analysis of the property rights of spouses in Australia and Nigeria shows that, while both countries adopt a complete separation of property system, Australian law has taken a further step by granting the courts the discretionary power to alter the property interest of spouses only when it is just and equitable to do so. There is, thus, a need to analyse the present Family Law Act No 53 of 1975 (Cth) and how the Australian courts have exercised their powers to make a property alteration order under section 79

¹⁹⁴ [45 & 46 Vict. Cap 75].

¹⁹⁵ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁹⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

of Family Law Act No 53 of 1975 (Cth).¹⁹⁷ The comparative analysis is helpful as it shows the difference in the nature of the property orders made by Australian and Nigerian courts. Using Australia for comparison in this regard, it is observed that the Australian law which makes provision for a permanent alteration of property interest between spouses is in contrast to the Nigerian position as provided for in section 73(1)(j) of the Matrimonial Causes Act No 18 of 1970¹⁹⁸ which states that a property settlement order can be discharged if a party in whose favour it was made remarries or dies.

In Australia, there is a statutory recognition of financial agreements between spouses.¹⁹⁹ This shows that it is possible to recognise binding financial agreements (nuptial agreements) in Commonwealth countries like Nigeria. This study supports the autonomy granted to spouses to determine the financial aspects of their marriage during its subsistence and on its breakdown.²⁰⁰ Unlike Australia, however, where financial agreements are enforceable and capable of ousting the court's jurisdiction if binding,²⁰¹ this study advocates a possible exercise of judicial discretion to vary the property rights of spouses in exceptional cases where a strict enforcement of the financial agreement will be unfair.²⁰²

A consideration of the provisions of the Australian Family Law Act No 53 of 1975 (Cth) places the compass of this study in the right direction and provides reasons for a departure from the complete separation of property system practised in Nigeria.

(c) South Africa

The choice of South Africa is made because it is the place where this study is carried

¹⁹⁷ At least two reasons have been identified in support of the legislative provision that created room for a departure from the separation of property regime in Australia thereby altering the property interests of spouses upon the breakdown of marriage: "The first is the variety of contribution that spouses can make to property and to the welfare of the family during marriage. The second is the failure of the ordinary rules of law and equity to recognise all such contributions as creating appropriate interests in property." See Dickey, *Family Law*, 473. These arguments are canvassed in this study in support of a new legal framework in Nigeria.

¹⁹⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁹⁹ See 4.3.7 below.

²⁰⁰ See 6.5; 7.2.1.3 below.

²⁰¹ See 4.3.7; 4.3.7.2; 4.3.7.3 below.

²⁰² See 6.3; 7.2.1.5 below.

out and assessed. Unlike the Australian and English legal systems, which have a common law heritage in the evolution of family law, South African family law is distinct in its own respect, having the Roman-Dutch common law root. There is, thus, a need to examine a jurisdiction where the property rights of spouses are specifically stipulated by statutes, different from the English common law countries. South Africa is further used for comparison in order to see how the country has addressed similar issues relating to the property rights of spouses with regard to divorce. With the concentration on South African matrimonial property law, as it relates to civil marriages, the present study examines the matrimonial property systems in South Africa in order to develop similar approaches in a Nigerian context.

The law in South Africa grants spouses the autonomy to elect a matrimonial property system, in the absence of which a default matrimonial property system is applicable. Consequent upon the examination of South African law, a similar proposal in respect of a new matrimonial property system in Nigeria is made.

The statutory recognition of nuptial contracts, the rationale behind the introduction of the accrual system and the current debate on the need for a redistributive power of the court in all matrimonial property systems in South Africa will help to shape the arguments on similar issues in Nigeria, as they are advanced in this study. Simply put, an examination of South African matrimonial property law will possibly improve Nigerian law.

1.9 RESEARCH METHODOLOGY²⁰³

The research methodology²⁰⁴ adopted in this study involves the logical study of the legal framework for the determination of the property rights of spouses on marriage breakdown in Nigeria, in particular, and other comparative countries in general, in order to make a case for a rethinking of the property rights of spouses upon civil marriage breakdown in Nigeria.

²⁰³ This simply refers to the procedure to be followed in carrying out the research.

²⁰⁴ Bulmer ed, *Sociological Research Methods: An Introduction*, 4 defines methodology in the general sense as "... the systematic and logical study of the general principles guiding sociological investigation, concerned in the broadest sense with the questions of how the sociologist establishes social knowledge and how he can convince others that his knowledge is correct."

Against the backdrop of the foregoing, research techniques which enabled the yielding of data about the research problem and question(s) highlighted in this study, are adopted. This research enterprise is analytical, descriptive, comparative and evaluative in nature. The normative/doctrinal research method constitutes the primary research method used in this study.²⁰⁵

Doctrinal research is “... the research into law as a normative science, that is, a science which lays down norms and standards for human behaviour in a specified situation(s) enforceable through the sanction of the state.”²⁰⁶ This study, therefore, utilises both primary and secondary sources of data collection. The primary sources include constitutions, statutes, law reports (case law) and treaties. The study employs the use of statutes and judicial precedents to do justice to the subject matter. Published and unpublished materials constitute the secondary sources. They include local and foreign textbooks and articles in journals (published materials), research and conference papers and seminars (unpublished materials). It is noted that this study is organised around legal propositions, and primary sources are employed, while secondary sources play supportive roles in accomplishing the objectives of the study.

Case law and statutory provisions in Australia, England, Nigeria and South Africa are critically analysed, which leads to the conclusion that a rethink of the property rights of spouses on civil marriage breakdown in Nigeria is desired in accordance with present legal developments.

1.10 CITATION STYLE

The citation style used in this study is distinct. An “own style” citation is adopted based on the supervisor’s recommendation. This enables the reader to quickly see cited sources without the hassle of flipping through the pages of the thesis. Sources are cited through footnotes, and a bibliography is used to outline all cited sources at the end of the study.

²⁰⁵ That is, research which entails a research into law as it stands in the books, statutes and judicial pronouncements.

²⁰⁶ Gasiokwu, *Legal Research and Methodology: The A-Z of Writing Theses and Dissertations in a Nutshell*, 13 – 14.

**CHAPTER 2: DETERMINING THE PROPERTY RIGHTS OF SPOUSES ON
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“Can one marriage partner lay claims to exclusive and sole ownership of what the two toiled and laboured to acquire and build when they were married, pretending the other partner was a mere footnote?”¹

2.1 INTRODUCTION

The discussion in this chapter is centred on a determination of the property rights of spouses when there is a breakdown of a civil marriage in Nigeria. To this end, it highlights the constitutional provision of property rights and how the Married Women’s Property Act, 1882² and the Married Women’s Property Law, 1959³ have been invoked by the courts to determine the rights of spouses in matters relative to disputed property. It further analyses extensively the provisions of sections 72 and 73 of the Matrimonial Causes Act No 18 of 1970⁴ while criticising the interpretation and application of the law by Nigerian courts. The Gender and Equal Opportunities Bill, 2016, is also analysed in relation to the property rights of Nigerian women in marriages. The chapter demonstrates how the application of the ordinary rules of property law in the determination of the property rights of spouses in Nigeria has been unfair to a financially weaker spouse on the breakdown of marriage. To this end, the chapter calls for a review of the law.

2.2 THE DEFINITION OF MARRIAGE IN NIGERIA

As an age-long tradition, marriage is an institution which “... has remained an indispensable anchor of a family which is the microcosm of the larger society”.⁵ While the society is founded on families, families are, in turn, founded on marriages.⁶

According to Lennart,⁷ the term “marriage” lacks a universal acceptable definition. In his words⁸:

“The legal regulation of marriage in different legal systems is

¹ *Iiyasu v Ahmed* [2011] 13 NWLR (Pt 1264) 236 at 256.

² [45 & 46 Vict. Cap 75].

³ Cap 76 Laws of Western Region of Nigeria, 1959.

⁴ Cap M7 Laws of the Federation of Nigeria, 2004.

⁵ Iyioku, 2010 *Seminar Paper on Jurisprudence and Legal Theory*, 1.

⁶ Iyioku, 2010 *Seminar Paper on Jurisprudence and Legal Theory*, 1.

⁷ *Marriage and Divorce in Comparative Conflict of Laws*, 144.

⁸ Lennart, *Marriage and Divorce in Comparative Conflict of Laws*, 144.

extremely varied. The differences in the condition and the manner of entry into as well as the effect of the marriage including possibility of the prerequisite or dissolution... of the matrimonial bond... are so wide as to render it difficult to establish any common denominator in terms of law to all unions called marriage.”

Hill agrees with Lennart’s viewpoint when he states:⁹

“It is impossible to provide a single definition of marriage. Indeed, one approach is to say that one cannot define marriage because marriage is whatever the parties... take it to mean. Thus a Christian couple seeking to base their marriage on biblical principle may well see their marriage in very different terms from a couple who see their marriage as open and short-term, entered into for tax purposes.”

The definition that is ascribed to marriage will, thus, depend on the type of marriage which has been contracted. It is worthy to note that, in Nigeria, there are two principal types of marriage. These are polygynous marriages¹⁰ and monogamous marriages.¹¹

The term “polygynous marriage” encompasses marriages celebrated under customary law and Islamic law.¹² This type of marriage is defined as “... a voluntary union for life ...” between a husband and more than one wife.¹³ It is a marriage rooted in the custom and religion of the people.¹⁴ In Nigeria, a polygynous marriage has its root in a “customary-law institution”¹⁵ and the incidences of such marriages are regulated by customary law¹⁶ which varies from place to place.¹⁷ This type of marriage, which is also known as a “native marriage”¹⁸ is given recognition under the Marriage Act of 1914.¹⁹ Section 35 of the Marriage Act of 1914²⁰ provides:

“... nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any customary

⁹ Hill, *Family Law*, 30.

¹⁰ It should be noted that that this study does not extend to the property rights of spouses in polygynous marriages.

¹¹ See Omoruyi, *An Introduction to Private International Law: Nigerian Perspectives*, 212.

¹² Rahmatian, 1996 *International Journal of Law, Policy and the Family*, 281 at 284, 287.

¹³ Nwogugu, *Family Law in Nigeria*, 9. See also Nwabachili and Nwabachili, 2015 *International Journal of Business and Law Research*, 89 at 92.

¹⁴ Omoruyi, *An Introduction to Private International Law: Nigerian Perspectives*, 212.

¹⁵ Nwogugu, *Family Law in Nigeria*, 9.

¹⁶ By s 2 of the High Court Law, Laws of Northern Nigeria, 1963, a reference to the term ‘customary law’ incorporates ‘Islamic law’.

¹⁷ Nigeria lacks a standard system of customary law. See Nwogugu, *Family Law in Nigeria*, 9.

¹⁸ S 35 of the Marriage Act of 1914 Cap M6 Laws of the Federation of Nigeria, 2004.

¹⁹ Cap M6 Laws of the Federation of Nigeria, 2004.

²⁰ Cap M6 Laws of the Federation of Nigeria, 2004.

law, or in any manner apply to marriages so contracted.”²¹

On the other hand, a monogamous marriage is defined in Nigeria by section 18 of the Interpretation Act No 1 of 1964²² to mean “... a marriage which is recognised by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage.” This type of marriage is also referred to as “statutory marriage” or “civil marriage” and, amongst the religious, it is referred to as “church marriage”,²³ or “court marriage” in the local parlance.

The Marriage Act of 1914²⁴ and the Matrimonial Causes Act No 18 of 1970²⁵ are the two principal “... laws which govern the celebration and incidents of monogamous marriages in Nigeria.”²⁶ The definition of marriage as conceived by the principal laws in Nigeria is not, however, expressly stated in their interpretative sections.²⁷ The definition, as conceived by the Marriage Act of 1914²⁸ and the Matrimonial Causes Act No 18 of 1970,²⁹ is the same as that proffered by Lord Penzance in the old English case of *Hyde v Hyde*,³⁰ as follows: “Marriage ... is the voluntary union for life³¹ of one man and one woman to the exclusion of all others.”

The Supreme Court of Nigeria in *Meribe v Egwu*³² states:

“In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be the union of a man and a woman thereby creating the status of husband and

²¹ See the latter part of s 35 of the Marriage Act of 1914 Cap M6 Laws of the Federation of Nigeria, 2004.

²² Cap I23 Laws of the Federation of Nigeria, 2004.

²³ By s 6 of the Marriage Act of 1914 Cap M6 Laws of the Federation of Nigeria, 2004, the Minister is empowered to license public places of worship as places for celebration of marriages under the Act.

²⁴ Cap M6 Laws of the Federation of Nigeria, 2004.

²⁵ Cap M7 Laws of the Federation of Nigeria, 2004.

²⁶ Nwogugu, *Family Law in Nigeria*, 8.

²⁷ Ss 2 and 114 of the Marriage Act of 1914 Cap M6 Laws of the Federation of Nigeria, 2004 and the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 respectively do not contain any definition of marriage.

²⁸ Cap M6 Laws of the Federation of Nigeria, 2004.

²⁹ Cap M7 Laws of the Federation of Nigeria, 2004.

³⁰ (1886) L R 1 P & D 130 (HL) at 133.

³¹ It remains a union for life at the time when the marriage was contracted. Such a marriage is, however, capable of being dissolved or terminated upon the occurrence of certain events as provided for by the Matrimonial Causes Act No 18 of 1970 cap M7 Laws of the Federation of Nigeria 2004. See ss 15, 16, 33, 34 and 38 of the Matrimonial Causes Act No 18 of 1970 cap M7 Laws of the Federation of Nigeria 2004.

³² (1976) 3 SC 50 at ratio 1.

wife.”³³

It is noted that section 46 of the Matrimonial Causes Act No 18 of 1970³⁴ prohibits any person who has contracted a marriage under customary law from getting married to another person under the Marriage Act of 1914³⁵ (during the subsistence of the customary law marriage) except the person with whom the customary marriage was contracted. Similarly, where a person has contracted a marriage under the statute, such a person is prohibited from contracting another marriage under customary law.³⁶

Conclusively, in Nigeria, “marriage” is defined as the union of a man and a woman, that is, a legally binding set of formal relationships of two persons of the opposite sex³⁷ celebrated in accordance with the legal regime regulating marriage in Nigeria,³⁸ which, for our present purpose, is the Marriage Act of 1914.³⁹

It is noted that the legality of the rules which have been built around marriage in Nigeria has over the years necessitated a more critical and thoughtful legal examination.⁴⁰ One of such rules is that which concerns the property rights of spouses in civil marriages in Nigeria, and, particularly how such rights are determined upon the breakdown of marriage.

2.3 THE MEANING OF MATRIMONIAL CAUSES AND JURISDICTION

Section 114(1)(a) of the Matrimonial Causes Act No 18 of 1970⁴¹ defines “matrimonial causes” to mean “... proceedings for a decree of dissolution of marriage; nullity of

³³ See also *Bibilari v Bibilari* [2011] 13 NWLR (Pt 1264) 207 at 229.

³⁴ Cap M7 Laws of the Federation of Nigeria, 2004.

³⁵ Cap M6 Laws of the Federation of Nigeria, 2004.

³⁶ S 47 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004. See also s 35 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

³⁷ See *Meribe v Egwu* (1976) 3 SC 50 at ratio 1. See also Nwogugu, *Family Law in Nigeria*, 4 – 5.

³⁸ S 3 of the Same Sex Marriage (Prohibition) Act of 2014 provides that only a marriage contracted between a man and a woman is recognised as valid in Nigeria. S 7 of the Same Sex Marriage (Prohibition) Act of 2014 defines “marriage” as “... a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic Law or Customary Law.”

³⁹ Cap M6 Laws of the Federation of Nigeria, 2004.

⁴⁰ Munby, <https://www.judiciary.gov.uk/wp-content/uploads/2014/10/munby-speech-bangor-10102014.pdf> 1 at 10.

⁴¹ Cap M7 Laws of the Federation of Nigeria, 2004.

marriage⁴²; judicial separation;⁴³ restitution of conjugal rights;⁴⁴ or jactitation of marriage.”⁴⁵ They are referred to as matrimonial relief⁴⁶ or principal relief.⁴⁷

Matrimonial causes also mean proceedings which deal with the maintenance of a spouse,⁴⁸ the custody or guardianship of a child⁴⁹ or settlement of property.⁵⁰ It is noted that proceedings for maintenance, custody and property settlements are referred to as ancillary relief.⁵¹

It should, however, be noted that unlike proceedings for the dissolution of marriage and the nullity of marriage which automatically bring a marriage to an end upon a decree being made absolute,⁵² judicial separation only prevents a spouse from cohabiting with the other spouse while the decree remains in force.⁵³ The marriage remains intact.⁵⁴ A spouse has the right to sue the other spouse in contract or tort or claim ancillary relief after a decree of judicial separation has been granted.⁵⁵ An order for settlement of property can, thus, be made after a decree of judicial separation (which is one of the

⁴² A petition for nullity of marriage can be based either on the grounds that a marriage is void or voidable at the suit of the petitioner. See s 34 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁴³ See s 39 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁴⁴ See s 47 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁴⁵ See s 52 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁴⁶ See Part II of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria 2004.

⁴⁷ See s 75(4) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria 2004.

⁴⁸ See s 70 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁴⁹ See s 71 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁵⁰ See s 72 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004; s 114(1)(c) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁵¹ See Part IV of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁵² See ss 33 and 38 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁵³ See s 41 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria 2004.

⁵⁴ A spouse can, during the pendency of a decree of judicial separation, commence proceedings for the dissolution of marriage.

⁵⁵ See s 42 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria 2004.

principal remedies) has been granted.⁵⁶

Section 2 of the Matrimonial Causes Act No 18 of 1970⁵⁷ confers on the High Court of any State of the Federation in Nigeria the jurisdiction to hear and determine matrimonial causes which are instituted by a person domiciled in Nigeria.⁵⁸ The High Court's jurisdiction to entertain proceedings for matrimonial causes is determined by the domicile of the petitioner.⁵⁹

It should be noted that, although the High Court is vested with the jurisdiction to determine proceedings for matrimonial causes, an order for the payment of maintenance, once made by a High Court, may be registered and enforced in accordance with the rules of a court of summary jurisdiction⁶⁰ in a state.⁶¹

Only a High court, however, has the original jurisdiction to entertain property settlement proceedings.⁶² This is particularly so because an order for the settlement of property cannot be made independently of proceedings for principal reliefs, which is the exclusive preserve of the High Courts of the States of the Federation.⁶³ In addition, where the High Court has made an order dismissing a petition, it cannot proceed to make a property order.⁶⁴

There is a general right of appeal against an order of a High Court in respect of

⁵⁶ See s 75 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria 2004.

⁵⁷ Cap M7 Laws of the Federation of Nigeria, 2004.

⁵⁸ See s 2(2) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004. A person is said to be domiciled in Nigeria if he or she is domiciled in any of the thirty-six states of the Federal Republic of Nigeria including Abuja which is the Federal Capital Territory. See s 2(3) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁵⁹ See Nwogugu, *Family Law in Nigeria*, 108.

⁶⁰ This means a magistrate court or a district court as defined by s 114 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004. Magistrate Courts are created by a law of the House of assembly of the State where they exist. They are inferior courts of record in Nigeria as they are not part of the courts (superior courts of record) established pursuant to s 6 of the Constitution of the Federal Republic of Nigeria, 1999 Cap C23 Laws of the Federation of Nigeria, 2004 for the Federation and the States as listed in s 6(5) of the Constitution of the Federal Republic of Nigeria, 1999 Cap C23 Laws of the Federation of Nigeria, 2004.

⁶¹ S 91 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁶² See s 2 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004. See also Nwogugu, *Nigerian Family Law*, 236.

⁶³ See s 2 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁶⁴ S 75(2)(b)(ii) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

proceedings for matrimonial causes⁶⁵ except when such appeals arise from any order of the court which was made *ex parte*,⁶⁶ in relation to costs,⁶⁷ by the consent of the parties,⁶⁸ or where the time allowed by the rules of court for a party to appeal against an order for a *decree nisi* has elapsed, or after such order has been made absolute.⁶⁹ In cases such as those mentioned above, the appeal must be with the leave of the court.⁷⁰ An appeal from a High Court⁷¹ decision or judgement lies with the Court of Appeal,⁷² and, thereafter, with the Supreme Court.⁷³

It is now appropriate to analyse the property rights of spouses in civil marriages. This examination will be done in the light of the provisions of the Constitution of the Federal Republic of Nigeria 1999,⁷⁴ the Married Women's Property Act, 1882,⁷⁵ which is a statute of general application in Nigeria,⁷⁶ and the property provisions as contained in section 72 of the Matrimonial Causes Act No 18 of 1970⁷⁷ and other sections related thereto.

2.4 PROPERTY RIGHTS UNDER THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999⁷⁸

The Constitution of the Federal Republic of Nigeria, 1999⁷⁹ gives recognition to the rights of every citizen of the country "... to acquire and own immovable property

⁶⁵ S 76 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁶⁶ S 77(a) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁶⁷ S 77(b) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁶⁸ S 77(c) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁶⁹ S 77(d) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁷⁰ S 77 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁷¹ See ss 270 – 274 of the Constitution of the Federal Republic of Nigeria, 1999 Cap C23 Laws of the Federation of Nigeria, 2004.

⁷² See ss 237 – 248 of the Constitution of the Federal Republic of Nigeria, 1999 Cap C23 Laws of the Federation of Nigeria, 2004.

⁷³ See ss 230 – 236 of the Constitution of the Federal Republic of Nigeria, 1999 Cap C23 Laws of the Federation of Nigeria, 2004; s 76(1)(a) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

⁷⁴ Cap C23 Laws of the Federation of Nigeria, 2004.

⁷⁵ [45 & 46 Vict. Cap 75].

⁷⁶ The provisions of the Married Women's Property Law of 1959 Cap 76 Laws of Western Region of Nigeria, 1959 which is a local enactment applicable to the former Western Region of Nigeria will be considered alongside.

⁷⁷ Cap M7 Laws of the Federation of Nigeria, 2004.

⁷⁸ Cap C23 Laws of the Federation of Nigeria, 2004.

⁷⁹ Cap C23 Laws of the Federation of Nigeria, 2004.

anywhere in Nigeria.”⁸⁰ Section 43 provides:

“Subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.”

The right to own immovable property as guaranteed by the Constitution of the Federal Republic of Nigeria 1999 does not preclude women from owning property.⁸¹ It is noted that the above constitutional provision is not specifically related to how property is regarded to be owned and shared between spouses should their marriage be terminated. It has, however, been observed that there is little societal approval in Nigeria in cases where married women take steps independently of their husbands to acquire separate property.⁸² This attitude is engraved in a cultural bias against women.⁸³ It is considered by many that Nigerian traditional customs, which disapprove of women to acquiring property independently of their husbands, are still retrogressive and are yet to be in tune with modern realities in relation to the rights of women,⁸⁴ particularly given the increased access by women to education,⁸⁵ the voluminous literature on the rights of women and the sensitisation of Nigerians⁸⁶ on the need to change their perception about women’s rights in general and their property rights in particular.⁸⁷

2.5 PROPERTY RIGHTS OF SPOUSES UNDER THE MARRIED WOMEN’S PROPERTY ACT, 1882

The Married Women’s Property Act, 1882⁸⁸ was enacted by the English Parliament to deal with the property rights of women married under statutory law. To a large extent,

⁸⁰ S 43 of the Constitution of the Federal Republic of Nigeria, 1999 Cap C23 Laws of the Federation of Nigeria, 2004.

⁸¹ Alemika, 2010 *University of Maiduguri Law Journal*, 25 at 35.

⁸² Alemika, 2010 *University of Maiduguri Law Journal*, 25 at 35.

⁸³ See Alemika, 2010 *University of Maiduguri Law Journal*, 25; Muna, 2011 *Indiana Journal of Global Legal Studies*, 87 at 101.

⁸⁴ Ekhatior, 2015 *Journal of International Women Studies*, 285 at 294.

⁸⁵ Ekhatior, 2015 *Journal of International Women Studies*, 285 at 293.

⁸⁶ Ekhatior, 2015 *Journal of International Women Studies*, 285 at 293.

⁸⁷ Alemika, 2010 *University of Maiduguri Law Journal*, 25 at 37; Ekhatior, 2015 *Journal of International Women Studies*, 285 at 293 – 294.

⁸⁸ [45 & 46 Vict. Cap 75]. This Act has been amended in England and certain portions of it have been repealed by the Law Reform (Married Women and Tortfeasors) Act, 1935 [25 & 26 Geo. 5. Cap 30] while some words are either substituted or omitted in other legislation.

this Act altered the property rights of married women and improved their status under English law.⁸⁹ The Married Women's Property Act, 1882⁹⁰ formed part of the Received English Law⁹¹ in Nigeria by virtue of British colonialism.⁹² It applied to the federating States of Nigeria as a Statute of General Application (SOGA)⁹³ until the former Western Region of Nigeria enacted the Married Women's Property Law, 1959⁹⁴ which applied to the Western and Mid-Western states in Nigeria.⁹⁵ It should be noted that some States in Nigeria have taken steps to re-enact the Married Women's Property Law, 1959.⁹⁶

The Married Women's Property Act, 1882⁹⁷ established the doctrine of separate property⁹⁸ between the spouses. It vested married women with separate ownership rights to property⁹⁹ as if they were *feme sole*.¹⁰⁰ By virtue of its provisions, the rights of

⁸⁹ Onokah, *Family Law*, 269.

⁹⁰ [45 & 46 Vict. Cap 75].

⁹¹ The Received English Law is one of the sources of Nigerian law. It comprises the English common law principles, the doctrine of equity and the statutes of general application which were enacted in England and were in force before the 1st day of January, 1900. See Sanni, *Introduction to Nigerian Legal Method*, 126. It should also be noted that subsidiary legislation which comprise regulations, rules, orders, bylaws, etc. made pursuant to a statute also form part of the sources of Nigerian law. They are also known as delegated legislation and are made in the exercise of a statutory power which is conferred on a person, body or authority. See Gasiokwu, *Legal Research and Methodology: The A – Z of Writing Theses and Dissertations in a Nutshell*, 72; Uwakah, *Due Process in Nigeria's Administrative Law System: History, Current Status and Future*, 79.

⁹² Sanni, *Introduction to Nigerian Legal Method*, 126. Onokah, *Family Law*, 269 observes that the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] was omitted in the Revised Edition of the Laws of the Federation of Nigeria, 1990 by virtue of s 3(1) of the Revised Edition (Authorised Omissions) Order, Decree No 21 of 1990 which authorised the omission of all imperial enactments or subsidiary legislations from the Laws of the Federation of Nigeria, 1990. Notwithstanding its omission, s 3(2) of the Revised Edition (Authorised Omissions) Order, Decree No 21 of 1990 recognised the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] as an existing law in Nigeria.

⁹³ See Park, *The Sources of Nigerian Law*, 24 – 36.

⁹⁴ Cap 76 Laws of Western Region of Nigeria, 1959. Nwogugu, *Family Law in Nigeria 2nd ed*, 85 states that this law re-enacted part of the provisions of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] and the Law Reform (Married Women and Tortfeasors) Act, 1935 [25 & 26 Geo. 5. Cap 30].

⁹⁵ See Onokah, *Family Law*, 273. See also Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 11.

⁹⁶ Cap 76 Laws of Western Region of Nigeria, 1959. These include Edo, Lagos, Ogun, Ondo, Osun and Oyo States.

⁹⁷ [45 & 46 Vict. Cap 75].

⁹⁸ The doctrine of separate property recognises the separate rights of the spouses to acquire and deal with property during the subsistence of their marriage as if they were not married. Ownership of property is in most cases ascertained by virtue of the strict principles of the law of property except where a spouse can by evidence show some financial contribution to the other spouse's property which could entitle her to some proprietary interest. See Miller, *Family Property and Financial Provision*, 3.

⁹⁹ Umukoro, 2006 *Commercial and Property Law Journal*, 118 at 118.

¹⁰⁰ Unmarried or a single woman. See s 1(1) of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75].

women married under the Marriage Act of 1914¹⁰¹ to acquire, hold, alienate and dispose of property by will without interference from their husbands or any trustee are recognised.¹⁰² With the operation of the Married Women's Property Act, 1882,¹⁰³ any personal (movable) or real (immovable) property acquired by a woman before and after her marriage is treated as her separate property.¹⁰⁴

Married women's contractual rights in respect of their separate property are recognised and they bear all entitlements and liabilities arising therefrom.¹⁰⁵ It is, however, noted that the equal recognition of the property rights of spouses in civil marriages is not extended to spouses married under customary law or Islamic law.¹⁰⁶

The provision of section 17 of the Married Women's Property Act, 1882¹⁰⁷ is relevant to this study. Section 17 grants the High Court the power to determine the ownership of property between spouses.¹⁰⁸ In Nigeria, as in England, a spouse may commence proceedings under section 17 of the Married Women's Property Act, 1882¹⁰⁹ at any time

¹⁰¹ Cap M6 Laws of the Federation of Nigeria, 2004.

¹⁰² See s 1(1) of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75].

¹⁰³ [45 & 46 Vict. Cap 75].

¹⁰⁴ See ss 2 and 5 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75].

¹⁰⁵ See s 1(3) to (5) of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75]. It should be noted that ss 1 – 5 of the Married Women's Property Act, 1882 [45 & 46 Vict.] Cap 75 have been repealed in England. See the second schedule of the Law Reform (Married Women and Tortfeasors) Act, 1935 [25 & 26 Geo. 5.] Cap 30. The current law which deals with the capacity, property and the rights and liabilities of married women in England is contained in Part I, ss 1 to 5 of the Law Reform (Married Women and Tortfeasors) Act, 1935 [25 & 26 Geo. 5.] Cap 30. The unrepealed sections of the Married Women's Property Act, 1882 [45 & 46 Vict.] Cap 75 remain valid.

¹⁰⁶ Section 1(2) of Married Women's Property Law, 1959 Cap 76 Laws of Western Region of Nigeria, 1959 provides: "Nothing in this law shall affect the capacity, property or liabilities of any persons married solely in accordance with the requirements of customary law." See Onokah, *Family Law*, 273 where the author states that the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] or the Married Women's Property Law, 1959 Cap 76 Laws of Western Region of Nigeria, 1959 had no effect on the property rights of customary spouses. See also Gbadamosi, *Reproductive Health & Rights (African Perspectives and Legal Issues in Nigeria)* 27.

¹⁰⁷ [45 & 46 Vict. Cap 75].

¹⁰⁸ It should also be noted that s 17 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] has been amended in England. Certain words in s 17 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] were repealed by the Statute Law (Repeals) Act Cap 52 of 1969, Sch. Pt. III, while others were either substituted or omitted by the Matrimonial and Family Proceedings Act Cap 42 of 1984, ss 43 and 48(2) thereof and the Crime and Courts Act Cap 22 of 2013. The amended s 17 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] as at the 6th day of May, 2016 reads: "In any question between husband and wife as to the title to or possession of property, either party may apply by summons or otherwise in a summary way to the High Court or the family court and the court may, on such an application (which may be heard in private), make such order with respect to the property as it thinks fit." See Married Women's Property Act 1882, <http://legislation.gov.uk/ukpga/Vict/45-46/75>.

¹⁰⁹ [45 & 46 Vict. Cap 75].

(before or after the breakdown of marriage).¹¹⁰

It is germane to emphasise that the Married Women's Property Act, 1882¹¹¹ does not regulate the redistribution or readjustment of matrimonial property between spouses on the dissolution of a civil marriage.¹¹² The primary aim of the Act in respect of disputed property between spouses is for the court to determine questions of ownership of property between spouses as it thinks fit.¹¹³ Whenever there is a property related dispute between spouses, therefore, Nigerian courts interpret the provisions of the Married Women's Property Act, 1882¹¹⁴ strictly to determine the extent of a spouse's interest in the property of the other spouse.¹¹⁵ For a spouse to succeed, he or she must prove a direct financial contribution to the purchase or development of the disputed property based on ordinary rules of property law.¹¹⁶

2.6 PROPERTY RIGHTS OF SPOUSES UNDER THE MATRIMONIAL CAUSES ACT NO 18 OF 1970¹¹⁷

The High Court is empowered, under section 72 of the Matrimonial Causes Act No 18 of 1970,¹¹⁸ to make an order for the settlement of property in proceedings for matrimonial causes where a principal relief has been sought¹¹⁹ and granted.¹²⁰ Section 72(1) of the Matrimonial Causes Act No 18 of 1970¹²¹ provides:

“The court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers

¹¹⁰ Onokah, *Family Law*, 274.

¹¹¹ [45 & 46 Vict. Cap 75].

¹¹² See *Pettitt v. Pettitt* [1969] 2 All ER 385 (HL) at 393, per Lord Morris.

¹¹³ See *Pettitt v. Pettitt* [1969] 2 All ER 385 (HL) at 393, per Lord Morris. For a discussion on the property entitlement of English spouses under the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75]. See also 3.3 below.

¹¹⁴ [45 & 46 Vict. Cap 75].

¹¹⁵ Arinze-Umobi, 2004 *Unizik Law Journal*, 188 at 197.

¹¹⁶ See *Egunjobi v Egunjobi* [1976] 2 FNLR 78.

¹¹⁷ Cap M7 Laws of the Federation of Nigeria, 2004.

¹¹⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

¹¹⁹ See Onokah, *Family Law*, 267.

¹²⁰ See s 75(1) and (2)(b)(ii) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹²¹ Cap M7 Laws of the Federation of Nigeria, 2004.

just and equitable in the circumstances of the case.”¹²²

The above provision enables a spouse who has contracted a civil marriage to apply for the settlement of property upon him or her upon the dissolution of marriage.¹²³ The court is empowered to make an order settling the property of one spouse or both spouses on either of the spouses or for the benefit of any child of the marriage.¹²⁴

It is not necessary that the property to be settled must be a property which was acquired after the celebration of the civil marriage between the spouses.¹²⁵ Even premarital property acquired by either or both spouses is also subject to a property settlement order under section 72(1) of the Matrimonial Causes Act No 18 of 1970.¹²⁶

The overriding consideration which directs the exercise of the court’s jurisdiction is the term “just and equitable”.¹²⁷ A property settlement order made pursuant to section 72(1) of the Matrimonial Causes Act No 18 of 1970¹²⁸ must satisfy the “just and equitable” requirement in the circumstance of each case.¹²⁹

Section 72(2) of the Matrimonial Causes Act No 18 of 1970¹³⁰ states:

“The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of, the marriage of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.”

Arising from the foregoing, it is stated that the law in Nigeria provides for antenuptial and postnuptial settlements of property on intended spouses and spouses respectively. Such settlements can be made by either or both of the spouses or by a third party in

¹²² See s 24(1)(b) of the Matrimonial Causes Act Cap 18 of 1973 (England) for a similar provision on settlement of property and the power of the English court in that regard. See also 3.5.2.2 below.

¹²³ Onokah, *Family Law*, 267.

¹²⁴ Onokah, *Family Law*, 267.

¹²⁵ Ashiru, 2007 *Journal of African Law*, 316 at 318.

¹²⁶ Ashiru, 2007 *Journal of African Law*, 316 at 318.

¹²⁷ See s 72(1) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹²⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

¹²⁹ Onokah, *Family Law*, 267; Ashiru, 2007 *Journal of African Law*, 316 at 318.

¹³⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

favour of either or both of the spouses.¹³¹ An antenuptial settlement has been defined as a settlement made on intended spouses "... in contemplation of a particular marriage."¹³² A postnuptial settlement, on the other hand, is a settlement made on already married spouses.¹³³ A postnuptial settlement makes provision for financial benefits for either or both of the spouses as spouses (husband and wife) in their married state.¹³⁴

The term "settlement" under section 72(2) of the Matrimonial Causes Act No 18 of 1970,¹³⁵ which is similar to section 86(2) of the Australian Matrimonial Causes Act No 104 of 1959 (Cth), means a disposition (transfer) made by a third party which makes future or continuing provision for either or both spouses or for their children.¹³⁶ The provision is resorted to in cases where a spouse alleges that dealings with a property, which is in the name of either or both spouses, were in the nature of making continuing provision for the future needs of either or both spouses in their status as husband and wife.¹³⁷

A spouse is entitled to seek relief for a property settlement order under section 72(2) of the Matrimonial Causes Act No 18 of 1970¹³⁸ in proceedings for the dissolution of marriage on the basis that the need for the continuing provision of the future needs of a spouse or both spouses, upon which the settlement was originally made, will be (or has been) extinguished by virtue of an order for dissolution of the marriage.¹³⁹

Upon the application of a spouse, the court is empowered to make an order which it

¹³¹ Nwogugu, *Family Law in Nigeria*, 272.

¹³² Nwogugu, *Family Law in Nigeria*, 272. Antenuptial settlement is a disposition of property made before marriage.

¹³³ Nwogugu, *Family Law in Nigeria*, 272. Postnuptial settlement is a disposition of property made after the marriage.

¹³⁴ See Nwogugu, *Family Law in Nigeria*, 272 citing the English case of *Prinsep v Prinsep* [1929] P225 (Fam) at 232 on the definition of postnuptial settlement.

¹³⁵ Cap M7 Laws of the Federation of Nigeria, 2004.

¹³⁶ See 4.3.5 below; *Dewar v Dewar* (1960) 106 CLR 170; CCH Australia Limited, *Australia Family Law Guide*, 207.

¹³⁷ See *Dewar v Dewar* (1960) 106 CLR 170 at 173.

¹³⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

¹³⁹ This was the position of the Australian court in *Dewar v Dewar* (1960) 106 CLR 170 which considered s 86(2) of the Matrimonial Causes Act No 104 of 1959 (Cth).

thinks just and equitable in respect of an antenuptial or postnuptial settlement.¹⁴⁰ In making the order, the court may likely consider whether the property in question can serve as part of maintenance provisions to a spouse and the children in his or her custody.¹⁴¹

The court's power to make a property settlement order upon the dissolution of a marriage in relation to either an antenuptial or postnuptial settlement must be founded on the consideration of what is "just and equitable".¹⁴² Where the court exercises its discretion, its order could relate to the whole or a part of a property dealt with by an antenuptial settlement.¹⁴³

The property settlement provisions of section 72 of the Matrimonial Causes Act No 18 of 1970¹⁴⁴ concludes with subsection (3) which is to the effect that the power of court to make a property settlement order can be exercised only in relation to the children of the marriage for the benefit of any child of the marriage who is less than twenty-one years of age.¹⁴⁵ The court is, however, enjoined to exercise its discretion where special circumstances exist to justify the exercise of such powers.¹⁴⁶

It is noted that, while section 72 of the Matrimonial Causes Act No 18 of 1970¹⁴⁷ specifically provides for the court's powers to make a property settlement order, section 73 of the Matrimonial Causes Act No 18 of 1970 outlines the general powers of the court in relation to Part IV of the Matrimonial Causes Act No 18 of 1970¹⁴⁸ (which deals with maintenance, custody and the settlement of property proceedings).

It is thought necessary to replicate the provisions of section 73(1) of the Matrimonial

¹⁴⁰ S 72(2) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁴¹ See *Dewar v Dewar* (1960) 106 CLR 170 at 173.

¹⁴² See 72(2) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004. See also, Nwogugu, *Family Law in Nigeria*, 272.

¹⁴³ See 72(2) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁴⁴ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁴⁵ This is the age of majority under English law.

¹⁴⁶ See s 72(3) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁴⁷ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁴⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

Causes Act No 18 of 1970¹⁴⁹ below, not only on the basis that they make direct reference to the provision for a property settlement order under section 72 of the Matrimonial Causes Act No 18 of 1970¹⁵⁰ but also on the basis that some of its provisions have been used by the court as alternatives to a property settlement order.¹⁵¹

Section 73(1) of the Matrimonial Causes Act No 18 of 1970,¹⁵² which is entitled “General Powers of the Court”, provides:

- “(1) The court, in exercising its powers under this Part of this Act, may do any or all of the following, that is to say, it may-**
- (a) order that a lump sum or a weekly, monthly, yearly or other periodic sum be paid;**
 - (b) order that a lump sum or a weekly, monthly, yearly or other periodic sum be secured;**
 - (c) when a periodic sum is ordered to be paid, order that its payment be wholly or partly secured in such manner as the court directs;**
 - (d) order that any necessary deed or instrument be executed, and that the documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;**
 - (e) ...**
 - (f) order that payments be made direct to a party to the marriage, or to a trustee to be appointed or to a public officer or other authority for the benefit of a party to the marriage;**
 - (g) order that payment of maintenance in respect of a child be made to such persons or public officer or other authority as the court specifies;**
 - (h) make a permanent order, an order pending the disposal of proceedings, or an order for a fixed term or for a life or during joint lives, or until further order;**
 - (i) impose terms and conditions;**
 - (j) in relation to an order made in respect of a matter**

¹⁴⁹ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁵⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁵¹ See Onokah, *Family Law*, 267.

¹⁵² Cap M7 Laws of the Federation of Nigeria, 2004.

referred to in section 70, 71 or 72 of this Act, whether made by the court or by another court, and whether made before or after the commencement of this Act,-

- (i) discharge the order if the party in whose favour it was made marries again or if there is any other just cause for so doing,
 - (ii) modify the effect of the order or suspend its operation wholly or in part and either until further order or until a fixed time or the happening of some future event,
 - (iii) revive wholly or in part an order suspended under sub-paragraph (ii) of this paragraph, or
 - (iv) subject to subsection (2) of this section, vary the order so as to increase or decrease any amount ordered to be paid by the order;
- (k) sanction an agreement for the acceptance of a lump sum or periodic sums or other benefits in lieu of rights under an order made in respect of a matter referred to in section 70, 71 or 72 of this Act, or any right to seek such an order;
- (i) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this subsection, and whether or not it is in accordance with the practice under any other enactment or law before the commencement of this Act) which it thinks it is necessary to make to do justice;
- (m) include in its decree under another Part of this Act its order under this Part; and
- (n) subject to this Act, make an order under this Part of this Act at any time before or after the making of a decree under another Part thereof.

A spouse can, by an agreement with the other spouse, accept a lump sum, a periodic sum or any other benefit in place of his or her rights under a property settlement order which has been made by the court under section 72 of the Matrimonial Causes Act No 18 of 1970.¹⁵³ Such an agreement can also be concluded in lieu of the right of a spouse to seek a property settlement order.¹⁵⁴ Where an agreement of this nature has been

¹⁵³ S 73(1)(k) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁵⁴ S 73(1)(k) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

reached, the court is empowered to give effect to it.¹⁵⁵

It is submitted that this type of agreement is akin to a financial agreement between spouses under the Australian Family Law Act No 53 of 1975 (Cth) which makes provisions in relation to how any of the property of either or both of the spouses or their financial resources can be dealt with on the breakdown of marriage.¹⁵⁶ An agreement as contemplated under section 73(1)(k) of the Matrimonial Causes Act No 18 of 1970¹⁵⁷ can be reached by the spouses in relation to a property settlement either before or after the High Court has made a property settlement order in a matrimonial cause proceeding. Rather than allowing the court to exercise its discretion in property settlement proceedings, the court's power is invoked by the spouses to sanction an agreement reached by them to that effect.

Of particular importance is the provision of section 73(1)(j) of the Matrimonial Causes Act No 18 of 1970¹⁵⁸ which empowers the court to discharge, modify or vary a maintenance, custody or property order made under Part IV of the Act. With particular reference to 73(1)(j)(i) of the Matrimonial Causes Act No 18 of 1970,¹⁵⁹ the court can discharge a property settlement order where the spouse in whose favour it was made remarries or where there exists a just cause for doing so.

It is based strictly on the above provision that the researcher has argued that the kind of settlement of property provided for by the Nigerian Matrimonial Causes Act No 18 of 1970¹⁶⁰ does not imply a total transfer of the legal and beneficial interest in a property,

¹⁵⁵ S 73(1)(k) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004. See s 87(1)(k) of the Matrimonial Causes Act No 104 of 1959 (Cth) which contains a similar provision.

¹⁵⁶ See generally, Part VIIIA of the Family Law Act No 53 of 1975 (Cth), particularly ss 90C and 90D of the Act. It should be noted that s 87(1)(k) of the Matrimonial Causes Act No 104 of 1959 (Cth) was expressly deleted from the Family Law Act No 53 of 1975 (Cth). In its place, the Family Law Act No 53 of 1975 (Cth) made provisions for maintenance and financial agreements between spouses. See ss 86, 87, 87A and 88 of the Family Law Act No 53 of 1975 (Cth) in respect of maintenance agreements between spouses and ss 90B, 90C and 90D of the Family Law Act No 53 of 1975 (Cth) in respect of financial agreements between spouses entered into before marriage, during the marriage or after a divorce order has been made by the court. See also 4.3.7.1 below.

¹⁵⁷ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁵⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁵⁹ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁶⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

that is total ownership, from one spouse to another upon the breakdown of marriage.¹⁶¹ If it does, then a spouse's remarriage will have no effect on a property settlement order which had earlier been made¹⁶² except in cases of fraud, duress, suppression of evidence, lack of material disclosure or the existence of other exceptional circumstances.¹⁶³

A careful perusal of some of the provisions of Part IV of the Matrimonial Causes Act No 18 of 1970¹⁶⁴ would reveal that but for the provision of section 73(1)(j) of the Matrimonial Causes Act No 18 of 1970,¹⁶⁵ Nigerian courts could interpret section 72 (Settlement of Property) of the Matrimonial Causes Act No 18 of 1970¹⁶⁶ as being capable of transferring ownership.¹⁶⁷

In this regard, it is submitted that in making a property settlement order under section 72 of the Matrimonial Causes Act No 18 of 1970,¹⁶⁸ the court is empowered to order the

¹⁶¹ See s 24(1)(a) of the Matrimonial Causes Act Cap 18 of 1973 (England) which specifically provides for the transfer of property as a property adjustment order. See also 3.5.2.1 below.

¹⁶² See the argument at 4.3.3.1 below where the researcher discussed the possibility for the court's variation or setting aside of a property order made under s 79 of the Australian Family Law Act No 53 of 1975 (Cth).

¹⁶³ It is noted that s 87(1)(j) of the Australian Matrimonial Causes Act No 104 of 1959 (Cth) is similar to the considered s 73(1)(j) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004. As a result of the legal arguments generated by s 87(1)(j) of the Australian Matrimonial Causes Act No 104 of 1959 (Cth) in relation to the nature of a property order made by the court, (see *Sanders v Sanders* (1967) 116 CLR 366 and *Mullane v Mullane* (1983) 158 CLR 436), however, the need arose to amend s 87(1)(j) of the Matrimonial Causes Act No 104 of 1959 (Cth) to reflect the true intention of the Australian Parliament in 1975. In the Family Law Act No 53 of 1975 (Cth), the provision of s 87(1)(j) of the Matrimonial Causes Act No 104 of 1959 (Cth) was not reproduced under the general powers of the court. See s 80 the Family Law Act No 53 of 1975 (Cth). The conditions stipulated in s 87(1)(j) of the Matrimonial Causes Act No 104 of 1959 (Cth) for the variation, modification, discharge or the setting aside of a court's order made pursuant to Part VIII of the Act are at present specifically related to the cessation and modification of spousal maintenance orders under the Family Law Act No 53 of 1975 (Cth). See ss 82 and 83 of the Family Law Act No 53 of 1975 (Cth). Thus, the issue of "remarriage" was no longer a condition for the reversal, variation or modification of a property alteration order made under s 79(1) (not as a maintenance order) of the Family Law Act No 53 of 1975 (Cth). See s 79A of the Family Law Act No 53 of 1975 (Cth). The conditions for setting aside any order which alters the property interests of the spouses are set out in s 79A(1)(a) – (e) of the Family Law Act No 53 of 1975 (Cth) and discussed in chapter four of this study. See 4.3.3.1 below.

¹⁶⁴ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁶⁵ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁶⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁶⁷ See 1.3 above. This is where the golden or mischief rule of interpretation comes in. This was exactly what the Australian courts did by way of judicial activism when they gave a similar interpretation to the repealed s 86(1) of the Matrimonial Causes Act No 104 of 1959. See *Lansell v Lansell* (1964) 110 CLR 353 at 362 and *Sanders v Sanders* (1967) 116 CLR 366 at 376.

¹⁶⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

execution of any necessary deed or instrument of title or the production of a document of title, amongst others, in order to carry out a property settlement order effectively.¹⁶⁹ Where a person who is mandated by the court to execute such a deed or an instrument of title in favour of a spouse fails or neglects to do so, an officer of the court may be appointed to do the same.¹⁷⁰ It is noted that the court is also empowered to make a permanent order in respect of section 72 of the Matrimonial Causes Act No 18 of 1970.¹⁷¹

The court is generally precluded from making an order for property settlement in cases where it has dismissed a petition for a principal relief.¹⁷² With particular reference to maintenance or custodial orders of the court, however, it may proceed to make such orders after dismissing a petition for a principal relief which was heard on the merits,¹⁷³ if "... the court is satisfied that the proceedings for principal relief were instituted in good faith to obtain that relief;¹⁷⁴ and there is no reasonable likelihood of the parties becoming reconciled ...".¹⁷⁵ Before the court can properly exercise its discretion to make an order under section 75(2) of the Matrimonial Causes Act No 18 of 1970,¹⁷⁶ it must, therefore, have "... heard the proceedings for the order at the same time as, or immediately after, the proceedings for a principal relief."¹⁷⁷

It is submitted that a property settlement proceeding must be heard concurrently with the proceedings for principal relief or immediately after the proceedings for a principal relief. The opening paragraph of section 72(1) of the Matrimonial Causes Act No 18 of

¹⁶⁹ See s 73(1)(d) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁷⁰ See s 74 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁷¹ Cap M7 Laws of the Federation of Nigeria, 2004. See section 73(1)(h) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁷² See s 75(1) and 2(b)(ii) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁷³ See s 75(2)(a) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁷⁴ See s 75(2)(b)(i) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁷⁵ See s 75(2)(b)(ii) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁷⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁷⁷ See s 75(3) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

1970¹⁷⁸ reads: “The court may in proceedings under this Act ...” Hence, property settlement proceedings cannot be commenced independently of proceedings for principal relief. This is so because a property settlement order is an ancillary relief under the Matrimonial Causes Act No 18 of 1970.¹⁷⁹

2.6.1 Property Settlement Order as Maintenance Order

Section 70 of the Matrimonial Causes Act No 18 of 1970¹⁸⁰ empowers the court to make maintenance orders. In maintenance proceedings, the court is enjoined to make a just order by considering “... the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.”¹⁸¹ An interim maintenance order can also be made by the court pending the disposal of proceedings for maintenance.¹⁸² Similar considerations as the above guide the court in making an interim maintenance order.¹⁸³

An order for the maintenance of a spouse may be made whether or not a decree for divorce or nullity of marriage has or has not been made against the beneficial spouse.¹⁸⁴ Unlike an order for property settlement which can be made only upon the grant of a principal relief,¹⁸⁵ a maintenance order can be made even where the court

¹⁷⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁷⁹ Cap M7 Laws of the Federation of Nigeria, 2004. The position in Nigeria is similar to what obtains in England where the English court makes a property adjustment order only as an ancillary relief on the grant of a principal relief. See s 24 of the Matrimonial Causes Act Cap 18 of 1973 Cap M7 Laws of the Federation of Nigeria, 2004. See also 3.5 below. In Australia, however, a similar provision in s 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) has been repealed. A property order made by the Australian court is not contingent on the proceedings for or the grant of a principal relief. See s 44(3) of the Family Law Act No 53 of 1975 (Cth) which creates a 12 month limitation period for the commencement of property settlement proceedings after a decree nisi has been made absolute or a decree of nullity of marriage has been made. See *Stanford v Stanford* [2012] HCA 52, paras 27 and 28 to the effect that a property order may be made even in a subsisting marriage. See also 4.3.3 below.

¹⁸⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁸¹ S 70(1) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004. See Nwogugu, *Family Law in Nigeria*, 255 – 260 for a discussion of the relevant factors which the court must take into consideration before making a maintenance order. A detail discussion on maintenance is not within the purview of this study.

¹⁸² S 70(2) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁸³ S 70(2) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁸⁴ S 70(3) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁸⁵ See s 75(1) and (2)(b)(ii) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

has dismissed a petition for a principal relief which was heard on the merits.¹⁸⁶

It is noted that, under the general powers of the court as stated in section 73 of the Matrimonial Causes Act No 18 of 1970,¹⁸⁷ the court is empowered to make a maintenance order by ordering a spouse to make a lump sum payment or periodic sum payment which may either be secured or not.¹⁸⁸ The court may also order a spouse to execute a deed or an instrument or produce a document of title for the purpose of effectively carrying out a maintenance order.¹⁸⁹

It is pertinent at this point to emphasise that there is a difference between a maintenance order and a property settlement order.¹⁹⁰ It should, however, be borne in mind that a maintenance order can also be made by way of ordering a spouse to settle a specific property¹⁹¹ on the other spouse.¹⁹² It is in this sense that Adesanya¹⁹³ and Tijani¹⁹⁴ have argued that the property settlement provision under section 72 of the Matrimonial Causes Act No 18 of 1970¹⁹⁵ can "... serve as an alternative to an order for lump sum payment where ..." the court thinks it is proper to order a spouse to settle a specific property or investment on the other spouse.

Discussing the advantages of a property settlement order, Tijani¹⁹⁶ proceeds to state other instances where the court could possibly make a maintenance order by way of settling a specific property on a spouse. They include:

- (a) Where both spouses are joint owners of the matrimonial home, the court could order a spouse to settle the matrimonial home on the custodial spouse

¹⁸⁶ S 75(2) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁸⁷ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁸⁸ See s 73(1)(a) – (c) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁸⁹ See s 73(1)(d) of the Matrimonial Causes Act No 18 of 1970

¹⁹⁰ See *Kafi v. Kafi* [1986] 3 NWLR (Pt 27) 175.

¹⁹¹ This means that the court's order is directed at a particular property of a spouse to be used by the other spouse as a home for herself and the children of the marriage.

¹⁹² S 73(1)(d) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁹³ *Laws of Matrimonial Causes*, 228.

¹⁹⁴ *Matrimonial Causes in Nigeria – Law and Practice*, 180.

¹⁹⁵ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁹⁶ *Matrimonial Causes in Nigeria – Law and Practice*, 180 – 181.

in order to provide a home for the spouse and the children of the marriage.¹⁹⁷ In this sense, the settlement of the matrimonial home on the custodial spouse does not extinguish the title of the non-custodial spouse unless the court in its order states that it does.¹⁹⁸

- (b) Where the financial resources or earnings of a spouse are not adequate to provide periodical payments, the court can by way of supplementing such payment, make an order for a property settlement in order to provide a home for a spouse and the children of the marriage.¹⁹⁹
- (c) Where the court thinks it could be impracticable, in view of the circumstances of the case, to make an order for a lump sum payment, a property settlement order could be made to prevent future financial uncertainties.²⁰⁰

The above²⁰¹ justifies the argument that property orders are made by the court in order to provide maintenance for a spouse. It is submitted that, where such is intended by the court, it should be stated specifically that the order being made is a maintenance order.

The rationale behind the difference between a maintenance order and a property settlement order lies in the effect of both orders. The effect of a property order is different from the effect of a maintenance order. This distinction, as will be seen in chapters three²⁰² and four²⁰³ of this study, is readily justifiable in advanced jurisprudence like that of Australia and England where a property order, once made, is not contingent or reversible upon the occurrence of certain event(s) like remarriage or a change in circumstances,²⁰⁴ unlike a maintenance order which can be varied, discharged or set-aside.

¹⁹⁷ Tijani, *Matrimonial Causes in Nigeria – Law and Practice*, 180.

¹⁹⁸ In *Akinboni v Akinboni* [2002] 5 NWLR (Pt 761) 564, although the wife failed to establish joint ownership in the disputed property which was used as the matrimonial home of the spouses and their children, the court restrained the husband from disposing of the property. It granted occupation rights in one of the flats to the wife and children subject to their good behaviour.

¹⁹⁹ Tijani, *Matrimonial Causes in Nigeria – Law and Practice*, 181.

²⁰⁰ Tijani, *Matrimonial Causes in Nigeria – Law and Practice*, 181.

²⁰¹ The court does any of these in exercise of its general powers under s 73 of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004. See also Onokah, *Family Law*, 267.

²⁰² See 3.5; 3.5.1; 3.5.2; 3.5.2.1; 3.5.2.2; 3.5.2.3 below.

²⁰³ See 4.2.1; 4.3.4.4 below.

²⁰⁴ See 4.3.3.1 below for exceptional situations where the court would readily set aside a property order.

It is submitted that the reference to section 72 of the Matrimonial Causes Act No 18 of 1970²⁰⁵ in section 73(1)(j) of the Matrimonial Causes Act No 18 of 1970²⁰⁶ is an anomaly to the extent that it is not related specifically to the cessation and modification of spousal maintenance orders. As was pointed out earlier, section 73(1)(j) of the Matrimonial Causes Act No 18 of 1970²⁰⁷ which was adapted from the Australian section 87(1)(j) of the Matrimonial Causes Act No 104 of 1959 (Cth) had been amended and replaced with relevant provisions in the Family Law Act No 53 of 1975 (Cth), which gives credence to the argument now advanced.²⁰⁸

It is argued that a maintenance order which contains an order for property settlement can properly be discharged, modified or suspended by the court upon the application of an “affected spouse”. The same argument cannot, however, be sustained in respect of a property order (in strict terms, which is not made by way of maintenance). It is reasoned that an “independent order” for a property settlement should be a final order which extinguishes the totality of the rights of the transferor spouse.

In *Kafi v Kafi*,²⁰⁹ the Court of Appeal upheld the trial court’s order made pursuant to section 72 of the Matrimonial Causes Act No 18 of 1970²¹⁰ for the settlement of property on the wife, not only on the basis of the spouses’ joint development and purchase of the property situate at 15 Adeola Adeleye Street, Ilupeju, Lagos, but also on the basis of the wife’s numerous contributions to the success of the husband’s businesses.²¹¹

A careful perusal of the facts of this case and the evidence on record would reveal that the order made by the trial court was a maintenance order which incorporated a property settlement order (as maintenance for the wife and children).²¹² The husband’s argument on appeal that the trial court should not have made a property settlement

²⁰⁵ Cap M7 Laws of the Federation of Nigeria, 2004.

²⁰⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

²⁰⁷ Cap M7 Laws of the Federation of Nigeria, 2004.

²⁰⁸ See the discussion on s 87(1)(j) of the Matrimonial Causes Act No 104 of 1959 (Cth) at fn 163 at 53 above.

²⁰⁹ [1986] 3 NWLR (Pt 27) 175.

²¹⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

²¹¹ *Kafi v Kafi* [1986] 3 NWLR (Pt 27) 175 at 187.

²¹² *Kafi v Kafi* [1986] 3 NWLR (Pt 27) 175 at 185 – 187. See also Sagay, *Nigerian Family Law Principles, Cases, Statutes & Commentaries*, 462.

order in favour of the wife and the children of the marriage, having already made a maintenance order of ₦360 per month for the wife, was not sustained at the Court of Appeal.²¹³

It was the judgement of the Court of Appeal that, in making a property settlement order as a maintenance order, the court does not require evidence of joint acquisition or the development of the property in question.²¹⁴ It held that the sole restriction on the exercise of the court's discretion is whether the order made in the circumstance is "just and equitable".²¹⁵ The condition imposed by the court that the settled property must not be sold off during the lifetime of the wife in order for it to remain a home for the wife and the children further buttressed the nature of the court's order.²¹⁶

The above case raises some interesting issues on the matrimonial property rights of spouses. Firstly, why were the properties in this case not "shared"? Secondly, why did the trial court decide to settle the property at 15 Adeola Adeleye Street, Ilupeju, Lagos on the wife as a maintenance order rather than as an "independent property order" under section 72 of the Matrimonial causes Act No 18 of 1970²¹⁷ in the light of the evidence on record that the wife contributed both financially, physically and morally to the husband's wealth and jointly negotiated and purchased the property?

The answer to the foregoing questions readily lies in the nature of the relief sought by the wife. The wife had sought only maintenance orders in her cross-petition and not for the "settlement" or transfer of property on her as a result of her financial, physical and moral contribution to the property at 15 Adeola Adeleye Street, Ilupeju, Lagos. It is a trite principle of law that the court is not a "Father Christmas" and will not grant to a party a relief which was not sought.²¹⁸ Exercising its powers under section 73 of the Matrimonial Causes Act No 18 of 1970,²¹⁹ however, the court is empowered to make an

²¹³ *Kafi v Kafi* [1986] 3 NWLR (Pt 27) 175 at 186.

²¹⁴ *Kafi v Kafi* [1986] 3 NWLR (Pt 27) 175 at 185.

²¹⁵ *Kafi v Kafi* [1986] 3 NWLR (Pt 27) 175 at 186.

²¹⁶ *Kafi v Kafi* [1986] 3 NWLR (Pt 27) 175 at 187.

²¹⁷ Cap M7 Laws of the Federation of Nigeria, 2004.

²¹⁸ See *Nwanya v Nwanya* [1987] 3 NWLR (Pt 62) 697; *Awoniyi v Registered Trustees of AMORC* [2000] 10 NWLR (Pt 676) 522 at 544; *Omotunde v Omotunde* [2001] 9 NWLR (Pt 718) 252 at 277; *Akinboni v Akinboni* [2002] 5 NWLR (Pt 761) 564; *Olabiwonnu v Olabiwonnu* (2014) LPELR 24065 (CA) at 12, 13.

²¹⁹ Cap M7 Laws of the Federation of Nigeria, 2004.

order for property settlement as a maintenance order.²²⁰ It is submitted that the court in this case properly exercised its powers in relation to the relief sought by the wife.²²¹

It is, however, submitted that, if the relief had been couched differently, an entirely different order would have emanated from the court. For instance, there were established facts in *Kafi v Kafi*²²² that the wife had assisted the husband in the management of his medicine store and had provided all needed support towards the growth of the husband's businesses; that the wife was physically involved in the supervision and construction of the husband's property when the husband was away on business trips; that they jointly negotiated and acquired the land upon which the building at 15 Adeola Adeleye Street, Ilupeju, Lagos was built; and that the wife diligently performed her domestic duties as a housewife which afforded the husband enough time to go about his businesses and travelling engagements.²²³ It is argued that, notwithstanding the court's frequent disposition towards the grant of joint ownership in matrimonial property on the basis of direct financial contribution and documentary evidence,²²⁴ a claim in constructive trust would legally and equitably have given rise to the wife's beneficial interests in the husband's property, which, in turn, would have entitled the wife to a joint interest in one or more of the husband's properties on the breakdown of marriage.²²⁵

Relying on the authority of *Kafi v Kafi*,²²⁶ Tijani²²⁷ states that a court can make a property settlement order in addition to a maintenance order. It is submitted that nothing precludes the court from making both orders where the justice of the case demands it.

Flowing from the foregoing, an examination of how Nigerian courts have interpreted and applied the provisions of section 72 of the Matrimonial Causes Act No 18 of 1970²²⁸ will

²²⁰ See s 73(1)(d),(h),(i) and (l) of the Matrimonial causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

²²¹ Umukoro, 2006 *Commercial and Property Law Journal*, 116 at 122.

²²² [1986] 3 NWLR (Pt 27) 175.

²²³ *Kafi v Kafi* [1986] 3 NWLR (Pt 27) 175 at 184.

²²⁴ See *Nwanya v Nwanya* [1987] 3 NWLR (Pt 62) 697; *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1.

²²⁵ See *Okere v Akaluka* (2014) LPELR-24287 (CA) at 20, 52 – 53, 60 – 61; 66 – 67, per Agube JCA

²²⁶ [1986] 3 NWLR (Pt 27) 175.

²²⁷ *Matrimonial Causes in Nigeria – Law and Practice*, 180.

²²⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

be instructive. It will be revealed that the exercise of the court's discretion in relation to the settlement of property has been limited, and, to a great extent, has failed to echo the unheard voices of Nigerian women in respect of the financial tragedies which they encounter upon the breakdown of marriage.

2.7 HOW DO COURTS DETERMINE THE PROPERTY RIGHTS OF SPOUSES TO CIVIL MARRIAGES?

2.7.1 Introduction

Under this head, the approach of courts in the exercise of their discretion to make a property settlement order will be considered. Firstly, the strict property right approach adopted by courts in view of applications brought pursuant to the Married Women's Property Act, 1882²²⁹ and the Matrimonial Causes Act No 18 of 1970²³⁰ will be examined. This will be followed by a brief critique of the court's approach and a possible recognition of the doctrine of constructive trust. Secondly, the equity and trust approach in the determination of the property rights of spouses will be examined.

2.7.2 The Strict Property Right Approach

The strict property right approach requires a court to determine legal ownership by way of documentary evidence. In order to sustain a claim for beneficial interest in property, where legal title to the property is in the name of one of the spouses, this approach requires the claimant to provide evidence of direct financial contribution to the acquisition of the property. In the determination of legal title to property or beneficial interest in property, therefore, the indirect financial or non-financial contributions of a spouse to the acquisition of the property are not taken into consideration by the court under this approach.

It is noted that, in relation to cases which have been brought pursuant to section 17 of the Married Women's Property Act, 1882²³¹ for the determination of the property rights

²²⁹ [45 & 46 Vict. Cap 75] or the Married Women's Property Law Cap 76 Laws of Western Region of Nigeria, 1959.

²³⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

²³¹ [45 & 46 Vict. Cap 75].

of spouses, the courts have adopted the strict property rights approach in such proceedings.²³² Even where a spouse has approached the court for an interest in property pursuant to section 72 of the Matrimonial Causes Act No 18 of 1970,²³³ the court has often placed reliance on documentary evidence and proof of financial contribution. This can be seen in the cases that are considered below.

It will be recalled that section 17 of the Married Women's Property Law, 1959²³⁴ empowers a spouse to commence an action in court for the determination of his or her title to or possession of property where there is a dispute between the husband and wife. In such a case, the judge is enjoined to make an order as he thinks fit in relation to the disputed property.²³⁵ The case of *Egunjobi v Egunjobi*²³⁶ presents a perfect example of the court's decision in this regard.

In a claim brought by the wife for a declaration that she and her husband were joint owners of the matrimonial property which consisted of a house, its furniture and two cars, the court declared their respective interests in the cars and awarded a car to each of the parties. The wife also received a half share of some of the furniture on the basis of her substantial financial contributions towards their acquisition.

In the determination of their respective interests in the house, the court also found as a fact that, although the husband had acquired the land upon which the house had been built and had erected the building to a lintel level before his marriage to the wife, it awarded the wife a one-third share in the house based on her financial contribution towards the completion of the house. It was established in evidence that the wife had assumed the responsibility of supervising the building from one Kehinde (a paid worker) and she had made series of financial contributions which were worth ₦1, 170.00. Based on the invoices which the husband tendered at trial, his financial contributions were valued at ₦2, 169.90. The trial court, thus, upheld the wife's claim for a share in the

²³² That is, for a claimant to succeed, he or she must prove legal title either by documentary evidence or prove of financial contribution towards the acquisition of the property in dispute. The court, by adopting the strict property approach, is precluded from varying vested titles to property.

²³³ Cap M7 Laws of the Federation of Nigeria, 2004.

²³⁴ Cap 76 Laws of Western Region of Nigeria, 1959.

²³⁵ See s 17 of the Married Women's Property Law Cap 76 Laws of Western Region of Nigeria, 1959.

²³⁶ [1976] 2 FNLR 78.

property.

The dissenting judgement of Fakayode JA, however, presents some arguments. The judge took a much stricter view of the proprietary rights of the parties in respect of the house in dispute. In his judgement, he queried why the wife had to be awarded a one-third share of the value of the house taking cognisance of the fact that the trial court had found based on the evidence on record that the husband personally acquired the land upon which the house was built and had erected the building to lintel level before the wife's financial intervention.²³⁷ Stating that it amounted to an arithmetic fallacy for the trial court to award the wife one-third of the share of the value of the property merely because the total sum of money she contributed in relation to that of the husband's stood in a relation of 1:2, he concluded that such an order would enable the wife unjustly to enrich herself with judicial permission.²³⁸

According to Fakayode JA, had the wife had wanted a one-third share of the value of the house, she should have been required by law to prove the total cost or value of the building and that of her contribution towards it, that is to the extent that it amounted to one-third.²³⁹ Since the above evidence was not given at trial, he held that the husband refund the sum of ₦1, 170.00 to the wife within three months or risk the sale of the house by the lower court and the said sum being deducted from the proceeds to settle the wife's beneficial interest.²⁴⁰

Onokah²⁴¹ has criticised the court's dissenting judgement as not taking into consideration the fact that the wife's contribution to the development of the house would have yielded some interest. The researcher further criticises the dissenting judgement on the ground that the court, having established that the wife substantially contributed to the development of the house, did not require every financial detail from her to establish the one-third interest which was ordered by the trial court.²⁴² It is submitted that the

²³⁷ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 85.

²³⁸ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 85.

²³⁹ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 85.

²⁴⁰ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 85.

²⁴¹ *Family Law*, 277.

²⁴² See also *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 4; *Okere v Akaluka* (2014) LPELR-24287 (CA).

primary responsibility of the court in an application brought pursuant to section 17 of the Married Women's Property Act, 1882²⁴³ is to determine the interests of the spouses in the property in dispute and proceed to make an order which it thinks fit. According to Akinkugbe JA,²⁴⁴ the maxim, "equality is equity" does not necessarily mean a half share. In his words²⁴⁵:

"There will of course be cases where a half share is a reasonable estimation, but there will be many others where a fair estimate might be a tenth or a quarter or sometimes even more than a half."

It would have been sufficient if she had given details and particulars of her financial contributions (which she did) to the property in proof of her joint ownership as was held by the Supreme Court in *Amadi v Nwosu*.²⁴⁶ It is argued that the wife, having established a joint interest in the property (which again she did), the court is enjoined to determine the *quantum* of her interest "... as it thinks fit"²⁴⁷ in relation to her financial contribution to the development of the property in question and the peculiar circumstances of the case before it. More particularly, there is sense in the argument that the court is expected to take "... cognisance of the fact that husband and wife may not keep records of their financial contributions to the building of a family house."²⁴⁸

It is submitted that the sole limitation which a spouse encounters by bringing his or her application under the Married Women's Property Act, 1882²⁴⁹ is that the court is precluded under the Act from varying the property rights of spouses in a property in dispute.²⁵⁰ A property right is determined only based on recognised property law

²⁴³ [45 & 46 Vict. Cap 75] or the Married Women's Property Law Cap 76 Laws of Western Region of Nigeria, 1959.

²⁴⁴ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 84.

²⁴⁵ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 84.

²⁴⁶ 1992 Legalpedia SC UJBT 1 at 4.

²⁴⁷ See s 17 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75].

²⁴⁸ *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 5.

²⁴⁹ [45 & 46 Vict. Cap 75].

²⁵⁰ See *Cobb v Cobb* [1955] 2 All ER 696 (CA) at 700 where it was held that the only duty of the court under s 17 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] is to determine ownership of property and not to vary vested titles to property. See also *Gissing v Gissing* [1971] AC 886 (HL) at 904 where it was held that the existing property rights of parties cannot be varied once it has been established under s 17 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75].

principles.²⁵¹ What the court does is to apply the law and exercise its discretion as it thinks fit while determining the extent of the established interests of the parties in the property in dispute.²⁵²

The Supreme Court's decision in *Amadi v Nwosu*,²⁵³ which has been followed by lower courts in the determination of the property rights of parties, will at best illustrate the present stance of the court in relation to the property rights of spouses either upon the breakdown of their marriage or in the course of any property dispute between the spouses. In this case, the question before the court was whether the house which the spouses had used as matrimonial home was built as a joint venture or not. In proving joint ownership of property, the Supreme Court held that a spouse must give details and particulars of his or her contributions to the building of the property and also explain the quality and quantity of such contributions for the court to decide the issue of joint ownership of property.²⁵⁴

It should be noted that, in *Amadi v Nwosu*,²⁵⁵ the marriage between the spouses was concluded under customary law. Hence, the provisions of the Married Women's Property Act, 1882²⁵⁶ and the Matrimonial Causes Act No 18 of 1970²⁵⁷ did not apply to the facts of this case.²⁵⁸ The case was a civil suit commenced by Mr Nwosu (plaintiff) against Mrs Amadi (defendant) in respect of a house which was sold to the former by the defendant's husband (Mr Amadi, who is hereinafter referred to as PW1).

The plaintiff at the High Court of Owerri sought declarations against the defendant that he was the rightful owner of the house situated at 179 Tetlow Road, Owerri, having bought same from its owner, PW1 and that the defendant was a trespasser for refusing

²⁵¹ This requires the proof of a legal title to property, for example, by way of a deed, or the proof of a beneficial title by the existence of a trust. In *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 393, per Lord Morris of Borth-Y-Gest, it was held that the question before the court under s 17 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] is to determine who amongst the spouses owns the property and not to decide to whom the property should be given based on the court's discretion.

²⁵² Cretney and Mason, *Principles of Family Law*, 234. See also Emiri and Giwa, *Equity and Trusts in Nigeria*, 424 – 425.

²⁵³ 1992 Legalpedia SC UJBT 1.

²⁵⁴ *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 4.

²⁵⁵ 1992 Legalpedia SC UJBT 1 at 6.

²⁵⁶ [45 & 46 Vict. Cap 75].

²⁵⁷ Cap M7 Laws of the Federation of Nigeria, 2004.

²⁵⁸ *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 6, per Karibi-Whyte JSC.

to vacate the house on the premise of a wrongful claim. PW1 gave evidence for the plaintiff and stated how he had become the rightful owner of the house. According to PW1, the land was partitioned to him as family land which he solely developed by building the house. After he had sold the house to the plaintiff, however, he used the proceeds to build a house at No 33 Anokwu Street, Owerri, after which he requested the defendant to join him but she refused. The defendant had, on her own part, claimed that the property sold to the plaintiff had been allocated to her husband, her children and herself as a family property. She claimed to be a joint owner of the house having built the house with her husband. She argued that her consent had not first been sought and obtained by PW1 before he (PW1) sold the house to the plaintiff.

In the absence of any evidence from the defendant on the issue of joint ownership, the court found as a fact that the land had been partitioned to PW1 as family land before he had married the defendant and that the husband had solely financed the disputed building. The High Court entered judgement in favour of the plaintiff. The judgement was upheld by the Court of Appeal. On a further appeal to the Supreme Court, it held:²⁵⁹

“But let me now be liberal and say that by using the words "joint-owner" and "co-jointly" in paras. 14 & 20 of her Statement of Defence above the appellant meant that she contributed to the building of the house. If it were so, then certainly when she came to testify in court she ought to have explained the quality and quantity of her contribution. She also ought to have given details and particulars of the contributions which would have enabled the court to decide whether or not she owned the property with P.W.1. She did not.”

Although the researcher concedes that the defendant failed entirely to prove her case to justify co-ownership of the house, having been married to PW1 under native law and custom, it is pondered whether the same principle of law, as established by the Supreme Court above, on the need to give a specific account of a spouse's financial contribution in a claim for joint ownership of property would be applicable in all cases, especially where there exists a different set of facts and circumstances. Say for instance, the spouses had contracted their marriage under statutory law and a spouse

²⁵⁹ *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 4, per Kutugi JSC. See also the endorsement of the Court of Appeal's viewpoint by Karibi-Whyte JSC on the need to give a detailed account of the financial contributions made by the wife to the construction of the disputed property and the monetary worth of the wife's contribution as labour.

gave evidence as to his or her contribution to the property but was not detailed enough to furnish the court with specific particulars of his or her financial involvement in the development of the matrimonial property, would the claim be successful?

Another instance would be a situation where a spouse contributed substantially to the development of the other spouse's property in a house which they both used as their matrimonial home before the marriage failed.²⁶⁰ It is, however, pertinent to begin a discussion of this kind with a consideration of the facts and the judgement of the Court of Appeal sitting at Ibadan in *Aderounmu v Aderounmu*.²⁶¹

In *Aderounmu v Aderounmu*,²⁶² the wife (petitioner/respondent) in this case commenced a proceeding for divorce against her husband (respondent/appellant) under the Matrimonial Causes Act No 18 of 1970.²⁶³ Amongst the ancillary relief sought against the husband were orders for a mandatory injunction against the husband to vacate the property at No 32 Francis Okediji Street, Old Bodija Estate, Ibadan and to hand over the Land Rover to the wife, the wife being the sole owner of the property. The documents of title to the property which were unchallenged at trial were in the wife's name where the husband had signed as a witness in the Deed of Assignment. The spouses had, however, used the property as their matrimonial home.

In response to these reliefs, the husband claimed in his answer to the petition that with the consent of the wife and their oral agreement he had spent about ₦300, 000.00 for the renovation and expansion of the property. He also claimed to be the owner of the vehicle having financed its purchase and effected a change of ownership in his name. Holding that the husband had failed to plead the above relief by way of counter-claim, cross petition or cross-ancillary relief, the trial court entered judgement against the husband. Dissatisfied, he proceeded on appeal.

The Court of Appeal upheld the trial court's judgement in relation to the house at No 32

²⁶⁰ See *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1.

²⁶¹ [2003] 2 NWLR (Pt 803) 1.

²⁶² [2003] 2 NWLR (Pt 803) 1.

²⁶³ Cap M7 Laws of the Federation of Nigeria, 2004.

Francis Okediji Street, Old Bodija Estate, Ibadan.²⁶⁴ In its judgement, the court stated that exhibits 46 and 47 (which were a mortgage deed and a Deed of Assignment respectively solely in the wife's name) were unchallenged and uncontroverted.²⁶⁵ It relied on the authority of *Idundun v Okumagba*²⁶⁶ and other cases to hold that exhibits 46 and 47 sufficiently established the sole ownership right of the wife and oral or extrinsic evidence could not dislodge the wife's sole ownership except within the proviso of section 132(1) of the Evidence Act²⁶⁷ which the husband had failed to prove.²⁶⁸ Also applying the common law rule of *superficies solo cedit; omne quod inaedificatur*, (that is, whatever is affixed to the land belongs to its owner), the Court of Appeal further held²⁶⁹ that since:

“... the disputed matrimonial house is affixed to all that piece or parcel of land assigned in exhibit 47 to petitioner/respondent to which respondent/appellant was a witness he is estopped from laying joint ownership to the property covered by exhibit 47 as the proviso to section 132(1) Evidence Act ... is not applicable...”

²⁶⁴ *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 23.

²⁶⁵ *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 23.

²⁶⁶ (1976) 1 NMLR 200 at 210.

²⁶⁷ Cap 112 Laws of the Federation of Nigeria, 1990. It was later cited as the Evidence Act, Cap E14 Laws of the Federation of Nigeria, 2004. Note that the latter Act has been repealed by the Evidence Act No 18 of 2011. See s 128(1) of the Evidence Act No 18 of 2011 which is similar to s 132(1) of the Evidence Act, Cap E14 Laws of the Federation of Nigeria, 2004. S 128 provides: “(1) When any judgment of any court or any other judicial or official proceedings, or any contract, or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings or of the terms of such contract, grant or disposition of property except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under this Act; nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence: Provided that any of the following matters may be proved - (a) fraud, intimidation, illegality; want of due execution; the fact that it is wrongly dated; existence or want or failure, of consideration; mistake in fact or law; want of capacity in any contracting party, or the capacity in which a contracting party acted when it is not inconsistent with the terms of the contract; or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating to it; (b) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them; (c) the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property; (d) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property; (e) Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.”

²⁶⁸ *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 20 – 23.

²⁶⁹ *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 23.

On the ownership of the Land Rover in dispute, the Court of Appeal again applied strict principles of law to determine the issue.²⁷⁰ It held that the certificate of ownership (exhibit R 17) being in the husband's name was *prima facie* evidence that he was the registered and rightful owner.²⁷¹

An appreciation of the facts of the above case and the judgements of the trial and appellate courts gives credence to the submission that the property system between a husband and a wife during the subsistence of their marriage and upon its breakdown is the complete separation of property. At divorce, it is common for spouses to rely on the provisions of the Married Women's Property Act, 1882²⁷² or the Married Women's Property Law, 1959²⁷³ to establish ownership of property as was done in the case of *Aderounmu v Aderounmu*.²⁷⁴

With respect, the researcher submits that both the trial judge and the Justices of the Court of Appeal failed to appreciate the above case in the light of the property relationship between a husband and a wife. For instance, Adekeye JCA, in his judgement, acknowledged the fact that the issues which arose from the case were related to matrimonial property, and yet he proceeded to apply strict property rights to determine their ownership.²⁷⁵ In his judgement he said:²⁷⁶

"I agree with the reasoning and conclusion that the germane issues for determination in this appeal are straight-forward and within narrow limits. *They touch upon the determination of matrimonial properties - a residential building No. 32, Francis Okediji, Bodija, Ibadan, and a Land Rover Jeep, registered as OY7768BD between spouses in a divorce petition.*"²⁷⁷

While stating that the evidence relied upon by the trial court to establish ownership was

²⁷⁰ *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 24 – 27.

²⁷¹ See s 36 of the Oyo State Road Traffic Law Cap 124, Laws of Oyo State, 1978; *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 26.

²⁷² [45 & 46 Vict. Cap 75].

²⁷³ Cap 76 Laws of Western Region of Nigeria, 1959. See also Married Women's Property Law, Cap 71, Laws of Oyo State, 1978 as applicable to the *Aderounmu's* case.

²⁷⁴ [2003] 2 NWLR (Pt 803) 1 at 19.

²⁷⁵ *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 28.

²⁷⁶ *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 28.

²⁷⁷ Words in italics are mine.

based on documentary evidence, the learned Justice held:²⁷⁸

“It is trite law that by virtue of section 132 (1) of the Evidence Act, Cap. 112, Laws of the Federation, 1990, where parties have reduced the terms of their contract in a written document, extrinsic evidence is not admissible to add to, vary or subtract from or contradict the terms of the written instrument. In this appeal - *no extrinsic evidence shall be admissible to vary or contradict the ownership of the building 32, Francis Okediji Street, Bodija Estate, Ibadan, vested in the petitioner/respondent, neither will such evidence be admissible to divest the respondent/ appellant of the ownership of the Land Rover Jeep, registered as OY7768BD.*”²⁷⁹

It should be noted that the “extrinsic evidence” referred to in the above quotation was the oral evidence of the spouses in court as to how they became joint owners or owners of the matrimonial property. Although the husband had given oral evidence that he had made a substantial contribution of ₦300, 000.00 to the development and expansion of the matrimonial house with the consent of the wife, the several cheques which were tendered at trial to corroborate the husband’s claim for financial contribution were held by the court to be not directly related to the property.²⁸⁰ Nevertheless, the wife did not refute the fact that the husband had actually contributed to the development of the house. The wife’s oral evidence that the Land Rover had been sold to her and not to the husband was also rejected as being extrinsic.²⁸¹

It is further submitted that the reliance placed by the court on the five different ways of establishing ownership to land in Nigeria as stated in the case of *Idundun v Okumagba*²⁸² in order to rule that the sole ownership of the house belonged to the wife would have been conceived differently if the court had applied its mind to the doctrine of constructive trust upon which the husband’s claim for an interest in the property would have been founded. Instead, the court applied strict property rights to determine ownership and treated the spouses as if they were strangers.

The point is made that, even in a case for an interest in matrimonial property founded on constructive trust, the first step is for the court to decide who has legal ownership.

²⁷⁸ *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 29.

²⁷⁹ Words in italics are mine.

²⁸⁰ *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 19 – 23.

²⁸¹ *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 24 – 26.

²⁸² (1976) 1 NMLR 200 at 210.

This the court can do by relying on documentary evidence as it did in *Aderounmu's*²⁸³ case. The court will then take a further (second) step to determine whether, in the light of the spouses' conduct and the facts of the case, there is a common intention, either expressly or by inference, for the spouse without a legal title to acquire a beneficial interest in the property.²⁸⁴

While the researcher admits that the husband did not seek relief under section 72 of the Matrimonial Causes Act No 18 of 1970²⁸⁵ for the settlement of a part of the matrimonial property on him in his answer to the wife's petition, it is noted that the limited interpretation given to the section by courts in Nigeria does not enable the litigant to succeed in an application for a beneficial interest in property without proof of a financial contribution to such property.

That being the case, it is submitted that, instead of the courts applying strict property rights by relying on documentary evidence to determine property interests between spouses on marriage breakdown, especially as they relate to matrimonial property (as was done in *Aderounmu's* case),²⁸⁶ the court should rather invoke the doctrine of constructive trust which will serve as a useful alternative tool in the determination of the matrimonial property rights of Nigerian spouses pending a reform of the property rights of spouses in civil marriages in Nigeria.

In *Mueller v Mueller*,²⁸⁷ the parties married in 1989. The husband (petitioner/respondent) was a German citizen and a rig operator while the wife (respondent/appellant) was a cleaner in a hotel when they met and married. The husband in this case petitioned for the dissolution of marriage and the equitable partitioning of the matrimonial property between himself and the wife. The wife claimed exclusive ownership of the property in dispute on the basis that the property had been purchased in her (marriage) name. She asserted that she had purchased the property from profits which she realised from her supply business with an oil company. She failed

²⁸³ [2003] 2 NWLR (Pt 803) 1 at 20 – 26.

²⁸⁴ See *Okere v Akaluka* (2014) LPELR-24287 (CA) at 59 – 61.

²⁸⁵ Cap M7 Laws of the Federation of Nigeria, 2004.

²⁸⁶ [2003] 2 NWLR (Pt 803) 1 at 20 – 26.

²⁸⁷ (2005) LPELR 12687 (CA).

to prove this assertion in court.

The trial court believed the husband's evidence that he provided the finance for the land and the construction of the buildings, and it did not believe the evidence of the wife who was considered to be an unreliable person.²⁸⁸ It awarded two buildings, together with an undeveloped piece of land, to the husband while the wife was awarded only one building. The Court of Appeal sitting in Port Harcourt, however, reversed part of the judgement of the trial court and awarded the husband two of the three buildings on the land while the wife received a building together with an undeveloped piece of land. This was justified by the court as being equitable in line with the relief sought by the husband.²⁸⁹

It must be noted that the equal partitioning of the matrimonial property was ordered consequent upon the husband's relief. In line with the facts of this case and the strict property right approach adopted by the courts,²⁹⁰ it is submitted that the husband was exceptionally magnanimous to have sought only an equal division of the matrimonial property even where evidence revealed that the property had been developed mostly by the use of his finances and all the appellant had done was to supervise the construction jobs.²⁹¹ It is the opinion of the researcher that the husband's relief was one of a kind. The researcher thinks most Nigerian spouses (especially men) would not likely seek a similar relief given the same circumstances.

The evidence adduced by the spouses and the findings of the court in respect of the division of the matrimonial property in *Mueller v Mueller*²⁹² were based mostly on documentary evidence. This included the receipts of purchase and the correspondence between the spouses.²⁹³

With respect to the wife's name on the receipt of purchase, the Court of Appeal sitting in

²⁸⁸ (2005) LPELR 12687 (CA) at 16, 17.

²⁸⁹ *Mueller v Mueller* (2005) LPELR 12687 (CA) at 19.

²⁹⁰ See *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 20 – 26.

²⁹¹ *Mueller v Mueller* (2005) LPELR 12687 (CA) at 16.

²⁹² (2005) LPELR 12687 (CA).

²⁹³ *Mueller v Mueller* (2005) LPELR 12687 (CA) at 13 – 15.

Port Harcourt held, citing *Rimmer v Rimmer*,²⁹⁴ *Coker v Coker*²⁹⁵ and *Egunjobi v Egunjobi*²⁹⁶ that it is not abnormal for a husband and wife to buy property in the name of one of them.²⁹⁷ The property is still treated as matrimonial property which belongs to the spouses jointly.²⁹⁸

In *Oghoyone v Oghoyone*,²⁹⁹ the Court of Appeal sitting in Lagos determined ownership based on strict property rights having found that the property in dispute (the subject of the appeal) had been used by the spouses as their matrimonial home. In proof of their property rights, the spouses called a total number of ten witnesses and tendered sixty-seven documents at trial. The court, having found that the marriage between the spouses was void, was faced with the issue of determining the property rights of the spouses in their joint and individual property.

The wife, as petitioner, had sought exclusive ownership of the property situate at Plot L, Block 26, Amuwo Odofin Layout, Lagos and Plot 316, Block 13, Amuwo Odofin Residential Estate, Lagos, including an equal division of the furniture contained in the property. She petitioned the court to exercise its discretion as it deemed just in relation to the relief sought by her. Alternatively, she petitioned the court to settle the entire property mentioned above on her for life and that, thereafter, the property should be sold and divided in the ratio of 2:1 in her favour. The husband opposed the claim and sought exclusive ownership of the property in his cross petition. He also sought orders in respect of the spouses' joint venture business and account.

The trial court found as a fact that the spouses had concluded a contract before their marriage in respect of how their joint business interests and property would be shared. They had executed a document entitled: "Memorandum of understanding between Mr D. E. Oghoyone and Mrs. S. Patience Oghoyone on the sharing of the joint business interests and property". This document was tendered as "Exhibit P 52". The court also found that the only property not covered by "Exhibit P 52" was the property situate at

²⁹⁴ [1952] 2 All ER 863 (CA) at 869.

²⁹⁵ (1964) LLR 188.

²⁹⁶ [1976] 2 FNLR 78.

²⁹⁷ *Mueller v Mueller* (2005) LPELR 12687 (CA) at 14 and 15.

²⁹⁸ *Mueller v Mueller* (2005) LPELR 12687 (CA) at 14.

²⁹⁹ [2010] 3 NWLR (Pt 1182) 564.

Plot L, Block 26, Amuwo Odofin Layout, Lagos.

The court relied on section 132(1) of the Evidence Act³⁰⁰ to distribute the property covered by the spouses' contract in accordance with the spouses' agreement in "Exhibit P 52". It held:

"The law is clear. Where parties have reduced into writing their contract the rule is that oral evidence is not allowed to be given to add, vary it, but oral evidence can be adduced to show that there is a mistake in the written agreement."³⁰¹

On the property which was not covered by "Exhibit P 52", the trial court found that both spouses had made financial contributions to the property which came mainly from the spouses' joint account. Consequently, the court exercised its discretion, under section 17 of the Married Women's Property Act, 1882,³⁰² to order the sale of the property and an equal division of the proceeds between the spouses.

With regards to the property situate at Plot 316, Block 13, Amuwo Odofin Residential Estate, Lagos, the trial court gave the husband exclusive ownership. It justified its reason as follows:

"The Petitioner is claiming an interest on the above premises to which the respondent claims is his exclusively. DW1 gave evidence that he sold the property to the respondent who paid him and for which he issued a receipt. The Petitioner also testified that she also bought a Plot of Land Plot 5 Block 28, Amuwo Odofin in her own name. *I am not going to go into the details of who paid for what in respect of this Plot because I am of the view that if the Petitioner can have a Plot In her name, the respondent is entitled to one in his own name too. It is the justice of the matter that should always prevail. For this reason I will not grant the Petitioner's prayer in respect of this Plot of Land and will declare that it remains the exclusive preserve of the respondent herein. I accordingly hold that she has no interest herein.*"³⁰³

The researcher is of the view that the trial court in this instance exercised its discretion in a just and equitable fashion. The court refused to take an inventory of the spouses' financial contributions to the purchase of the property. It justified its discretion on the

³⁰⁰ Cap E14 Laws of the Federation of Nigeria, 2004.

³⁰¹ *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564 at 583.

³⁰² [45 & 46 Vict. Cap 75].

³⁰³ *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564 at 589. Words in italics are mine.

basis of equity. Although the court's order for equitable sharing arose from the fact that the property in question had been bought with funds from a joint account, it is suggested that the court's liberal discretion as exercised in this case should also be extended to the settlement provision order under section 72 of the Matrimonial Causes Act No 18 of 1970.³⁰⁴

While the husband appealed against the order of the trial court granting equal division of the property not covered by "Exhibit P 52", the wife's cross appeal was based on the exclusive ownership granted to the husband in respect of the property situate at Plot 316, Block 13, Amuwo Odofin Residential Estate, Lagos. The Court of Appeal upheld the trial court's judgement.³⁰⁵

The Court of Appeal stated that the trial court had been right from whatever way one examined the case.³⁰⁶ According to the Court of Appeal, even if the marriage between the spouses was void and the parties were regarded as living as friends, the trial court still had the responsibility of determining the spouses' proprietary rights in respect of the property jointly acquired.³⁰⁷

2.7.3 Equity and Trust Approach to Property Rights of Spouses

This approach requires the court to apply trust and equitable principles in the determination of the property rights of spouses where a reliance on documentary evidence or proof of direct financial contribution to the acquisition of property will lead to an unfair result on the part of the spouse without a legal title.

It is argued that, where there is a dispute between the spouses during a divorce regarding an entitlement to a beneficial interest in a property which is in the name of one of the spouses, the court should adopt an equitable approach in dealing with such

³⁰⁴ Cap M7 Laws of the Federation of Nigeria, 2004. Nwogugu, *Family Law in Nigeria*, 252 – 252 has argued that the decision in *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564 was wrongly reached. According to the author, the court would have applied the provisions of ss 69 and 72(1) and (2) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 to make a property settlement order since the marriage between the parties was void; as s 17 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] does not operate in cases of void marriages.

³⁰⁵ See *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564 at 590.

³⁰⁶ *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564 at 584.

³⁰⁷ *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564 at 584.

cases. In considering the peculiar facts of each case, especially in respect of long marriages, where a spouse has either directly or indirectly contributed to the acquisition of property and to the welfare of the family, proprietary claims could be sustained under equity and trust.

It should be borne in mind that the approach of the Supreme Court in *Amadi v Nwosu*³⁰⁸ as followed in *Aderounmu v Aderounmu*³⁰⁹ and other cases considered above in demanding detailed documentary evidence to prove title or sustain a claim for a joint interest in property between spouses has been criticised³¹⁰ on the basis that it failed to recognise that under the doctrine of constructive trust, a wife need not establish her right to matrimonial property with detailed particularity in certain cases.³¹¹

A constructive trust is that trust which is raised by the construction of equity in a person to prevent him/her from obtaining an undue advantage at the expense of other person(s).³¹² For the purpose of this discussion, it is

“... a remedy by which the court can enable an aggrieved spouse or party to obtain restitution, and the success of the party’s case does not depend on his or her direct physical or monetary contribution to the building or acquisition of the property.”³¹³

It is submitted that the courts’ attitude on the establishment of the particularity of a

³⁰⁸ 1992 Legalpedia SC UJBT 1.

³⁰⁹ [2003] 2 NWLR (Pt 803) 1 at 20 – 26.

³¹⁰ It should be noted that it is trite law that a lower court cannot overrule the judgement of a higher court. At best, the court below can distinguish the facts of the superior court case from the facts before it and refuse to follow the judgement of the superior court. In such a case, there must be a material difference between the present case and the earlier case. Besides this exception, the doctrine of *stare decisis* which is also referred to as judicial precedence operates in the Nigerian legal system. The judgement of an apex court binds all the courts below it. However, the judgements of courts of coordinate jurisdictions are not binding on such courts. See *Comptel International SPA v Dexson Ltd* [1996] 7 NWLR (Pt 459) 170 at 184, per Uwaifo JCA (as he then was); *Chief Mene Kenon & 2 Ors v Chief Albert Tekan & 5 Ors* [2001] 14 NWLR (Pt 732) 45 at 89; *Alhaji Muhammadu Maigari Dingyadi & Anor v Independent National Electoral Commission & Ors* (2011) LPELR-950 (SC), ratio 1, per Adekeye JSC; *Nigeria Agip Oil Company Ltd v Nkweke & Anor* (2016) LPELR-26060 (SC) ratios 5 and 6. See also Sanni, *Introduction to Nigerian Legal Method*, 85 – 87 and 91 – 95; Ikegbu, *et al.* 2014 *American International Journal of Contemporary Research*, 149 at 149 – 151; 156 – 157; Murgan, *et al.* 2015 *IOSR Journal of Humanities and Social Science (IOSR-JHSS)*, 65 at 67. This explains the different reasoning and approaches in the judgements of the Court of Appeal in the Ibadan, Lagos and Port-Harcourt judicial Divisions, which were considered above in relation to the property rights of spouses upon marriage breakdown.

³¹¹ See *Okere v Akaluka* (2014) LPELR-24287 (CA) at 60.

³¹² Godefroij. *A Digest of the Principles of the Law of Trusts and Trustees*, 1879, 72. HeinOnline [Accessed 17 October, 2016]. See also, 3.4.2.2 below.

³¹³ See *Okere v Akaluka* (2014) LPELR-24287 (CA) 1 at 56 – 57 with reference to the dictum of Lord Denning in *Hussey v Palmer* (1972) 1 WLR 1286 (CA).

spouse's contribution to property³¹⁴ before a joint interest can be established may not be applicable to cases where a claim for joint interest in property is based on constructive trust.³¹⁵ The cases of *Egunjobi v Egunjobi*,³¹⁶ *Oghoyone v Oghoyone*³¹⁷ and *Okere v Akaluka*³¹⁸ are instructive in this regard.

With illustrations from the English cases of *Pettitt v Pettitt*³¹⁹ and *Gissing v Gissing*,³²⁰ the court in *Egunjobi v Egunjobi*³²¹ relied on the doctrine of constructive trust to uphold the wife's claim for an interest in the matrimonial home. This was, however, decided based on the evidence of the wife's direct financial contributions to the development of the property in dispute.

The trial court held that there was an implication of trust arising from the wife's substantial contribution to the development of the house. While the husband challenged this part of the judgement on appeal, arguing that the wife was not entitled to any share in the house in the absence of an express agreement to that effect, the wife cross-appealed on the ground that she should be entitled to one-half of the interest in the house.³²²

The trial court's judgement was upheld on appeal. According to the Western State Court of Appeal (as it then existed), in the absence of an express written agreement that a spouse who has contributed financially in a substantial manner to the development of the other spouse's property would be entitled to a joint interest in the property, a constructive or resulting trust can arise in such circumstances.³²³ The onus, therefore, lies on the court to ascertain what the spouses must have intended arising from their conduct.³²⁴ The Western State Court of Appeal, thus, held that the husband became the wife's trustee by operation of law upon his knowledge of the wife's substantial

³¹⁴ *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt 803) 1 at 20 – 26.

³¹⁵ See *Okere v Akaluka* (2014) LPELR-24287 (CA).

³¹⁶ [1976] 2 FNLR 78.

³¹⁷ [2010] 3 NWLR (Pt 1182) 564.

³¹⁸ (2014) LPELR-24287 (CA).

³¹⁹ [1969] 2 All ER 385 (HL) at 390.

³²⁰ [1971] AC 886 (HL) at 896, 900 and 904.

³²¹ [1976] 2 FNLR 78.

³²² See *Egunjobi v Egunjobi* [1976] 2 FNLR 78.

³²³ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 82 – 84.

³²⁴ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 84.

contributions towards the development of the house.³²⁵

One thing is certain. It is clear from both the lead judgement and the dissenting judgement in *Egunjobi's*³²⁶ case that a spouse's (mostly the wife's) financial contribution to property was recognised as giving rise to a beneficial interest under the doctrine of constructive or resulting trust. This financial contribution, according to the court, can either be a direct contribution or an indirect contribution.³²⁷

A contribution is said to be direct when a spouse makes a direct payment towards the acquisition, mortgage or lease of the property in dispute.³²⁸ An indirect contribution will include a spouse's contribution to the improvement or development of the property in dispute.³²⁹ A spouse's contribution will also be indirect in cases where a spouse undertakes to bear household expenses in order to enable the other spouse to acquire a specific property. Fakoyode, JA in his dissenting judgement stated:³³⁰

“It seems to me that if a wife foregoes house-keeping allowances from her husband and runs the house at her own expense for a substantial period of time in order to enable her husband save money to buy or acquire some specific property e.g. land, house or car, she should be entitled to some beneficial interest in the property even though her contributions to the property are indirect.”

Noting that an indirect contribution to property can give rise to a trust, the Justice held:³³¹

“Having regard to the facts of each case, the court may be able to find that the parties agreed expressly or by implication or by imputation that the complaining spouse should have a beneficial interest in the family asset. What must be considered in such circumstances are (a) the nature of the indirect contributions of the complaining spouse, and (b) the conduct of the parties in dealing with themselves.”

³²⁵ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 84. On this principle of law (particularly as it relates to English law) with regards to when a spouse's contribution to the development of property may give rise to a beneficial interest in property, see the discussion on 3.2, 3.3 and 3.4 below.

³²⁶ (1976) 2 FNLR 78.

³²⁷ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 84 – 85.

³²⁸ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 85.

³²⁹ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 85.

³³⁰ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 85.

³³¹ *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 85.

The case of *Dairo v Dairo*³³² also presented another opportunity for the Lagos High Court to apply the doctrine of constructive trust. It, however, failed to live up to expectations when it rejected the ancillary relief sought by the wife in a proceeding for the dissolution of the marriage between the spouses. In that case, the wife's uncontroverted evidence at trial was that both she and her husband had reached an agreement where she spent her income on the maintenance and welfare of the family while the husband spent his on building the matrimonial house. The court, in the absence of proof of a direct financial contribution to the house, ignored the wife's claim for a share in the house.

It is argued that, even in the absence of proof of the exact financial contribution to the building of the house, the High Court should have upheld the wife's claim for an interest in the house in the light of the circumstances of the case and the agreement reached by the spouses which was not controverted by the husband.

The court could have upheld the doctrine of constructive trust to hold that, in the peculiar circumstances of the case before it, it would be unconscionable for the husband to lay a total claim to the property. Having reached an oral agreement with his wife in respect of how their financial resources would be channelled, there was the inference of a common intention between the spouses that the house would be owned jointly.³³³ The onus would then lie on the court to quantify the extent of the spouses' interest in the house. Whether or not the interest should be equal will remain for the court to decide as it thought fit.

In *Oghoyone v Oghoyone*,³³⁴ the Court of Appeal in its judgement, in relation to the appeal against the equitable division of Plot 316, Block 13, Amuwo Odofin Residential Estate, Lagos held:

"I am satisfied that the order of the learned trial Judge on Plot L Block 26 Amuwo Odofin Scheme was fair, just and equitable. It would be unconscionable for any party to claim exclusive ownership. Bearing in mind the changing social and economic realities, a Judge is to ascertain the parties shared intentions,

³³² Suit No ID/90HD/86 of 15/7/88 (Unreported) Lagos High Court.

³³³ See the English case of *Falconer v Falconer* (1970) 1 WLR 1333 (CA).

³³⁴ [2010] 3 NWLR (Pt 1182) 564.

actual, inferred with respect to the property in the light of their conduct. In that light I am satisfied that when the going was good the parties made contributions to ensure that they had good living accommodation. When the going turns bad it is only right and equitable that each side recoups its contribution and calls it a day.”³³⁵

It appears that the Court of Appeal seemed to be referring to the position of the English law in *Gissing v Gissing*³³⁶ and *Lloyd’s Bank Plc. v Rosset*,³³⁷ amongst other cases, as currently expounded in the English cases of *Stack v Dowden*,³³⁸ *Abbott v Abbott*³³⁹ and *Jones v Kernott*³⁴⁰ as it relates to how the “shared intentions” of the parties can be ascertained with respect to their property rights under constructive trust.³⁴¹ Prior to these cases, the English court had held that “shared intention” can be established only on the basis of a common agreement between the parties which can either be expressed or inferred from the parties’ conduct and the surrounding circumstances with regards to the property.³⁴²

In *Okere v Akaluka*,³⁴³ the plaintiff (Mrs Akaluka) commenced an action against the 1st defendant (her late husband who had died during the process of the suit) and the 2nd Defendant (Mr Okere). The plaintiff claimed against the defendants that she and her late husband had been joint owners of the property which her late husband sold to Mr Okere without her consent.

It was the plaintiff’s evidence at the trial that she had contributed financially to the acquisition of the property and its reconstruction from a one-bedroom apartment to a three-bedroom apartment which the spouses occupied with their children as their matrimonial home for four years before the husband abandoned her and the seven children of the marriage to live with another woman. According to the plaintiff, her late husband had convinced her that the disputed property was jointly owned by both the

³³⁵ Words in Italics are mine. See *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564 at 584.

³³⁶ [1971] AC 886 (HL).

³³⁷ [1991] AC 107 (HL).

³³⁸ [2007] WL 1157953 (HL).

³³⁹ [2007] WL 2126565 (PCA).

³⁴⁰ [2012] 1 AC 776 (SC(E)).

³⁴¹ These cases are discussed in chapter three of this study under the application of trust in the determination of the property rights of spouses.

³⁴² See *Gissing v Gissing* [1971] AC 886 (HL); *Lloyd’s Bank Plc. v Rosset* [1991] AC 107 (HL).

³⁴³ (2014) LPELR-24287 (CA).

husband and wife, and, based on that assurance; she had intensified her interest in making contributions to the acquisition of the property and its development. This piece of evidence was corroborated by the plaintiff's eldest son.

The plaintiff's claim was, however, challenged at trial by the defendant who did not admit that the plaintiff had had any interest in the property. The defendant had threatened to eject the plaintiff and her children from the disputed property. He also asserted that, if in any case the plaintiff had any interest in the disputed property, he had bought the property without notice of such interest.

At the close of trial, the trial judge concluded that the plaintiff was a joint owner of the disputed property having contributed to its acquisition and development.³⁴⁴ Although the property had been acquired in the sole name of the husband, the court held that the plaintiff had an equitable interest in the property and that, in the absence of her consent first sought and obtained by the late husband, the assignment of the property to the defendant was null and void.³⁴⁵ The court further did not believe the evidence of the defendant that he had bought the property without notice/knowledge.³⁴⁶

Dissatisfied with the trial court's judgement, the defendant filed an appeal at the Court of Appeal sitting in Port-Harcourt. The first ground of appeal is relevant to this discussion. It is reproduced as follows:

"The learned trial Judge erred in law when he held that the Plaintiff/Respondent was a joint owner of the property in question i.e. PLOT WB85A, Road 8, Federal Housing Estate Trans-Egbu Road, Owerri with the deceased Paul Akaluka notwithstanding the fact that all the title documents of the property were in the name of the deceased alone to the knowledge of the Plaintiff/Respondent."³⁴⁷

Based on the above ground of appeal, the Court of Appeal dealt with the question of whether or not the trial court had been right when it had held that the plaintiff was a joint owner of the disputed property. The Court of Appeal held that the burden of proving joint

³⁴⁴ *Okere v Akaluka* (2014) LPELR-24287 (CA) at 20.

³⁴⁵ *Okere v Akaluka* (2014) LPELR-24287 (CA) at 20.

³⁴⁶ *Okere v Akaluka* (2014) LPELR-24287 (CA) at 20 – 21.

³⁴⁷ *Okere v Akaluka* (2014) LPELR-24287 (CA) at 21 – 22.

ownership of the disputed property was on the plaintiff.³⁴⁸

It referred to the evidence of the plaintiff as to the various contributions which she claimed to have made to the acquisition and development of the disputed property, as corroborated by her eldest son. Notwithstanding the challenge by the appellant's counsel on the veracity of the wife's evidence, particularly on the sum of money which she claimed to have given the late husband during the acquisition of the disputed property, the appellate court believed the evidence of the plaintiff on the basis that her substantial contribution towards the purchase of the property and its development was uncontroverted. Agube JCA held:

"I agree therefore with the submission of the learned Counsel for the Respondent that the evidence of the Respondent and PW2 on her contribution remained unchallenged since the only person who ought to have led evidence in rebuttal of their assertions on the contributions and initial deposit was the 1st Defendant who is unfortunately dead."³⁴⁹

The court further held that, considering the evidence of the plaintiff and her eldest son, the mere fact that the receipts of purchase and other documents were in the plaintiff's late husband's name did not extinguish the joint ownership of the disputed property.³⁵⁰ In its considered view, the Court of Appeal held that the plaintiff was entitled to 50% of the proceeds from the sale of the house. According to the court, in circumstances such as *Okere v Akaluka*,³⁵¹ the correct position of the law in Nigeria is to apply constructive trust.³⁵²

Referring to the dictum of Lord Denning in *Hussey v Palmer*,³⁵³ the Court of Appeal³⁵⁴

³⁴⁸ *Okere v Akaluka* (2014) LPELR-24287 (CA) at 36. See also s 137(1) and (2) of the Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990 as presently provided in s 131(1) and (2) of the Evidence Act No 18 of 2011. It provides: "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

³⁴⁹ *Okere v Akaluka* (2014) LPELR-24287 (CA) at 51.

³⁵⁰ *Okere v Akaluka* (2014) LPELR-24287 (CA) at 52 – 53.

³⁵¹ (2014) LPELR-24287 (CA).

³⁵² *Okere v Akaluka* (2014) LPELR-24287 (CA) at 50. Umezulike, *ABC of Contemporary Land Law in Nigeria*, 513 – 517 also argued in favour of the application of the doctrine of constructive trust in circumstances where both spouses have a joint interest in matrimonial property but legal ownership is in the name of one spouse.

³⁵³ (1972) 1 WLR 1286 (CA).

³⁵⁴ *Okere v Akaluka* (2014) LPELR-24287 (CA) at 56 – 57.

noted that the doctrine of constructive trust is:

“... a remedy by which the court can enable an aggrieved spouse or party to obtain restitution, and the success of the party’s case does not depend on his or her direct physical or monetary contribution to the building or acquisition of the property.”

The justice called for a similar application of the doctrine of constructive trust in Nigeria.³⁵⁵ By this doctrine, a spouse will be held to be a constructive trustee to the other spouse in cases where a matrimonial property is acquired in the name of one of the spouses.³⁵⁶

When the inference of a trust will be drawn with regards to matrimonial property, the Court of Appeal, once again, placed reliance on the principle established by Lord Denning in *Falconer v Falconer*³⁵⁷ below:

"This inference of a trust, the one for the other is readily drawn when each has made a financial contribution to the purchase price or the mortgage instalment. The financial contribution may be direct as where it is actually stated to be contribution towards the price or instalments. It may be indirect, as where both go out to work, and one pays for the housekeeping and other the mortgage instalments. It does not matter who pays what; so long as there is a substantial financial contribution towards the family expenses, it raises the inference of a trust. We should not give monied right priority over social justice. We should protect the position of a wife who has a share, just as years ago we protected the deserted wife"³⁵⁸

It will be recalled that the Supreme Court in *Amadi v Nwosu*³⁵⁹ took a different view from the position of the law canvassed by Lord Denning in *Rimmer v Rimmer*³⁶⁰ and *Falconer v Falconer*.³⁶¹ The Supreme Court declined to adopt the principle established by Lord Denning on two grounds.³⁶² Firstly, it found that, unlike the above cases, the marriage between the spouses was celebrated under customary law.³⁶³ Secondly, it found that the spouses in the English cases had both proved their financial contributions

³⁵⁵ *Okere v Akaluka* (2014) LPELR-24287 (CA) at 57.

³⁵⁶ *Okere v Akaluka* (2014) LPELR-24287 (CA) at 52.

³⁵⁷ (1970) 1 WLR 1333.

³⁵⁸ See also *Rimmer v Rimmer* [1952] 2 All ER 863 (CA) at 869.

³⁵⁹ 1992 Legalpedia SC UJBT 1 at 6.

³⁶⁰ [1952] 2 All ER 863 (CA).

³⁶¹ (1970) 1 WLR 1333 (CA).

³⁶² *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 6.

³⁶³ *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 6.

to the purchase of the property, while the defendant (the wife) in the present case had failed to plead hers in relation to the disputed property.³⁶⁴ The Supreme Court then went further to state that a wife (as in *Amadi's* case) who makes a claim for joint ownership of property on the basis that she had contributed to the building of the property must explain the quantity and quality of her contributions by giving detail particulars.³⁶⁵

The Court of Appeal in *Okere v Akaluka*³⁶⁶ commented on the above position of the Supreme Court in *Amadi v Nwosu*,³⁶⁷ particularly on the burden placed on a spouse who claims joint ownership to prove his or her contributions in detail. Applying the doctrine of constructive trust to the case before it, the Court of Appeal stated:³⁶⁸

“The position taken by Kutigi, JSC in the Amadi v. Nwosu's case which required that in a dispute of this nature, the wife must establish with sufficient particularity the quantity and quality of her contributions to the acquisition of the property in dispute has been criticised as not having taken into consideration the fact that under constructive trust, the wife need not establish her right to marital property with sufficient particularity as it could be sufficient in this case where the Respondent was abandoned with seven of their children in the property while the 1st Defendant was hobnobbing with a concubine and subjected the Respondent to the untold hardships of taking care of those children's upkeep, trained them until they have graduated from the University apart from making substantial contributions towards the acquisition, expansion and reconstruction of the property in dispute. It would therefore be most unconscionable to throw the Respondent and children away from a house she had made such substantial contributions towards its acquisition and maintenance. Rather, the dictum of Denning, M.R. in the Falconer's case (supra) where he held that sometimes the indirect contributions of a wife to the marital property cannot be quantified in monetary terms which would entitle her to a share in the property should apply, accords with modern reality particularly where the parties were husband and wife of Christian and Statutory marriage. Thus, it was held in the Falconer and Rimmer cases, that wives were entitled without further proof to share in the marital property acquired during marriage since it was the performance of their functions as wives that enabled their husbands (if at all in this case) to perform theirs.”

It should be noted that, by the doctrine of judicial precedence, the Court of Appeal cannot depart from a Supreme Court's decision except where it distinguishes the

³⁶⁴ *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 6.

³⁶⁵ *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 4, 7.

³⁶⁶ *Okere v Akaluka* (2014) LPELR-24287 (CA).

³⁶⁷ 1992 Legalpedia SC UJBT 1 at 4.

³⁶⁸ *Okere v Akaluka* (2014) LPELR-24287 (CA) at 60; 61. Words in italics are my emphasis.

Supreme Court's decision from the one presently considered. The binding nature of the Supreme Court's judgement in *Amadi v Nwosu*³⁶⁹ on the Court of Appeal can be gleaned from the conclusive statement of Agube JCA. After expressing the above view and upholding constructive trust, the Justice stated:³⁷⁰

“In any case, the Court below believed the Respondent and the PW2 that the Respondent made substantial contributions towards the property in line with the dictum of Kutigi, JSC in the Amadi v. Nwosu's case and I am unable to interfere with that finding as it is not perverse but borne out of evidence...”

This demonstrates the fact that the Court of Appeal was not in the position to set aside the Supreme Court's judgement in *Amadi v Nwosu*.³⁷¹ The Court of Appeal's judgement was still hinged on the fact that the plaintiff (the wife) had made substantial contributions to the acquisition of the property in dispute. It is submitted that, until the Supreme Court overrules itself, there is no authority to the effect that a spouse's indirect contributions or a wife's domestic contributions to the family welfare (and nothing more) will give rise to a claim for joint ownership of property acquired in the sole name of the other spouse.

2.8 ANALYSIS OF THE GENDER AND EQUAL OPPORTUNITIES BILL, 2016

Despite being signatories to international treaties³⁷² and conventions,³⁷³ discrimination

³⁶⁹ 1992 Legalpedia SC UJBT 1.

³⁷⁰ *Okere v Akaluka* (2014) LPELR-24287 (CA) at 61.

³⁷¹ 1992 Legalpedia SC UJBT 1.

³⁷² See for instance Article 16(1) of the Universal Declaration of Human Rights, 1948, <http://www.un.org/en/universal-declaration-human-rights/> which provides: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. *They are entitled to equal rights as to marriage, during marriage and at its dissolution.*” Words in italics are my emphasis. Nigeria was admitted as a Member of the United Nations on 7th October, 1960. It has been argued that, by virtue of her membership, Nigeria had accepted the Universal Declaration of Human Rights, 1948 and The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, which was adopted in Maputo, Mozambique, 11th July, 2003 and was ratified by Nigeria in 2004. It encourages State parties amongst other things to recognise the equitable rights of spouses to share in the joint property which results from their marriage. See art 7(d) of the Protocol. It is noted that the principal Charter has been domesticated as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act No 2 of 1983 Cap A9 Laws of the Federation of Nigeria, 2004. Ashiru, 2007 *Journal of African Law*, 316 at 331 has called on the Nigerian government to take steps to reform its laws in order for them to be consistent with international instruments which the country has ratified. See also, Onwubiko, 2009 <https://www.modernghana.com/news/241794/human-rights-and-nigeria-at-49-by-emmanuel-onwubiko.html>, Ezeilo, 2011 <http://www.muslimpersonallaw.co.za/inheritedocs/lawandpractices%20in%20nigeria.pdf>, 1 at 19; Ekhatior, 2015 *Journal of International Women's Studies*, 285 at 293.

³⁷³ See United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 which came into operation on 3rd September, 1981, signed by Nigeria in 1984 and

on the basis of sex as a result of the patriarchal structure of the Nigerian society³⁷⁴ has characterised the polity called Nigeria.³⁷⁵ In practical effect, women are discriminated against on the basis of entrenched societal norms that have outlived their usefulness in the 21st Century.³⁷⁶

On 15 March 2016, the upper legislative Chambers (the Nigerian Senate) of the National Assembly³⁷⁷ rejected³⁷⁸ the Gender and Equal Opportunities Bill, 2016³⁷⁹

ratified in 1985. Some of the provisions are yet to be domesticated by the National Assembly in Nigeria. See Ashiru, 2007 *Journal of African Law*, 316 at 328. Cl 1 of the Gender and Equal Opportunities Bill, 2016 sought to achieve that purpose.

³⁷⁴ See Asiyanbola, 2005 *Presentation Paper, International Union for Scientific Study of Population (IUSSP/UIESP) XXV International Population Conference Tours, France*, 1 at 2 – 3. Ashiru, 2007 *Journal of African Law*, 316 at 326 – 328; Ogbogu, 2013 *The 2013 West East Institute International Academic Conference Proceedings*, 19; Ekhaton, 2015 *Journal of International Women's Studies*, 285.

³⁷⁵ See Akande, *Akande: Introduction to the Constitution of the Federal Republic of Nigeria 1999*, 107. This is notwithstanding the fact that s 42 of the Constitution of the Federal Republic of Nigeria, 1999 Cap C23 Laws of the Federation of Nigeria, 2004 prohibits such discrimination. See also Odiaka, 2013 *Afe Babalola University: Journal of Sustainable Development Law and Policy*, 190 at 191.

³⁷⁶ See Alemika, 2010 *University of Maiduguri Law Journal*, 25 at 33; Daley and Englert, 2010 *Journal of Easter African Studies*, 91 at 98; Odiaka, 2013 *Afe Babalola University: Journal of Sustainable Development Law and Policy*, 190 at 191, 204, 205; Ekhaton, 2015 *Journal of International Women's Studies*, 285 at 285, 293.

³⁷⁷ The National Assembly is the legislative arm of the Federal Republic of Nigeria. See s 47 of the Constitution of the Federal Republic of Nigeria, 1999 Cap C23 Laws of the Federation of Nigeria, 2004. It is vested with the "... power to make laws for the peace, order and good government of the Federation or any part ..." of the federating States "... with respect to any matter included in the Exclusive Legislative List ... set out in Part I of the Second Schedule to this Constitution." It also has the concurrent power with State House of Assemblies to make laws in relation to "... any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution ..."; and on any other matter as stated by the Constitution. See s 4 of the Constitution of the Federal Republic of Nigeria, 1999 Cap C23 Laws of the Federation of Nigeria, 2004. An enactment of the National Assembly is called an "Act" while an enactment of the State House of Assemblies is called a "Law". These were called "Decrees" and "Edicts" respectively during military regime in Nigeria. See Gasiokwu, *Legal Research and Methodology: The A – Z of Writing Theses and Dissertations in a Nutshell*, 73.

³⁷⁸ It is noted that the Gender and Equal Opportunities Bill, 2016 failed to pass the Second Reading on the floor of the Nigerian Senate as cultural and religious examples were cited as the basis for rejecting it. See Kazeem, <http://legislation.gov.uk/ukpga/Vict/45-46/75>; Goitom, <http://www.loc.gov/law/foreign-news/article/nigeria-gender-equality-bill-fails-in-the-senate/>. It was argued that the Gender and Equal Opportunities Bill, 2016 was incompatible with Nigerian religious and cultural beliefs and also inconsistent with the Constitution of the Federal Republic of Nigeria, 1999 Cap C23 Laws of the Federation of Nigeria, 2004 which provides for freedom of religion. See s 38(1) of the Constitution of the Federal Republic of Nigeria, 1999 Cap C23 Laws of the Federation of Nigeria, 2004. See also *Thisdaylive*, <http://www.thisdaylive.com/index.php/2016/03/17/anger-after-senate-rejects-gender-equality-bill/>.

Proponents of the Gender and Equal Opportunities Bill, 2016 have, however, argued that cultural and religious dogma in a multi-ethnic and multi-religious country like Nigeria should not be a basis for rejecting a Bill which seeks to advance gender equality and prevent sexual discrimination. See Ademiluyi, <http://indepenting.com/2016/03/rejection-gender-equality-bill-another-setback-nigerian-women/>.

³⁷⁹ Note that the Bill which is also referred to as the Gender Parity and Prohibition of Violence against Women Bill, 2016 was culled from the Gender and Equal Opportunities Bill, 2016. For the purpose of this discussion, the content of the latter Bill will be discussed. The Gender and Equal Opportunities Bill, 2016

which was aimed at according women equal rights before the law together with their rights to administer property.³⁸⁰

The Gender and Equal Opportunities Bill, 2016 recognised the equitable right of a widow to a share in the deceased husband's property and her right to continuous occupation of the matrimonial home.³⁸¹ Since the scope of this study does not extend to the proprietary rights of spouses on the termination of the marriage as a result of death, only clauses 15 and 17 of the Gender and Equal Opportunities Bill, 2016 have a direct relevance to this study.

Clause 15 of the Gender and Equal Opportunities Bill, 2016 made provision for the rights of a woman in marriage and family life. It sought "... to eliminate discrimination against women in all matters in relation to marriage and family relations ..."³⁸² It also guaranteed the rights and responsibilities of spouses during the subsistence of the marriage and upon its breakdown.³⁸³ On the other hand, clause 17 of the Gender and Equal Opportunities Bill contained provisions which were related to marriage and matrimonial causes. The provisions included *inter alia* joint contributions towards safeguarding the family interests³⁸⁴ and the woman's right of acquisition, ownership and

was sponsored by Senator Biodun Christine Olujinmi (Senate Deputy Minority Whip), a Senator from Ekiti State (in the South Western Region of Nigeria) See Oshi, <http://www.premiumtimesng.com/news/top-news/200202-nigerian-senate-rejects-bill-seeking-gender-equality-marriage.html>.

³⁸⁰ See cl 3(b) of the Gender and Equal Opportunities Bill, 2016.

³⁸¹ See cl 5(vi) of the Gender and Equal Opportunities Bill, 2016.

³⁸² See cl 15 of the Gender and Equal Opportunities Bill, 2016.

³⁸³ It is noted that the cl 15 was poorly drafted as the legislator's intention was not specifically stated. For example, cl 15(c) contained the expression: "...and shall ensure, to women and men ... rights and responsibilities during marriage and at its dissolution ...". One may ask: What are those rights and responsibilities which the proposed Bill sought to achieve? Do they include the rights of spouses to property during marriage and their rights to an alteration of the property interests upon the breakdown of marriage? It is submitted that cl 15 of the Gender and Equal Opportunities Bill, 2016 was a restatement of Article 16(1)(a) to (f) of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979. This provision only emphasised the equality of property in a marital relationship but it did not specifically state that there should be equality of property division between spouses on the dissolution of marriage. This lacuna has been taken care of by the UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No 21: Equality in Marriage and Family Relations*, 1994, <http://www.refworld.org/docid/48abd52c0.html>, paras 30 to 31 which emphasised equal property rights between spouses during the subsistence of marriage and upon marriage breakdown. See Ashiru, 2007 *Journal of African Law*, 316 at 326. It is the opinion of the researcher that the Bill would have been drafted to highlight the equal rights and responsibilities which the proposed Bill sought to promote during marriage and upon its dissolution.

³⁸⁴ The question may be asked: What type of joint contribution is required to safeguard the interests of the family? Does it include both financial and non-financial contributions or moral, physical and spiritual

free management of property during her marriage.³⁸⁵

Clause 17(e) of the Gender and Equal Opportunities Bill, 2016 specifically stated that during a woman's marriage, she should have the right of acquisition, ownership and administration of property without interference. One wonders why there was no mention of the property rights of spouses (especially wives) on the breakdown of marriages in Nigeria. Although the need for a just division of matrimonial property between spouses on the breakdown of marriage has been emphasised by scholars,³⁸⁶ the proposed Bill was found wanting in this regard.

The rationale behind the call to eschew societal norms which are discriminatory in any property division between husband and wife upon the breakdown of marriage³⁸⁷ has been brought to the fore by the United Nations Committee on the Convention to

contributions? How should these contributions be equated when the need arises? A second question is: What constitutes the family interests which the proposed Bill sought to safeguard by the contributions of the spouses? Do they include property interests? If the question is answered in the affirmative, whose property will be subject to redistribution? Individual or separate property, the joint property of the spouses as a result of monetary contributions; their family property or matrimonial property as the case may be?

³⁸⁵ CI 17(e) of the Gender and Equal Opportunities Bill, 2016. It is noted that this provision has already been taken care of by the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] in respect of women who contracted civil marriages. It is reasoned that the inclusion of this provision seeks to elevate the contractual status of the customary law wife whose contractual rights and property rights were limited. This provision reemphasises Article 16(1)(h) of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 which advanced the equal rights of "... spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration." A related and more specific provision on the property rights of spouses on the breakdown of marriage is found in Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 which provides for the enactment of laws by State parties to the effect that "... in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage."

³⁸⁶ See Arinze-Umobi, 2004 *Unizik Law Journal*, 188 at 198; Umukoro, 2006 *Commercial and Property Law Journal*, 116 at 131; Ashiru, 2007 *Journal of African Law*, 316 at 318 – 323; International Federation for Human Rights, <http://www.refworld.org/docid/48a0007a2.html>, 61 – 62. Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 10 – 17; Alemika, 2010 *University of Maiduguri Law Journal*, 25 at 30, 35 – 38; Odiaka, 2013 *Afe Babalola University: Journal of Sustainable Development Law and Policy*, 190 at 190 – 192.

³⁸⁷ Ashiru, 2007 *Journal of African Law*, 316 at 321 – 323 stated that Nigerian judges are compelled by customs and societal attitude to make property settlement orders in line with customary practices. See *Olabiwonnu v Olabiwonnu* (2014) LPELR 24065 (CA) at 20 where the trial judge, having found that both spouses had a joint interest in the matrimonial property, ordered that, upon sale, the proceeds should be divided in accordance with Yoruba customary law.

Eliminate All Forms of Discrimination Against Women. The Committee³⁸⁸ states:

“In most countries, a significant proportion of the women are single or divorced and many have the sole responsibility to support a family. Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, *any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.*”

Commenting on marital property as it relates to the need for an equitable interest in matrimonial property during marriage and upon its breakdown, the United Nations Committee called for a revocation of property laws and customs which are discriminatory against women.³⁸⁹ The Committee's statements in paragraphs 30, 31 and 32 will be instructive to the discussion in this thesis. They are replicated below:

“30. There are countries that do not acknowledge that rights of women to own an equal share of the property with their husband during a marriage or *de facto* relationship and when that marriage or relationship ends. Many countries recognise that right, but the practical ability of women to exercise it may be limited by legal precedent or customs.”

“31. Even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce may be managed by a man. In many states, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or *de facto* relationship is sold or otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it.”

“32. In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions

³⁸⁸ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No 21: Equality in Marriage and Family Relations*, 1994, <http://www.refworld.org/docid/48abd52c0.html>, para 28. Words in italics are my emphasis.

³⁸⁹ See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No 21: Equality in Marriage and Family Relations*, 1994, <http://www.refworld.org/docid/48abd52c0.html>, paras 30 – 33.

should be accorded the same weight.”

The Committee’s statements above properly describe the current status of the property rights of spouses in Nigeria, particularly upon the breakdown of marriage. It is common parlance that there exist lacunae in terms of the provisions, interpretation and the application of section 72 of the Matrimonial Causes Act No 18 of 1970³⁹⁰ which call for urgent judicial activism and legislative reform.

2.9 CONCLUSION

It is the opinion of the researcher that the lack of a law which provides for the redistribution of the property interests of spouses upon marriage breakdown in Nigeria is antithetical to the principles of gender equality.³⁹¹ It is not possible to argue against the need for a matrimonial property regime which Nigeria currently lacks.³⁹²

The provisions of the law on the property rights of spouses in civil marriages in Nigeria, with particular reference to section 17 of the Married Women’s Property Act, 1882³⁹³ and sections 72 to 75 of the Matrimonial Causes Act No 18 of 1970³⁹⁴ have been analytically reviewed. In view of the strict and separate property rights of spouses under previous legislation, i.e. the Married Women’s Property Act, 1882,³⁹⁵ one would have expected section 72 of the Matrimonial Causes Act No 18 of 1970³⁹⁶ to afford the courts the opportunity to exercise their discretion with regard to redistributing property between spouses on marriage breakdown where there are compelling requirements of justice in the circumstances of each case.

Noting that section 72 of the Matrimonial Causes Act No 18 of 1970³⁹⁷ was adapted from section 86(1) of the Australian Matrimonial Causes Act No 104 of 1959 (Cth),³⁹⁸ Nigerian courts have failed to give a similar interpretation to the provisions of the section

³⁹⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

³⁹¹ See Ashiru, 2007 *Journal of African Law*, 316 at 326 – 328.

³⁹² See 7.2.1 below.

³⁹³ [45 & 46 Vict. Cap 75].

³⁹⁴ Cap M7 Laws of the Federation of Nigeria, 2004.

³⁹⁵ [45 & 46 Vict. Cap 75].

³⁹⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

³⁹⁷ Cap M7 Laws of the Federation of Nigeria, 2004.

³⁹⁸ See Sagay, *Nigerian Family Law: Principles, Cases, Statutes & Commentaries*, 505.

as was made by Australian courts.³⁹⁹ While Australian courts have, thus, held that section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) could be used as a means of redistributing the property of spouses or readjusting their property rights,⁴⁰⁰ Nigerian courts have barely followed a similar direction.⁴⁰¹

In the Australian case of *Sanders v Sanders*,⁴⁰² clarifying the extent of the court's power in section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth), the court held that where it is established that a spouse does not possess a legal or equitable right in the other spouse's property, it can proceed to make a property settlement order (beyond "mere maintenance") or grant the first mentioned spouse a beneficial interest in such property where the demands of justice require the exercise of such power.⁴⁰³

The question that necessarily follows is: If the Australian courts, as far back as 1959, lacked the express statutory power to give recognition to the non-financial contributions of spouses as capable of creating interests in property but still proceeded to "transfer specific property" and grant beneficial interests in property (to spouses without legal ownership) by way of property settlement under section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth), what then would have been responsible for the attitude of Nigerian courts in the interpretation and application of section 72(1) of the Matrimonial Causes Act No 18 of 1970?⁴⁰⁴ It is submitted that the attitude of Nigerian courts towards the settlement of property is discriminatory and does not reflect modern practices in other countries which will be described in the subsequent chapters of this study.⁴⁰⁵

Nigerian courts have, in the majority of cases, adopted a strict property right approach in the determination of the property rights of spouses upon the breakdown of marriage

³⁹⁹ See *Lansell v Lansell* (1964) 110 CLR 353; *Sanders v Sanders* (1967) 116 CLR 366.

⁴⁰⁰ *Lansell v Lansell* (1964) 110 CLR 353 at 362.

⁴⁰¹ See the cases discussed at 2.7 above.

⁴⁰² (1967) 116 CLR 366.

⁴⁰³ *Sanders v Sanders* (1967) 116 CLR 366 at 376.

⁴⁰⁴ Cap M7 Laws of the Federation of Nigeria, 2004.

⁴⁰⁵ See Afonja, 1987 *United Nations Educational, Scientific and Cultural Organisation*, 1 at 4 unesdoc.unesco.org/images/0007/000756/075609eb.pdf. According to Arinze-Umobi, 2004 *Unizik Law Journal*, 188, "[t]he recognition of this financial contribution as the basis of entitlement to property upon divorce is not only wrong, absurd, negative and unnatural, it is discriminatory, and does not reflect the position between spouses for it runs contrary to the flow of matrimonial relationships."

in Nigeria. A complete separation of property system, which has left financially weaker spouses in worse-off positions after the termination of their marriages, is, thus, presently being practised in Nigeria. There is a need for a comparative analysis of the property rights of spouses in other countries in order to determine the best possible practice for Nigeria. Even more, the need to adopt trust and equitable principles of law to bypass the strict property right approach in Nigeria will also be emphasised.

It is suggested that section 72 of the Matrimonial Causes Act No 18 of 1970⁴⁰⁶ is due for an amendment specifically to provide for, amongst other things, the court's discretion to redistribute the property of spouses on the breakdown of marriage and to provide cogent and express factors which must be considered by the court should such discretion be exercised.⁴⁰⁷ Consequently, the need for an overhaul of the property rights of spouses in Nigeria will necessitate a comparative analysis in the subsequent chapters of this study.

⁴⁰⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

⁴⁰⁷ See Arinze-Umobi, 2004 *Unizik Law Journal*, 188 at 198.

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3.1 INTRODUCTION

In civil law countries, marriage affects the property rights of spouses.¹ The property consequences of marriage are generally regulated through a defined legal framework commonly referred to as matrimonial property law.² There is also a default matrimonial property regime which can be modified at the instance of spouses, either before or during marriage through the instrumentality of a marital agreement³ in existence in most civil law jurisdictions. Prospective spouses can, thus, construct their own system within the ambit of the law or can choose from a set of options as defined by statute.

The property rights of spouses under English law are in clear contrast to what is obtainable under the civil law jurisdictions in other places.⁴ In England, the mere fact that spouses are married does not influence their property rights,⁵ and a default property regime does not exist.⁶ The redistribution of property system in England is aptly described in the words of Sir Mark Potter:⁷

“Almost uniquely our jurisdiction does not have a marital property regime and it is scarcely appropriate to classify our jurisdiction as having a marital regime of separation of property. More correctly we have no regime, simply accepting that each spouse owns his or her own separate property during the marriage but subject to the court’s wide distributive powers in prospect upon a decree of judicial separation, nullity or divorce.”⁸

English law on matrimonial property has been described as “... a complicated patchwork of legislation and case law.”⁹ The property rights of spouses upon civil marriage breakdown were determined by the courts in accordance with the strict principles of the law of property.¹⁰ The powers of the English courts¹¹ with respect to

¹ See Featherston, <http://www.baylor.edu/law/facultystaff/doc.php/205011.pdf>, 1 at 3.

² Boele-Woelki *et al*, *The Principles of European Family Law Regarding Property Relations Between Spouses*, 11.

³ The marital agreement may be a prenuptial or postnuptial agreement.

⁴ See Featherston, <http://www.baylor.edu/law/facultystaff/doc.php/205011.pdf>, 1 at 2 – 3.

⁵ Masson, Bailey-Harris and Probert, *Cretney’s Principles of Family Law*, 115.

⁶ Boele-Woelki *et al*, *The Principles of European Family Law Regarding Property Relations Between Spouses*, 11.

⁷ See *Charman v Charman* [2007] EWCA Civ 503 (Fam) at para 124 as cited by Masson, Bailey-Harris and Probert, *Cretney’s Principles of Family Law*, 115.

⁸ However, Baroness Hale in *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 591 – 592 has stated: “The matrimonial property regime of England and Wales has to all intents and purposes been a separate property regime since 1882.”

⁹ Miller, *Family Property and Financial Provision*, v.

¹⁰ Miller, *Family Property and Financial Provision*, 3.

the capital assets of spouses are restricted, and the courts "... could only vary any antenuptial or postnuptial settlements."¹² The courts were not empowered to order a spouse to transfer his/her property to the other spouse. They were also prevented from making financial provision to a spouse by awarding a lump sum.¹³ Financial provisions were made by the courts only by way of maintenance to the wife.¹⁴

With the movement of opinion in the 19th century against the injustice which emanated from the strict application of the common law, the Married Women's Property Act, 1882¹⁵ was enacted by the English Parliament, and it introduced the doctrine of the "separate estate of spouses".¹⁶ Notwithstanding the enactment of the Married Women's Property Act, 1882,¹⁷ certain problems still remained unresolved, particularly in respect of properties which were being referred to as "family property" or "family assets".¹⁸

While Bromley stressed the need for a complete overhaul of the entire field of

¹¹ In England, matrimonial proceedings are commenced at the High Court or family court. Appeals from this court go to the Court of Appeal (Civil Division) and subsequently to the House of Lords, which was the final court of appeal in the English judicial system. In 2009, with the establishment of the Supreme Court of the United Kingdom, the judicial role of the House of Lords, as the court of last resort, was passed to the Supreme Court of the United Kingdom. Currently, the Supreme Court is the highest appellate court in England. It should be noted that the Judicial Committee of the Privy Council (JCPC) serves as the court of last resort only to United Kingdom overseas territories and their Crown dependencies. See s 52 of the Matrimonial Causes Act Cap 18 of 1973; Part 3 of the Constitutional Reform Act Cap 4 of 2005.

¹² *Watchel v Watchel* [1973] 1 All ER 829 (CA) at 836.

¹³ See *Watchel v Watchel* [1973] 1 All ER 829 (CA) at 836.

¹⁴ *Watchel v Watchel* [1973] 1 All ER 829 (CA) at 836.

¹⁵ [45 & 46 Vict. Cap 75].

¹⁶ Bromley, *Bromley's Family Law*, 441. See Cretney and Mason, *Principles of Family Law*, 233. According to these authors, the implication of the 1882 Act was that marriage stopped having an immediate effect on entitlement to property.

¹⁷ [45 & 46 Vict. Cap 75].

¹⁸ Bromley, *Bromley's Family Law*, 419. The author observes that the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] dealt with isolated problems. For instance, by interpreting s 17 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75], the English courts have held that, where evidence points to sole ownership of property, the court cannot divest the legal owner of his right in the property in the bid to do "palm tree justice". See Edmund Davies LJ's dissent judgement in *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1052. The court, thus, does not have any power to modify or alter the acknowledged or vested titles of spouses to property. It can determine the individual rights of the spouses in respect of a property in dispute only where they have been varied by a subsequent agreement. See also *Cobb v Cobb* [1955] 2 All ER 696 (CA) at 700; *National Provincial Bank Ltd. v Ainsworth* [1965] 2 All ER 472 (HL); *Bedson v Bedson* [1965] 3 All ER 307 (CA). By a proceeding brought under s 17 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75], Lord Reid in *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 389 - 390 refused "... to consider whether the property belonging to either spouse ought to be regarded as family property..." on the basis that to do such would amount to "... introducing a new conception into English law and not merely developing existing principles." The separation of property system as introduced by the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] and its implications on the property rights of spouses on marriage breakdown is discussed in 3.3 below.

matrimonial property law through the aid of a statute,¹⁹ Lord Reid in *Pettitt v Pettitt*²⁰ was of the opinion that English law does not recognise joint family property or *communio bonorum*.²¹ He indicated the need for a legislative intervention in resolving the proprietary rights of spouses over their property, particularly such property as was used as family property during the subsistence of the marriage.²²

When the Matrimonial Proceedings and Property Act Cap 45 of 1970 was enacted, however, English courts were empowered to transfer the assets of one spouse to the other by way of making a financial provision to the disadvantaged spouse.²³ As the law stands at present, the statute²⁴ gives English courts a wide discretion to adjust the financial position of the spouses and to make property adjustment orders on civil marriage breakdown.²⁵ It enables the court to do justice by taking cognisance of the circumstances of each case.²⁶

In England, there is separation of property with a judicial discretion to redistribute property in order to make provision for the financial needs of the disadvantaged spouse. In the determination of the property rights of spouses upon marriage breakdown, there is a benchmark of equal division.²⁷ Under English law, it is presumed that both spouses had contributed to the family welfare to the best of their ability.²⁸ The conduct of spouses or the assessment of their contribution does not

¹⁹ Bromley, *Bromley's Family Law*, 419.

²⁰ [1969] 2 All ER 385 (HL) at 390.

²¹ [1969] 2 All ER 385 (HL) at 390. *Communio bonorum* is a term in civil law jurisdiction which signifies community of goods or community of property. Such property is jointly owned and the person (usually the husband), in whose control it is, is bound by law to give an account of it to the other.

²² *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 390 – 391.

²³ See ss 2 – 5 of the Matrimonial Proceedings and Property Act Cap 45 of 1970. In *Watchel v Watchel* [1973] 1 All ER 829 (CA) at 836, Lord Denning MR stated that the Matrimonial Proceedings and Property Act Cap 45 of 1970 "... is not in any sense a codifying statute ..." but "... a reforming statute designed to facilitate the granting of ancillary relief in cases where marriages have been dissolved under the 1969 Act..." (Divorce Act Cap 55 of 1969).

²⁴ The Matrimonial Causes Act Cap 18 of 1973, ss 23 – 25.

²⁵ See Lowe and Douglas, *Bromley's Family Law*, 131. The focal point of discussion in this chapter shall be on how the financial claims of a divorcing spouse are determined under English law especially in relation to the financial provisions and property adjustment orders under ss 23, 24 and 25 of the Matrimonial Causes Act Cap 18 of 1973. It is noted that the Matrimonial and Family Proceedings Act Cap 42 of 1984 amends only the Matrimonial Causes Act Cap 18 of 1973.

²⁶ See s 25 of the Matrimonial Causes Act Cap 18 of 1973. See *Watchel v Watchel* [1973] 1 All ER 829 (CA) at 837 where the Court of Appeal concurred with the interpretation of s 4 of the Matrimonial Proceedings and Property Act Cap 45 of 1970 given by Ormrod J at the court of first instance. The court must in each case endeavour to achieve a fair and pragmatic solution to the financial problems of divorced spouses. See Wilkinson and De Hass, *Property Distribution on Divorce*, 14 – 15.

²⁷ See *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 (HL).

²⁸ See *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 (HL). See also Ellman, 2007 *Law Quarterly Review*, 2 at 3.

affect financial claims.²⁹ The quantum of the spouses' contribution is brought into focus only in exceptional cases and assessed only if there was such a disparity in their contributions that it would be inequitable to disregard such in granting financial claims. Then the court examines the contribution made to the family's welfare.³⁰

Until the decision in *Radmacher v Granatino*,³¹ which brought about a shift in judicial thinking,³² prenuptial and postnuptial agreements were not binding on English courts.³³ English courts took such agreements into account only as one of the factors to determine the appropriate order to make in terms of ancillary relief.³⁴ In *W v W*,³⁵ the court followed the decision in *Radmacher v Granatino*³⁶ and accorded weight to the prenuptial agreement of spouses.

Against the backdrop of the foregoing, this study examines the development of English law with regard to the property rights of spouses on the breakdown of marriage. This is done in the light of statutory provisions and recent case law.

3.2 PROPERTY ENTITLEMENT OF SPOUSES AT COMMON LAW

Prior to 1882, upon the celebration of marriage, the husband had total control of all the freehold assets held by the wife before and during the marriage.³⁷ While the leasehold property of the wife belonged to the husband, the power of disposition in relation to the wife's real property was also vested in the husband.³⁸ The situation was not different in respect of personal property. The wife's personal property (except articles of apparel and personal ornament) which she acquired before and after the marriage vested in the husband who possessed the power to dispose of

²⁹ See Ellman, 2007 *Law Quarterly Review*, 2 at 3.

³⁰ See *Miller v Miller, McFarlane v McFarlane* [2006] 2 AC 618 (HL). See also Ellman, 2007 *Law Quarterly Review*, 2 at 3.

³¹ [2011] 1 AC 534 (SC(E)).

³² It should, however, be noted that the court did not state expressly that prenuptial agreements are now binding on English courts. It took the position that a properly concluded prenuptial agreement would be accorded considerable weight in the determination of the proper order to make under ss 23 – 25 of the Matrimonial Causes Act Cap 18 of 1973.

³³ Boele-Woelki *et al*, *The Principles of European Family Law Regarding Property Relations Between Spouses*, 11.

³⁴ Herring, Harris and George, 2011 *Law Quarterly Review*, 335.

³⁵ [2015] EWHC 1844 (Fam). For a detailed discussion on the weight to be accorded to prenuptial agreements, see 3.6.3.2 below.

³⁶ [2011] 1 AC 534 (SC(E)).

³⁷ See Lowe and Douglas, *Bromley's Family Law*, 127.

³⁸ Lowe and Douglas, *Bromley's Family Law*, 127.

them either by will or *inter vivos*.³⁹ All these were made possible under the common law via the common law doctrine of the legal unity of spouses.⁴⁰

As a result of the injustice which the common law rule created,⁴¹ the Married Women's Property Act, 1882⁴² was enacted by Parliament. The Act empowered a married woman to retain, as separate property, all property (whether real or personal) over which she had legal title at the time of her marriage with the right to dispose of the same as if she were a *feme sole*.⁴³

Since 1882, the principle of separate property remained the basis of the law of family property in England.⁴⁴ It has been a basic principle of English common law that marriage, as such, does not have an immediate effect on the property entitlement of spouses. At common law, therefore, marriage does not change the ownership of property, although it may affect its enjoyment⁴⁵ in relation to ancillary relief. This was put very clearly in the case of *Pettitt v Pettitt*.⁴⁶ Lord Upjohn stated:

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

There is, thus, an apparently firm assertion of the basic principle of the doctrine of separate property. The individual property of spouses acquired before their marriage

³⁹ Equity, however, developed the concept of the wife's separate estate which "... established that if property (both realty and personalty) was conveyed to trustees *to the separate use* of a married woman, she retained in equity the same right of holding and disposing of it as if she were a 'feme sole'." The concept of "restraint upon anticipation" was also developed to prevent a married woman from vesting in the husband the interest which the separate use had sought to keep out of his hand. See Lowe and Douglas, *Bromley's Family Law*, 128 – 129.

⁴⁰ "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything ..." See Blackstone, *Commentaries on the Law of England*, 442 – 445 on the doctrine of legal unity. It is noted that, in the 18th Century, an equitable doctrine of the separate estate of spouses was created by the Court of Chancery as an exception to the doctrine of the legal unity of spouses. This permitted certain property to be settled upon married women for their own separate use. See Hardingham and Neave, *Australian Family Property Law*, 11.

⁴¹ Married women who were deserted by their husbands and went away with their property could not obtain any relief at common law. Husbands misused the property of wives without being accountable. See Lowe and Douglas, *Bromley's Family Law*, 129.

⁴² [45 & 46 Vict. Cap 75].

⁴³ See ss 1 and 2 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75].

⁴⁴ Miller, *Family Property and Financial Provision*, 17.

⁴⁵ Miller, *Family Property and Financial Provision*, 17.

⁴⁶ [1969] 2 All ER 385 (HL) at 407.

remained their separate property even after the marriage, and neither spouse could acquire any proprietary interest in the other spouse's property.⁴⁷ The only means by which there could be an acquisition of interest in the property of a spouse is only when there is a disposition in that other spouse's favour, or by virtue of a court's order upon the breakdown of marriage which limits the interest of a spouse in the other spouse's property to that of enjoyment and use only.⁴⁸

The position is not different in relation to a joint property, that is, in cases where either spouse alleges to be a co-owner. Common law requires a strict proof of interest which must be substantial in nature for a spouse to be declared a co-owner, and such interest must be evidenced in writing (generally by way of a deed).⁴⁹ Common law, thus, stipulates that, before any interest in land can be created or conveyed, it must be made by a deed.⁵⁰ This formal requirement of the common law became problematic where the property in question concerned a family asset.⁵¹ The courts were confronted by the question of whether a particular property should be regarded as a family asset⁵² notwithstanding in whose name the title document was written. It is noted that most of the cases which were determined by the courts had to deal with the matrimonial home⁵³ and the question of whether it was jointly owned so as to entitle both spouses to an interest in it.

⁴⁷ Miller, *Family Property and Financial Provision*, 17.

⁴⁸ In *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 403, the House of Lords held that such a wife would have the right to bring an application for an order of maintenance for herself and in respect of any children of the marriage in her custody. It is the opinion of the researcher that such order may include an occupation of the matrimonial home.

⁴⁹ See *Gissing v Gissing* [1971] AC 886 (HL) at 909.

⁵⁰ S 52 of the Law of Property Act, 1925 [15 and 16 Geo 5 Cap 20]. It is also a formal requirement of law that an interest in land cannot be created or disposed of except by a document evidenced in writing and duly signed. See s 53 of the Law of Property Act, 1925 [15 and 16 Geo 5 Cap 20]. Writing is also required for contracts for the sale or other disposition of interest in lands. See s 2 of the Law of Property (Miscellaneous Provisions) Act Cap 34 of 1989 which repealed s 40 of the Law of Property Act, 1925 [15 and 16 Geo 5 Cap 20]. In *Gissing v Gissing* [1971] AC 886 (HL) at 909, the court held that, in the absence of a deed which could displace the legal estate of the husband or a written document which could give the wife any other interest in the property, the wife's claim on the basis of the oral statements and assurances given to her by the husband would fail.

⁵¹ Family asset as used in this context implies the matrimonial home. See *Watchel v Watchel* [1973] 1 All ER 829 (CA) at 836.

⁵² Lord Hodson and Lord Upjohn in *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 403 and 409 strongly disapproved of the use of the expression "family assets". According to Viscount Dilhorne in *Gissing v Gissing* [1971] AC 886 (HL) at 899, the term "family assets" was "... devoid of legal meaning and conducive to the error of supposing that the legal principles applicable to the determination of the interests of spouses in property are different from those of general application in determining claims by one person to a beneficial interest in property in which the legal estate is vested in another."

⁵³ Miller, *Family Property and Financial Provision*, 17. See *Rimmer v Rimmer* [1952] 2 All ER 863 (CA), *Fribance v Fribance* (No 2) [1957] 1 WLR 384 (CA), *Ulrich v Ulrich and Felton* [1968] 1 WLR 180 (CA), *Pettitt v Pettitt* [1969] 2 All ER 385 (HL), *Gissing v Gissing* [1971] AC 886 (HL).

It is submitted that, under common law, English courts had no discretion to redistribute the property of either spouse upon the breakdown of marriage.⁵⁴ For the courts to adjust the property rights of spouses, the spouse who claimed to have a proprietary interest in the other spouse's property, must, in the absence of a legal interest, prove the existence of a beneficial interest in such a property.⁵⁵ This issue brings the cases which were decided before the enactment of the Matrimonial Proceedings and Property Act Cap 45 of 1970 to the fore. It is noted that the Matrimonial Proceedings and Property Act Cap 45 of 1970 is a direct response by Parliament to the several injustices which spouses, mostly the wives, suffered at common law consequent upon the strict application of common law principles in ascertaining ownership to (matrimonial) property.⁵⁶

In *Gissing v Gissing*,⁵⁷ the legal title to the house used as the matrimonial home of the spouses was in the husband's name. The wife paid some £220 from her savings to furnish the house and have a lawn laid. In 1961, the husband deserted the wife to live with another woman, saying as he left: "Don't worry about the house – it's yours. I will pay the mortgage payments and all other outgoings." In 1966, after the wife had obtained a decree absolute, the husband, wishing to sell the house, claimed exclusive ownership. He also claimed to be entitled to all the proceeds from the sale of the property. The wife sued to ascertain ownership. The trial court held that the wife had no interest in the matrimonial home as it belonged to the husband.

On appeal to the Court of Appeal, Lord Denning MR⁵⁸ and Phillimore LJ⁵⁹ (with

⁵⁴ In *Gissing v Gissing* [1971] AC 886 (HL) at 898, the House of Lords stated: "When the full facts are discovered the court must say what their effect is in law. The court does not decide how the parties might have ordered their affairs: it only finds how they did. The court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had. Nor can ownership of property be affected by the mere circumstance that harmony has been replaced by discord. Any power in the court to alter ownership must be found in statutory enactment." Per Lord Morris of Borth -Y- Gest.

⁵⁵ Miller, *Family Property and Financial Provision*, 17, 22. The mere fact that the legal estate is vested in a sole name does not prevent the other spouse from establishing a beneficial interest. This can be done through an express declaration of trust or by some evidence adduced in court from which a resulting, implied or constructive trust could arise. See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) and *Gissing v Gissing* [1971] AC 886 (HL).

⁵⁶ The Matrimonial Proceedings and Property Act Cap 45 of 1970 vested the courts with extensive powers to adjust the property rights of spouses upon the breakdown of a civil marriage.

⁵⁷ [1971] AC 886 (HL). By s 2 of the Law of Property (Miscellaneous Provisions) Act Cap 34 of 1989, writing is also required for contracts for the sale or any disposition of interest in land. This section replaced s 40 of the Law of Property Act, 1925 [15 and 16 Geo 5 Cap 20].

⁵⁸ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1044 – 1047.

⁵⁹ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1047 – 1051.

Edmund Davies LJ dissenting)⁶⁰ allowed the appeal. Lord Denning MR, in the determination of the "... question: to whom does this house belong?" had no difficulty in construing the property in question to be a "family asset" which was purchased by the joint efforts of the spouses despite the fact that the legal title was in a single name.⁶¹ Lord Denning MR and Phillimore LJ made a declaration of equal share in favour of the wife should the house eventually be sold.⁶²

Phillimore LJ stated that it would amount to injustice to uphold the husband's claim for the entire proceeds from the sale of the house thereby leaving the wife with nothing.⁶³ According to him, a strict interpretation of section 53 of the Law of Property Act, 1925⁶⁴ would result in injustice when applied to a husband and wife in relation to property rights.⁶⁵ Adopting the words of Romer LJ in *Rimmer v Rimmer*.⁶⁶

"... 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..."

Phillimore LJ held that the property was a family asset which belonged to both spouses in equal shares.⁶⁷ He, however, stated that the court would not interfere if the property in question did not fall into the category of "family assets";⁶⁸ as to do otherwise would amount to the judge making an order which contradicts settled principles of law.⁶⁹ In his words:

"... if there was at some stage a clear decision as to the ownership of the matrimonial home reached between the parties or if one of them had established his or her title against a third, or perhaps *owned this house before the marriage or inherited it,*⁷⁰ this court would not interfere."⁷¹

⁶⁰ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1051 – 1055.

⁶¹ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1046.

⁶² *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1046; 1049 – 1050.

⁶³ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1048.

⁶⁴ S 53(1)(a) of the Law of Property Act, 1925 [15 and 16 Geo 5 Cap 20] provides that "... no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same ..."

⁶⁵ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1048.

⁶⁶ [1952] 2 All ER 863 (CA) at 870.

⁶⁷ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1049 – 1050.

⁶⁸ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1051.

⁶⁹ Phillimore LJ in *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1051 citing *Newgrosh v Newgrosh* (1950) 210 LTJo 108 (CA).

⁷⁰ Italics, my emphasis. If the property in question were to be a separate property, the court would ascertain ownership in accordance with the well-established principles of common law.

⁷¹ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1051.

Edmund Davies LJ in his dissenting judgement held that, without proof of an express agreement between the spouses in the instant case, a strict approach to the question of the rights of the spouses was applicable.⁷² According to him:

“... there being no express agreement relating to the matrimonial home, the task is that of inferring what the common intention of the parties would have been expressed to be had they reduced it to words before the matrimonial difficulties arose.”⁷³

He concurred with the finding of fact reached by the trial judge, Buckley J, which was that the husband had been responsible for the total purchase price of the house⁷⁴ and the wife’s contribution was negligible in relation to the husband’s ability to buy the house.⁷⁵ He concluded that the furniture, which the wife had bought, the laying of the lawn, together with the husband’s assurance: “Don’t worry about the house – it is yours” did not establish any title in the wife to a beneficial interest.⁷⁶

The House of Lords upheld the judgement of Buckley J and the dissenting views of Edmund Davies LJ. It overturned the majority decision of the Court of Appeal and refused to recognise any contribution made by the wife as capable of granting her an interest in the house.⁷⁷ The House of Lords gave recognition to the husband’s sole beneficial interest in the house.⁷⁸

Although the case of *Pettitt v Pettitt*⁷⁹ was considered in *Gissing v Gissing*,⁸⁰ the actual decision of the House of Lords in *Pettitt v Pettitt*⁸¹ was not directly in point in *Gissing v Gissing*.⁸² In *Pettitt v Pettitt*,⁸³ the House of Lords, for the first time, considered questions concerning the ownership of the matrimonial home.⁸⁴ Mr Pettitt

⁷² *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1052.

⁷³ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1052.

⁷⁴ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1053.

⁷⁵ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1054.

⁷⁶ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1053.

⁷⁷ *Gissing v Gissing* [1971] AC 886 (HL) at 892. This decision was distinguished from the case of *MacDonald v MacDonald* [1957] 2 All ER 690 (HL) which supports the proposition that the purchase of furniture and the house formed part of a joint enterprise. According to the House of Lords, the facts of *MacDonald v MacDonald* were much stronger in favour of a joint enterprise than the facts of *Gissing v Gissing*.

⁷⁸ *Gissing v Gissing* [1971] AC 886 (HL) at 910.

⁷⁹ [1969] 2 All ER 385 (HL).

⁸⁰ [1971] AC 886 (HL). The judgement of the Court of Appeal (*Gissing v Gissing* [1969] 1 All ER 1043 (CA)) was delivered while *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) was pending in the House of Lords.

⁸¹ [1969] 2 All ER 385 (HL).

⁸² [1969] 1 All ER 1043 (CA). See Lord Diplock’s observation in *Gissing v Gissing* [1971] AC 886 (HL) at 903.

⁸³ [1969] 2 All ER 385 (HL).

⁸⁴ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 410, per Lord Diplock.

commenced his action under section 17 of the Married Women's Property Act, 1882,⁸⁵ on which he claimed that he had a beneficial interest in a house (matrimonial home) which had been purchased by the wife in her name. Mr Pettitt's claim was founded on the basis that he had enhanced the value of the house by making substantial improvements to both it and the garden.

The House of Lords allowed the wife's appeal and held that, since no agreement existed between the spouses, the husband's monetary claim could not be sustained against the wife, and, since no estoppel or mistake was implied, the husband's claim for a beneficial interest in, or a charge on, the wife's property would fail.⁸⁶ According to Lord Upjohn, "... by the law of England the expenditure of money by A on the property of B stands in quite a different category from the acquisition of property by A and B."⁸⁷

It is clear from the judgement in *Pettitt v Pettitt*⁸⁸ that there was no doctrine of English law that assumed that property acquired for family purposes was prima facie owned in common by the spouses. Lord Diplock⁸⁹ construed "family assets" as:

"... property, whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use and enjoyment of both spouses or their children, such as the matrimonial home, its furniture and other durable chattels. It does not include property acquired by either spouse before the marriage but not in contemplation of it."

He went further by stating:

"Family assets are not *res nullius*. When a "family asset" is first acquired from a third party the title to it must vest in one or other of the spouses, or be shared between them, and where an existing family asset is improved, this, too, must have some legal consequence even if it is only that the improvement is an accretion to the property of the spouse who was entitled to the asset before it was improved. Where the acquisition or improvement is made as a result of contributions in money or money's worth by both spouses acting in concert the proprietary interests in the family asset resulting from their respective contributions depend on their common intention as to what those interests should be."⁹⁰

⁸⁵ [45 & 46 Vict. Cap 75].

⁸⁶ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 409.

⁸⁷ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 409.

⁸⁸ [1969] 2 All ER 385 (HL).

⁸⁹ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 410.

⁹⁰ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 413.

It was observed that “[t]he notion of family assets opened a new field involving change in the law of property whereby community of ownership between husband and wife would be assumed unless otherwise excluded.”⁹¹ The House of Lords refused to entertain such a notion as it was considered to be “... outside the field of judicial interpretation of property law.”⁹² It was left instead for Parliament to decide.⁹³

Flowing from the foregoing, and relying on the authority of *National Provincial Bank Ltd. v Ainsworth*,⁹⁴ under common law the court was not vested with the power to vary from agreed or established titles where it could, on the strength of the evidence before it, determine the interest of the spouse(s) in any property referred to as a family asset. In the absence of any contrary evidence, therefore, it was a rule of common law that beneficial interest in a property followed legal title.⁹⁵

It is submitted that the common law requirement of strict proof of ownership in relation to property between spouses produced unsatisfactory outcomes.⁹⁶ In cases where a spouse was divorced, he or she was unable to establish any claim to the other’s property merely by asserting that it was a “family asset”.⁹⁷ The spouse’s remedy lay only in a maintenance order, and nothing more.

It is further submitted that the common law position created an imbalance⁹⁸ which was remediable only by an Act of Parliament. As will be seen in the next section of this chapter, the judicial interpretation given to the provision of section 17 of the Married Women’s Property Act, 1882⁹⁹ aggravated the predicament created by common law. Hence, it is considered appropriate at this point to examine the property entitlement of spouses under the Married Women’s Property Act, 1882.¹⁰⁰

⁹¹ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 403, per Lord Hodson.

⁹² *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 403, per Lord Hodson. See also Lord Reid’s viewpoint at 390.

⁹³ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 403. Lord Reid at 390 refused “... to consider whether property belonging to either spouse ought to be regarded as family property ...” on the basis that it would amount to an introduction of “... a new conception into English law and not merely developing existing principles.” Acknowledging that the concept of “joint family property” is recognised in other matrimonial property systems, he gave the opinion that it would amount to an encroachment on the province of the English Parliament to give effect to it.

⁹⁴ [1965] 2 All ER 472 (HL).

⁹⁵ See *Allen v Allen* [1961] 1 WLR 1186 (CA) and *Gissing v Gissing* [1971] AC 886 (HL) at 890.

⁹⁶ See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 404.

⁹⁷ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 404.

⁹⁸ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 403 & 404.

⁹⁹ [45 & 46 Vict. Cap 75].

¹⁰⁰ [45 & 46 Vict. Cap 75].

3.3 PROPERTY ENTITLEMENT OF SPOUSES UNDER THE MARRIED WOMEN'S PROPERTY ACT, 1882 [45 & 46 VICT. CAP 75]

This Act was enacted in England to improve the status of the English wife under the common law in respect of her property rights.¹⁰¹ Section 1(1) of the Act stated:

“A married woman shall ... be capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a *femme sole*, without the intervention of any trustee.”

Hence, married women were given full proprietary rights.¹⁰²

By section 2 of the Act, “... all real and personal property which ...” a woman acquired could be retained by her as her private property when she got married after the commencement of the Act, and she had the power to dispose of the same as though she were a *femme sole*.

It is also noted that a woman who had married before the commencement of the Act had similar powers over any property which she acquired separately or devolved upon her after marriage.¹⁰³ Section 5 of the Act provided:

“Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.”

This statute adopted the equitable doctrine of separate property which had earlier been created by the Court of Chancery as an exception to the doctrine of the legal unity of spouses,¹⁰⁴ and it vested in the wife a legal interest in her property.¹⁰⁵ The common law rule that empowered the husband, to have an interest in the wife's property by the operation of law ceased to have any effect.¹⁰⁶ The capacity of a

¹⁰¹ The Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] has been amended. Some portions of the Act have been repealed by the Law Reform (Married Women and Tortfeasors) Act, 1935 [25 & 26 Geo. 5. Cap 30] while some words have been either substituted or omitted by other legislation. See 2.5 above.

¹⁰² *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 392.

¹⁰³ See s 5 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] as it relates to women married before the commencement of the Act.

¹⁰⁴ Cowie, 2009 <http://www.austlii.edu.au/au/journals/AUJIGendLaw/2009/6.pdf>, 1 at 7.

¹⁰⁵ Lowe and Douglas, *Bromley's Family Law*, 130.

¹⁰⁶ Lowe and Douglas, *Bromley's Family Law*, 130.

married woman to hold property was like that of an unmarried woman.¹⁰⁷ Lowe and Douglas¹⁰⁸ noted that, with the extension of the equitable principle of separate estate, the Act "... replaced the total incapacity of a married woman to hold property at common law with a rigid doctrine of separate property."

The 1882 reform of the common law was intended to be beneficial to married women, and the introduction of separate property certainly did have some advantages – for example, a married woman's earnings were henceforth her own to do with what she wished, whereas at common law her earnings had belonged to her husband.¹⁰⁹ In 1883, before the commencement of the Act, "... the matrimonial home and its contents would almost invariably be vested in the husband to the exclusion of the wife ..."¹¹⁰ The Married Women's Property Act, 1882,¹¹¹ however, extended the doctrine of separate property to the ownership of the matrimonial home.¹¹² It is an opinion that "[o]ne of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept entirely separate."¹¹³ The status of marriage was not intended by the Act to result in a joint ownership of property.¹¹⁴

It is noted that the practical importance of this Act was undermined in that wives still suffered some injustices with regards to claims touching on the matrimonial home. The strict application of the doctrine of separate property in the determination of the ownership of the matrimonial home created some manifest absurdities.¹¹⁵ For instance, it became an established principle of law that, for a wife to make a claim to

¹⁰⁷ Cowie, 2009 <http://www.austlii.edu.au/au/journals/AUJIGendLaw/2009/6.pdf>, 1 at 7.

¹⁰⁸ *Bromley's Family Law*, 130.

¹⁰⁹ Cretney and Mason, *Principles of Family Law*, 233.

¹¹⁰ Lowe and Douglas, *Bromley's Family Law*, 131.

¹¹¹ [45 & 46 Vict. Cap 75].

¹¹² Lowe and Douglas, *Bromley's Family Law*, 131.

¹¹³ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 392 – 393. It is noted that, under common law, a woman's proprietary capacities were restricted. It was only by statutory enactment that her equitable separate estate was protected by the Court of Chancery. For instance, the Matrimonial Causes Act, 1857 [20 & 21 Vict. Cap 85] stated that "... in every case of a judicial separation a wife should be considered as a *feme sole* with respect to property that she might acquire." The Married Women's Property Act, 1870 [33 & 34 Vict. Cap 93] declared as the wife's separate property "... any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill." See s 2 of the Act. S 12 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] recognised a married woman's right to institute an action against her husband or any other person for the recovery of her separate property.

¹¹⁴ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 393.

¹¹⁵ See *Rimmer v Rimmer* [1952] 2 All ER 863 (CA) at 870. See also Lowe and Douglas, *Bromley's Family Law*, 131.

a “family asset” or “matrimonial property”, she would have to base her claim on some recognised principles of property law, otherwise her claim would fail. In effect she would be able to do so only if someone who had never been married to the husband could equally have made out such a claim.

As will be illustrated, this led judges to adapt the doctrine of separate property in many cases by regarding spouses as having a joint interest in the family asset even though the legal estate was vested in one of the spouses, who, in most cases, was the husband.¹¹⁶ It is noted that, even in cases where such a position was taken, the judicial interpretation which was later given to section 17 of the Married Women’s Property Act, 1882¹¹⁷ by the House of Lords did not ameliorate the financial tragedies of a divorced wife under English law.

The relevant part of section 17¹¹⁸ of the Married Women’s Property Act, 1882¹¹⁹ provided:

“In any question between husband and wife as to the title to or possession of property, either party ... may apply by summons or otherwise in a summary way to any judge of the High Court of Justice ... and the judge ... may make such order with respect to the property in dispute ... as he thinks fit ...”¹²⁰

The striking phrase from section 17 of the Married Women’s Property Act, 1882¹²¹ is “... as he thinks fit ...” On this, Bucknill LJ in *Newgrosh v Newgrosh*,¹²² while varying the property rights of spouses in order to do what he perceived as “palm tree justice”,¹²³ concluded that the provision of section 17 of the Act was fair and just to

¹¹⁶ See *Rimmer v Rimmer* [1952] 2 All ER 863 (CA); *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1044 to 1051, per Lord Denning MR and Phillimore LJ.

¹¹⁷ [45 & 46 Vict. Cap 75].

¹¹⁸ This section has been described as a long and complicated section. See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 388.

¹¹⁹ [45 & 46 Vict. Cap 75].

¹²⁰ The current amended version of s 17 of the Act reads: “In any question between husband and wife as to the title to or possession of property, either party may apply by summons or otherwise in a summary way to the High Court or the family court and the court may, on such an application (which may be heard in private), make such order with respect to the property as it thinks fit.”

¹²¹ [45 & 46 Vict. Cap 75].

¹²² (1950) 210 LTJo 108 (CA).

¹²³ “Palm tree justice” is defined as: “A pragmatic approach to justice that is entirely discretionary and transcends legal rights or precedent enabling the court to make such order as it thinks fair and just in the circumstances of the case.” See Wikitionary, https://en.m.wikitionary.org/wiki/palm_tree_justice#English;_uslegal.com/p/palm-tree-justice/. Wikitionary, citing Chambers Dictionary, records that palm tree justice is etymologically an “... old Arabic or Jewish idea of a wise man dispensing justice under a palm tree”. “Deborah, a prophetess, the wife of Lapidoth was leading Israel at that time. She held court under the Palm of Deborah

the extent that it vested the court with a wide discretionary power. In his words:

“... I do not think it entitles him to make an order which is contrary to any well-established principle of law, but, subject to that, I should have thought that disputes between husband and wife as to who owns property which at one time, at any rate, they have been using in common are disputes which may very well be dealt with by the principle which has been described here as ‘palm tree justice’. I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case.”¹²⁴

This decision was followed in *Rimmer v Rimmer*,¹²⁵ a case which arose out of a proceeding commenced under section 17 of the Married Women’s Property Act, 1882.¹²⁶ The Court of Appeal stated:

“It seems ... that the only general principles which emerge from our decision 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”¹²⁷

To Phillimore LJ, “[i]t does not sound like justice....”¹²⁸ if a matrimonial property or a “family asset” is determined on the strict laws of property between spouses especially in cases where there is no clear decision as to whom had ownership.¹²⁹ Relying on the statement of Bucknill LJ in *Newgrosh v Newgrosh*:¹³⁰ “I do not think it entitles him¹³¹ to make an order which is contrary to any well-established principle of law ...,” Phillimore LJ in *Gissing v Gissing*¹³² implied:

“I take this to mean that if there was at some stage a clear decision as to the ownership of the matrimonial home reached between the parties or if one of them had established his or her title against a third, or perhaps owned this house before the

between Ramah and Bethel in the hill country of Ephraim, and the Israelites came to her to have their disputes decided”. See Judges 4:4 – 5, *The Holy Bible, New International Version*.

¹²⁴ *Newgrosh v Newgrosh* (1950) 210 LTJo 108 (CA) cited with approval by Sir Raymond Evershed MR in *Rimmer v Rimmer* [1952] 2 All ER 863 (CA) at 865.

¹²⁵ [1952] 2 All ER 863 (CA).

¹²⁶ [45 & 46 Vict. Cap 75].

¹²⁷ *Rimmer v Rimmer* [1952] 2 All ER 863 (CA) at 870. See also *Cobb v Cobb* [1955] 2 All ER 696 (CA).

¹²⁸ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1048.

¹²⁹ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1049.

¹³⁰ [1950] 210 LTJo 108 (CA).

¹³¹ The judge.

¹³² [1969] 1 All ER 1043 (CA) at 1051.

marriage or inherited it, this court would not interfere. In the absence of something of the sort, however, if, for example, it is to mean that the provisions of s 53 of the Law of Property Act 1925, are to be strictly applied, then in my judgment the phrase is in direct contrast to the principle of “*palm tree justice*”¹³³ and contradicts the whole intention of doing what appears to be fair and just. If the mere facts that the conveyance was taken in the name of the husband and the evidence is insufficient to meet the strict requirements of s 53 are to be regarded as conclusive, it seems to me that most of the decisions of the court on this subject would have to be designated as wrong.”

In *Gissing v Gissing*,¹³⁴ Lord Denning MR in the bid to circumvent the strict interpretation given to the question of ownership and the consequent injustice, especially when it concerns “matrimonial property”, advanced the opinion that, in the determination of the question: “To whom does this house belong?,” the court would have to construe whether the property in question was a “family asset” or not.¹³⁵ According to him, where such a property was a “family asset”, spouses would be entitled to it in equal shares, but, if it proved not to be, then the spouse on whom the legal estate lay was the sole owner.¹³⁶

Lord Denning MR followed his earlier judgement in *Fribance v Fribance*,¹³⁷ where he held:

“The title to the family assets does not depend on the mere chance of which way round it was. It does not depend on how they happened to allocate their earnings and their expenditure. The whole of their resources were expended for their joint benefit—either in food and clothes and living expenses for which there was nothing to see or in the house and furniture which are family assets—and the product should belong to them jointly. It belongs to them in equal shares. I agree with counsel for the husband that the title to the property must remain the same, whether the question arises under s. 17 before divorce, or in other proceedings after divorce, or under a will...”¹³⁸

Noteworthy, in 1969, in *Pettitt v Pettitt*,¹³⁹ the House of Lords had unequivocally

¹³³ Italics, my emphasis. See Edmund Davies LJ’s dissenting judgement in *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1052 where he held that the position in relation to the applications under the Married Women’s Property Act, 1882 [45 & 46 Vict. Cap 75] appears to be that there is no scope for “palm tree justice” in ascertaining the nature and extent of the parties’ rights in property used in common during their matrimonial life.

¹³⁴ [1969] 1 All ER 1043 (CA).

¹³⁵ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1046.

¹³⁶ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1046.

¹³⁷ [1957] 1 All ER 357 (CA).

¹³⁸ *Fribance v Fribance* [1957] 1 All ER 357 (CA) at 359, 360. See also *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1046.

¹³⁹ [1969] 2 All ER 385 (HL). Note that all the judgements on this issue before *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) were decided by the Court of Appeal. *Pettitt v Pettitt* was the first time in which the

ruled, contrary to the views of Lord Denning MR¹⁴⁰ and others,¹⁴¹ that the provisions of section 17 of the Married Women's Property Act, 1882¹⁴² empowering a judge to "... make such order ... as he thinks fit..."¹⁴³ in disputes about title to or possession of property did not give the court the unfettered discretion to redistribute property in accordance with what it deemed just.¹⁴⁴

In *Pettitt v Pettitt*,¹⁴⁵ Mrs Pettitt was married to Mr Pettitt in 1952. For about nine years, the house which the wife had inherited was used as their matrimonial home. In 1961 the house was sold, and Mrs Pettitt acquired another. Mr Pettitt did some improvements to the house, by way of decorating, on which he spent about £800. The new house was used as the spouses' matrimonial home for about four years, after which Mrs Pettitt was separated from the husband and later obtained a decree of divorce in 1967. Mr Pettitt left the house and commenced an action under section 17 of the Married Women's Property Act, 1882.¹⁴⁶ His claim was for the sum of £1,000 as his beneficial interest in the property being the total sum spent in carrying out significant improvements to the house and the garden. The trial court ordered Mrs Pettitt to pay Mr Pettitt £300. Being dissatisfied, Mrs Pettitt appealed and she had her appeal dismissed at the Court of Appeal.¹⁴⁷

In the House of Lords, it was held that the language of section 17 of the Married Women's Property Act, 1882¹⁴⁸ was purely procedural and only "... suggests a situation where an assertion of title by either husband or wife has been met by denial or by counter-assertion on the part of the other."¹⁴⁹ The court's only duty under

House of Lords had the opportunity of examining and correcting developments by the Court of Appeal with particular reference to the issue of "family assets" and the proper interpretation of s 17 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75]. See per Lord Diplock in *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 410. In this case Lord Reid at 388 described the position of the law as being in an unsatisfactory state.

¹⁴⁰ In *Fribance v Fribance* [1957] 1 All ER 357 (CA) at 359 – 360; *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1046

¹⁴¹ Bucknill LJ in *Newgrosh v Newgrosh* [1950] 210 LTJo 108 (CA); Sir Raymond Evershed MR in *Rimmer v Rimmer* [1952] 2 All ER 863 (CA) at 865 & 870; Phillimore LJ in *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1048 – 1050.

¹⁴² [45 & 46 Vict. Cap 75].

¹⁴³ See s 17 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75].

¹⁴⁴ See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 295; 398. See also Cretney and Mason, *Principles of Family Law*, 234. See also Emiri and Giwa, *Equity and Trusts in Nigeria*, 424 – 425.

¹⁴⁵ [1969] 2 All ER 385 (HL).

¹⁴⁶ [45 & 46 Vict. Cap 75].

¹⁴⁷ The following statement of facts is taken from the judgement of Lord Reid at 387.

¹⁴⁸ [45 & 46 Vict. Cap 75].

¹⁴⁹ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 392.

section 17 of the Act was to determine the ownership of property and not to vary vested titles to property.¹⁵⁰ The question before the court was, thus, “Whose is this?”, and not “To whom shall this be given?”¹⁵¹

In the determination of the question of ownership under the Married Women’s Property Act, 1882,¹⁵² section 17 did not empower the court to redistribute the property of a spouse to the other spouse.¹⁵³ Romer LJ, in *Cobb v Cobb*,¹⁵⁴ stated explicitly:

“... I know of no power that the Court has under s. 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property and frequently has to do so on very little material, but where, as here, the original rights to property are established by the evidence and those rights have not been varied by subsequent agreement, the court cannot in my opinion under s. 17 vary those rights merely because it thinks that, in the light of subsequent events, the original agreement was unfair.”

Agreeing with the above statement, the House of Lords, in *Pettitt v Pettitt*,¹⁵⁵ held:

“I cannot agree that s 17 empowers a court to take property from one spouse and allocate it to the other. But something may depend on what is meant by “family assets”. If what is referred to is an asset separately owned by someone who is a member of a family, then once the ownership is ascertained it cannot, under s 17, be changed. If what is referred to is property which, on the evidence, has been decided to be property which belongs beneficially to husband and wife jointly, I do not consider that s 17 enables a court to vary whatever the beneficial interests were ascertained to be. There would be room for the exercise of discretion in deciding a question whether a sale should be ordered at one time or another but there would be no discretion enabling a court to withdraw an ascertained property right from one spouse and to grant it to the other. Any power to do that must either be found in some existing provision in relation to matrimonial causes or must be given by some future legislation.”

The House of Lords, thus, unanimously decided that section 17 of the Married Women’s Property Act, 1882¹⁵⁶ was merely procedural and did not empower the

¹⁵⁰ See *Cobb v Cobb* [1955] 2 All ER 696 (CA) at 700.

¹⁵¹ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 393, per Lord Morris of Borth-Y-Gest.

¹⁵² [45 & 46 Vict. Cap 75].

¹⁵³ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 395.

¹⁵⁴ [1955] 2 All ER 696 (CA) at 700.

¹⁵⁵ [1969] 2 All ER 385 (HL) at 394 – 395.

¹⁵⁶ [45 & 46 Vict. Cap 75].

court to vary the established interests of spouses in a disputed property.¹⁵⁷ The import of the phrase "... as he thinks fit..." in section 17 of the Married Women's Property Act, 1882¹⁵⁸ was aptly captured by Lord Morris of Borth-Y-Gest in the following words:

"There was no provision which empowered a judge on the trial of an action between husband and wife concerning a question as to the title to property to give a decision which, however benevolently motivated, was in disregard of the law. There is no provision empowering a judge on the summary adjudication of a question to act any differently. I do not find this in the words (in s 17) "as he thinks fit". Those are undoubtedly words which give a judicial discretion. Ample reason for their presence in the section is found when it is remembered that the section is dealing with questions "as to the title to or possession of property". There may be cases where discretion can properly be exercised in regard to possession and in regard to remedies. I cannot, however, interpret the words "as he thinks fit" as endowing a judge with the power to pass the property of one spouse over to the other or to do so on some vague basis that involves estimating or weighing the good or bad behaviour of the one and the other or assessing the deserts of the one or the other in the light of their work, activities and conduct. If matrimonial troubles bring the spouses to the courts there are various statutory powers relating to property which can be exercised. But if in a "question" between a husband and a wife as to the title to property recourse is had to the special procedure made possible by s 17, decision must be reached by applying settled law to the facts as they may be established."¹⁵⁹

Arising from the foregoing in line with the already settled principle of law in *Pettitt v Pettitt*¹⁶⁰ as to how the property right in the matrimonial home can be ascertained, when *Gissing v Gissing*¹⁶¹ came before the House of Lords, their Lordships found no difficulty in overruling the majority decision of the Court of Appeal. It was established that, once a common intention cannot be inferred between the spouses that a spouse should have a beneficial interest in the real property of the other spouse on whom the whole legal and beneficial interest vested, the spouse who claims could acquire no right.¹⁶²

It must, however, be clearly stated that irrespective of the laid down principles by the

¹⁵⁷ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 388, 395, 398, 405 and 411. See also *Gissing v Gissing* [1971] AC 886 (HL) at 904.

¹⁵⁸ [45 & 46 Vict. Cap 75].

¹⁵⁹ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 393.

¹⁶⁰ [1969] 2 All ER 385 (HL).

¹⁶¹ [1971] AC 886 (HL).

¹⁶² See *Gissing v Gissing* [1971] AC 886 (HL) at 903 and 910.

English courts in *Pettitt v Pettitt*¹⁶³ and *Gissing v Gissing*,¹⁶⁴ many problems still remained unresolved¹⁶⁵ which necessitated the aid of a statute.¹⁶⁶ In the words of Lord Reid in *Pettitt v Pettitt*.¹⁶⁷

“Even if my views are accepted they only go a short way towards solving the many problems which are coming before the court in increasing numbers ... The whole question can only be resolved by Parliament and in my opinion there is urgent need for comprehensive legislation.”

English law with regards to the property rights of spouses or what was being referred to as “family assets” was, thus, for several years in an unsatisfactory state.¹⁶⁸ The Married Women’s Property Act, 1882,¹⁶⁹ which was described by Holcombe as an “... ill-conceived and ill-drawn Act sanctioned by the ignorance and stupidity of Parliament and rendered more complicated by the subtlety of judicial interpretation...,”¹⁷⁰ dealt only with isolated problems and there was a need for a complete statutory overhaul of the entire field of matrimonial property law.¹⁷¹

It is submitted that, upon the enactment of the Matrimonial Proceedings and Property Act Cap 45 of 1970 and the Matrimonial Causes Act Cap 18 of 1973, there was a radical departure of English law and cases from the earlier reasoning which presumed exclusive ownership of property purchased during marriage as belonging to the spouse who had purchased the same.¹⁷²

English law, as will be examined in the latter part of this study, now takes into consideration a spouse’s contribution as a homemaker in determining her entitlement to property upon marriage breakdown.¹⁷³ English courts are inclined

¹⁶³ [1969] 2 All ER 385 (HL).

¹⁶⁴ [1971] AC 886 (HL).

¹⁶⁵ Bromley, *Bromley’s Family Law*, 443.

¹⁶⁶ See s 4 of the Matrimonial Proceedings and Property Act Cap 45 of 1970 which gave the courts extensive powers to readjust the property rights of spouses upon marriage breakdown. This section was re-enacted as s 24 of the Matrimonial Causes Act Cap 18 of 1973 which will be examined in section 3.5 of this chapter.

¹⁶⁷ [1969] 2 All ER 385 (HL) at 391.

¹⁶⁸ See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 388.

¹⁶⁹ [45 & 46 Vict. Cap 75].

¹⁷⁰ Holcombe, *Wives and Property: Reform of the Married Women Property Law in the Nineteenth – Century England*, 219.

¹⁷¹ Bromley, *Bromley’s Family Law*, 419.

¹⁷² Bromley, *Bromley’s Family Law*, 442.

¹⁷³ See s 25(2)(f) of the Matrimonial Causes Act Cap 18 of 1973. See also 3.5.3.3 below.

towards dividing the matrimonial home or its proceeds between the spouses.¹⁷⁴ At present, on the dissolution of marriage, a spouse can invoke the wide discretion of the court under section 24 of the Matrimonial Causes Act Cap 18 of 1973 for a property adjustment order,¹⁷⁵ thereby obviating the need of making an enquiry into the precise property interest of each spouse in the matrimonial home or other assets.¹⁷⁶

At this point, the study shall examine further developments in relation to the property rights of spouses under English law. It will be necessary to start a discussion of this kind with a consideration of how the courts have employed equity and trust concepts in ascertaining the beneficial interests of spouses in property upon the breakdown of marriage. This will be followed by an examination of the financial provision orders and property adjustment orders under the Matrimonial Causes Act Cap 18 of 1973.

3.4 BENEFICIAL INTERESTS OF SPOUSES IN PROPERTY: EMPLOYING CONCEPTS OF EQUITY AND TRUST

It is noted that the wide discretion to redistribute property between married spouses upon marriage breakdown which has been conferred on the English courts has whittled down the utility of the role of trust in this area. The discussion in this section will, however, demonstrate how the English courts determined the property rights of spouses before the enactment of the Matrimonial Causes Act Cap 18 of 1973 by employing trust and equitable principles. It will also demonstrate how the courts have developed these principles over the years in the light of cases (involving married and unmarried persons) which came before it after the enactment of the Matrimonial Causes Act Cap 18 of 1973.

3.4.1 Express Declaration of Trust

An express declaration of trust is a statement contained in a title document, for

¹⁷⁴ Bromley, *Bromley's Family Law*, 441. See *Watchel v Watchel* [1973] 1 All ER 829 (CA).

¹⁷⁵ Lowe and Douglas, *Bromley's Family Law*, 145. See *Williams v Williams* [1976] Ch 278 (CA) where the Court of Appeal noted the possibility of relying on the court's wide discretionary powers under section 24 of the Matrimonial Causes Act Cap 18 of 1973 to adjust the property rights between spouses on marriage breakdown.

¹⁷⁶ See Lowe and Douglas, *Bromley's Family Law*, 131 – 132 & 145. These authors, however, observed that a spouse who is unwilling to apply for a property adjustment order under s 24 of Matrimonial Causes Act Cap 18 of 1973 may commence proceedings under s 17 of the Married Women's Property Act, 1882 [45 & 46 Vict. Cap 75] to enforce his or her strict property rights against the other spouse.

example, a deed, which is to the effect that the legal owner holds the property for the benefit of a named person.

On the authority of *Pettitt v Pettitt*¹⁷⁷ and *Gissing v Gissing*,¹⁷⁸ a claim for a beneficial interest in property can be founded only on the basis of trust against a spouse on whom the legal estate is vested.¹⁷⁹ It is, thus, trite law that for a spouse to claim a beneficial interest in the other spouse's property there must be in existence an express declaration of trust in the favour of the spouse who alleges that, especially when the property concerns immovable property (land).¹⁸⁰

It was held, in *Goodman v Gallant*¹⁸¹ that, in the presence of an express declaration of trust in a conveyance which declares in a copious manner the beneficial entitlement of the parties in a property or its proceeds of sale, the court will pronounce on the wordings of the conveyance.¹⁸² In such cases, "... there is no room for the application of the doctrine of resulting, implied¹⁸³ or constructive trusts¹⁸⁴ unless and until the conveyance is set aside or rectified ..."¹⁸⁵

It is equally noted that, where a property is conveyed in the joint names of both spouses "... as tenants in common in equal shares or some other proportions...",¹⁸⁶ spouses will be beneficially entitled to a joint interest in the property.¹⁸⁷ The words of

¹⁷⁷ [1969] 2 All ER 385 (HL).

¹⁷⁸ [1971] AC 886 (HL).

¹⁷⁹ See Miller, *Family Property and Financial Provision*, 22.

¹⁸⁰ *Gissing v Gissing* [1971] AC 886 (HL) at 1052. It is a formal requirement of law pursuant to s 52 of the Law of Property Act, 1925 [15 and 16 Geo 5 Cap 20] that, for a legal estate in land to be created or conveyed, a deed is required. See Masson, Bailey-Harris and Probert, *Cretney Principles of Family Law*, 125. It should be noted that, where the property in question is a movable property, ownership is usually vested in the spouse that provided the purchase price, but, where joint contribution of the purchase price is proved, "... ownership will be shared." See Miller, *Family Property and Financial Provision*, 37.

¹⁸¹ [1986] Fam 106 (CA) at 110H – 111A. See also *Clarke v Harlowe* [2006] 1 P & CR DG11 (Ch)

¹⁸² See also *Clarke v Harlowe* [2006] 1 P & CR DG11 (Ch).

¹⁸³ It should be noted that implied trust is a generic term for both resulting and constructive trust. Masson, Bailey-Harris and Probert, *Cretney Principles of Family Law*, 130, citing *McKenzie v McKenzie* [2003] 2 P & CR. DG6 (Ch), para 89, gave the opinion that implied trust does not constitute an independent category. According to Miller, *Family Property and Financial Provisions*, 25, the term implied trust is generally used to refer to "... an intention to create a trust that is not clearly expressed but has to be found in the language used and all the relevant facts."

¹⁸⁴ These trusts can be referred to as informal trusts. See Masson, Bailey-Harris and Probert, *Cretney Principles of Family Law*, 130. For the purpose of this study, we shall only discuss "informal trusts" as resulting and constructive trust.

¹⁸⁵ See *Goodman v Gallant* [1986] Fam 106 (CA) at 110H – 111A. See also *Roy v Roy* [1991] WL 838489 (CA); *Clarke v Harlowe* [2006] 1 P & CR DG11 (Ch).

¹⁸⁶ Lowe and Douglas, *Bromley's Family Law*, 153 – 154.

¹⁸⁷ Lowe and Douglas, *Bromley's Family Law*, 153. See also *Goodman v Gallant* [1986] Fam 106 (CA).

the deed of conveyance declaring the interest of the spouses in the property will prevail¹⁸⁸ unless a spouse can prove the existence of fraud, mistake or undue influence when the agreement was concluded.¹⁸⁹ Masson, Bailey-Harris and Probert argued that, even where there is absence of fraud or mistake, the court could "... rectify a conveyance that does not give effect to the parties' true intentions..."¹⁹⁰

¹⁸⁸ See Miller, *Family Property and Financial Provision*, 24; Lowe and Douglas, *Bromley's Family Law*, 154. It is the researcher's viewpoint that the words of the deed of conveyance declaring the joint interests of the spouses will also prevail even in cases where it is proved by way of evidence that it was only a spouse (usually the husband) that provided the purchase price. We often see in legal practice instances where parties (usually husband and wife) to a deed of conveyance, assignment or transfer insist that the solicitor should express the couple as "Mr and Mrs ..." (either as vendors or purchasers, assignors or assignees; or transferors or transferees) transferring or receiving a property as beneficial owners. It is reasoned that it is against such instances as the foregoing that Lowe and Douglas, *Bromley's Family Law*, 154 admonished solicitors who act for couples while drafting their deed of conveyance to enquire what the true or actual intentions of the couples are, particularly with regards to their beneficial interest in the property, in order to avoid possible disputes in the future when the love which once existed between them goes sour and the marriage breaks down. See *Clarke v Harlowe* [2006] 1 P & CR DG11 (Ch) at D31 where the property known as "Bank House" was paid for solely by Mr Harlowe (a commercial solicitor) but it was agreed that the property should be vested in himself and his spouse (Ms Margot Clarke) as beneficial joint tenants. On the breakdown of the relationship, "Bank House" was eventually sold and there was dispute as to how the proceeds should be distributed. Ms Margot Clark contended that she was beneficially entitled to an equal share in the net proceeds of sale but Mr Harlowe refused to accept Ms Margot Clark's contention on the basis that he alone had paid for the cost of improvement of the property, and as such the principle of equitable accounting should apply. The court held that this was not a case where the principle of equitable accounting applied because there was no obligation on the part of Ms Margot Clarke to contribute to the cost of the improvements. It further held that the parties were beneficial joint tenants and are entitled to equal shares of the proceeds of the sale of "Bank House" (at D33). See also *Begum v Issa* [2014] WL 5833780 Case No. 3 NE 30071 (County Court) where the property (107 Chalford Oaks) was conveyed in the joint names of the spouses with an express declaration of trust that they held it as joint tenants. Although it was in evidence that the husband had paid for the property, the court held that the wife had an overriding beneficial interest in the property which was subsequently transferred to a third party by the husband without obtaining the wife's consent.

¹⁸⁹ See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 405; *Goodman v Gallant* [1986] Fam 106 (CA). In *Clarke v Harlowe* [2006] 1 P & CR DG11 (Ch) at D32, ruling on express declaration of trust, the court held that "... in the absence of fraud or mistake, the declaration is conclusive and the parties are not permitted to go behind it." The court, however, noted the possibility of parties to vary their beneficial interest in the property after its acquisition only in exceptional cases. In *Pankhania v Chandegra* [2013] 1 P & CR 16, 238 (CA), the property was transferred to the parties and they both held it as tenants in common in equal shares. Although it was established in evidence that the plaintiff had contributed nothing to the mortgage payments and that the declaration of trust was made only for convenience so as to enable the defendant to obtain the mortgage in respect of the property, on the application of the plaintiff for an equal beneficial interest by virtue of the paper title, the trial court held that the defendant was solely vested with the legal and beneficial ownership (at 243). This judgement was overruled by the Court of Appeal which held that the parties (both of full age) had, for whatever reason, "... executed an express declaration of trust over the property in favour of themselves as tenants in common in equal shares and had therefore set out their respective beneficial entitlement as part of the purchase itself." (at 244). It should be noted that the Court of Appeal's decision in this case was based on the fact that there was no evidence before the trial judge to the effect that there was fraud, mistake or undue influence which would have warranted the trial court to depart from the express declaration of trust and impose a constructive trust in favour of defendant (at 244). See also *Begum v Issa* [2014] WL 5833780 Case No. 3 NE 30071 (County Court).

¹⁹⁰ Masson, Bailey-Harris and Probert, *Cretney's Principles of Family Law*, 126.

Miller¹⁹¹ aptly described the instance thus:

“Where it is clear that both spouses were aware that the property was being conveyed into their joint names, a spouse seeking rectification will have to show that the agreement between them was that the other spouse was not to have a beneficial interest notwithstanding the words of the conveyance.”

In *Wilson v Wilson*,¹⁹² the husband and wife purchased the matrimonial home and conveyed it into their joint names. The conveyance contained an express declaration of trust which stated that both spouses “... held the property upon trust to sell the same with power to postpone sale and that they would hold the net proceeds of sale ... upon trust for themselves as joint tenants.”¹⁹³ After the dissolution of the marriage the husband continued to make repayment of the mortgage installment until he lost his job and he fell into arrears. The matrimonial home was eventually sold and the proceeds of sale, after repayment of the mortgage debt, amounted to £1,001.¹⁹⁴ The husband claimed the entirety of the £1,001.

On an application by the wife brought pursuant to section 17 of the Married Women's Property Act, 1882,¹⁹⁵ for the determination of the spouses' rights in the proceeds of sale, the wife's claim was for an equal share in the proceeds of sale, while the husband claimed total entitlement to the proceeds of sale. The wife's contention was upheld on appeal, however, “... subject to the husband being given credit for half of such mortgage repayments as he had made after the separation.”¹⁹⁶ Russell LJ held:

¹⁹¹ *Family Property and Financial Provision*, 24. See also *Day v Day* [2014] Ch 114 (CA).

¹⁹² [1963] 1 WLR 601 (CA).

¹⁹³ *Wilson v Wilson* [1963] 1 WLR 601 (CA) at 602.

¹⁹⁴ *Wilson v Wilson* [1963] 1 WLR 601 (CA) at 603.

¹⁹⁵ [45 & 46 Vict. Cap 75].

¹⁹⁶ *Wilson v Wilson* [1963] 1 WLR 601 (CA) at 605, 607, 610 – 611. The court took into consideration the “principle of equitable accounting” in this case to hold that the husband was entitled to post separation mortgage payments in respect of the matrimonial home. By the “principle of equitable accounting”, a party will be entitled to recoup from the other party one half of his or her actual payments in respect of a property which was jointly owned. For instance, where a co-owner pays the entire mortgage on a property or a substantial part of it; or where he or she has expended money on the improvement of the property which has given rise to an increase in its value, the co-owner will be entitled to recoup his/her money from the other co-owner's share of the payments. It should be noted that the applicability of this principle will depend on the nature of the property in question and the time of such payments or expenditure in respect of the property. See *Clarke v Harlowe* 1 P & CR DG11 (Ch) at D31 – D33 and *Wilcox v Tait* [2006] WL 3609988 (CA) at para 65. By “the nature of the property”, it would depend on whether the property was used as a matrimonial home or acquired for commercial purposes, and, by “time”, it would depend on whether the payments or expenditures were made during the subsistence of the marriage or after the marriage had broken down. The consideration is different when it relates to a contractual obligation in respect of a property. In *Clarke v Harlowe* [2006] 1 P & CR DG11 (Ch) at D32, Behrens J held that the period of equitable accounting in

“As I read the judgment below and the affidavits, *there was no evidence to justify the conclusion that this declaration of beneficial interests was in any way due to mistake or a misunderstanding of instruction.*¹⁹⁷ The fact that the purchase price was produced as to £750 by the husband out of his own resources and by family loans, and the balance of £1,600 by a building society mortgage under which both husband and wife were mortgagors, and that the husband paid off instalments totalling £400 odd is entirely consistent with the beneficial trust declared by them.”¹⁹⁸

In the case of *Goodman v Gallant*,¹⁹⁹ Mrs Goodman married Mr Goodman in 1960 and they parted ways in 1971. While the marriage subsisted, Mr Goodman bought a property which was conveyed in his sole name. It was, however, Mrs Goodman’s evidence at trial that she had 50 per cent beneficial interest in the property. Mrs Goodman, who later started a relationship with Mr Gallant, agreed with Mr Gallant to purchase Mr Goodman’s interest in the property. Mr Goodman conveyed his interest to Mrs Goodman and Mr Gallant as “purchasers” for the price of £6,700 by a deed of conveyance which read: “... to hold the same unto the purchasers in fee simple as beneficial joint tenants.”²⁰⁰ The express declaration of trust read:

“The purchasers hereby declare as follows: (a) the purchasers shall hold the property upon trust to sell the same with power to postpone the sale thereof and shall hold the net proceeds of sale and net rents and profits thereof until sale upon trust for themselves as joint tenants.”²⁰¹

When the relationship deteriorated, Mr Gallant left the house, and Mrs Goodman gave a written notice of severance of the tenancy wherein she claimed to be entitled

such a case (cohabitation case) is dependent on the parties’ intentions regarding the relevancy of their expenditure and how they should treat the same. He expressed the view that in cohabitation cases where the parties used the disputed property as their matrimonial home and their relationship comes to an end, only post separation payments and expenditures in respect of the property will be reckoned with when applying the principle of equitable accounting. Jonathan Parker LJ in the Court of Appeal in *Wilcox v Tait* [2006] WL 3609988 (CA) at para 66 upheld this view and stated: “... I agree with Judge Behrens in *Clarke v. Harlowe* that in the ordinary cohabitation case it is open to the court to infer from the fact of cohabitation that, during the period of cohabitation, it was the common intention of the parties that neither should thereafter have to account to the other in respect of expenditure incurred by the other on the property during that period for their joint benefit. Whether the court draws that inference in the given case will of course depend on the facts of that case.” The court in this case (*Wilcox v Tait*) held that the parties were beneficially entitled to the disputed property in equal shares; as the principle of equitable accounting does not apply to cohabitation cases in respect of mortgage payments or expenditures on the property during the subsistence of the marriage. One must not confuse the application of equitable accounting which is on one hand from the court’s “... enquiry as to the extent of the parties’ respective beneficial interests in the property in question.” See *Wilcox v Tait* [2006] WL 3609988 (CA) at para 64.

¹⁹⁷ Italics, my emphasis.

¹⁹⁸ *Wilson v Wilson* [1963] 1 WLR 601 (CA) at 608.

¹⁹⁹ [1986] Fam 106 (CA).

²⁰⁰ *Goodman v Gallant* [1986] Fam 106 (CA) at 108.

²⁰¹ *Goodman v Gallant* [1986] Fam 106 (CA) at 109.

to a three-quarter share in the house. She sought a declaration of their respective interests by an originating summons. At trial, it was held that, upon the severance of the joint tenancy, both parties had equal shares in the property.²⁰² Dismissing Mrs Goodman's appeal, the Court of Appeal held:

"... in the absence of any claim for rectification or rescission, the provision in the conveyance declaring that the plaintiff and the defendant were to hold the proceeds of sale of the property 'upon trust for themselves as joint tenants' concludes the question of the respective beneficial interests of the two parties in so far as that declaration of trust, on its true construction, exhaustively declares the beneficial interests."²⁰³

In *Roy v Roy*,²⁰⁴ the vendor conveyed a house to the parties (as purchasers) "... to hold same as joint tenants in law and equity ..." While the plaintiff made a claim for an equal share in the proceeds of the sale of the house, the defendant claimed exclusive ownership to the property alleging that the transfer did not represent the true intentions of the parties to the effect that the property would be held "... in trust for themselves beneficially to the shares proportionate to their respective contributions to the purchase price."²⁰⁵ In upholding the trial court's refusal to have the conveyance rectified, the Court of Appeal held:

"Either the provisions of the written transfer of the land represent the wishes of the transferees at the time of the transfer, or they do not. If they do, there is no rational basis for interfering with the written disposition executed by the transferor. If they do not, then it can be rectified to give effect to the true intentions of the parties."²⁰⁶

The appellate court observed that a transfer, which, as a result of some error, does not reflect the true intentions of the purchasers in relation to their beneficial interests upon acquisition, cannot be foisted on the aggrieved party.²⁰⁷ The aggrieved party's remedy lay in an application for rectification²⁰⁸ which could be obtained only by a

²⁰² *Goodman v Gallant* [1986] Fam 106 (CA) at 109 – 110.

²⁰³ *Goodman v Gallant* [1986] Fam 106 (CA) at 117.

²⁰⁴ [1991] WL 838489 (CA).

²⁰⁵ *Roy v Roy* [1991] WL 838489 (CA) at para 25.

²⁰⁶ *Roy v Roy* [1991] WL 838489 (CA) at para 43.

²⁰⁷ *Roy v Roy* [1991] WL 838489 (CA) at para 40.

²⁰⁸ It should be noted that an express declaration of trust can be removed either by rescission or rectification. The aggrieved party can apply for a rescission of the document on the basis of fraud or mistake or apply for a rectification of the document in the appropriate manner to vary or to remove the express declaration of trust in order to reflect the parties' true intention. The Court of Appeal also pointed out that, where the document is rectifiable, "... the court may be able to give effect to the true position between the parties by some more direct form of relief without actually going through the machinery of rectifying the document in question." See *Pink v Lawrence* (1978) 36 P & CR 98 (CA) at 101.

proof of what the parties' true intention was at the point of purchase.²⁰⁹

There was a claim for rectification in *Day v Day*,²¹⁰ to reflect the true intention of Mrs Day. In that case,²¹¹ the mother of the parties had executed a general power of attorney in favour of her solicitor (Mr Froud). Mrs Day had instructed Mr Froud, through the defendant, to do all that was necessary in respect of her property to enable the defendant to use the property to secure funds for his benefit. In carrying out the instruction, Mr Froud executed a conveyance on her behalf with a clause to the effect that the property was held by Mrs Day and the defendant as joint tenants.

On Mrs Day's demise, the defendant claimed exclusive ownership of the property by survivorship. In her testament, however, Mrs Day had named the parties as executors and directed that the property should be sold and its proceeds equally divided among her six children.

The claimants sought a rectification of the conveyance alleging that it was not Mrs Day's intention to give away the beneficial interest in her house to the defendant. Although it was found at trial that Mrs Day's intentions had been erroneously reflected in the conveyance as "... it was not her actual intentions to confer any beneficial interest in the property on the defendant ...",²¹² the claim was dismissed on the ground that the solicitor had executed a conveyance pursuant to a general power of attorney which precluded the right to rectification.

Upholding the claimants' appeal, the Court of Appeal held that "... the necessary conditions for equitable relief against the consequences of a mistake were satisfied, and that, accordingly, the claimants were entitled to rectification of the conveyance."²¹³ In the words of Sir Terence Etherton:

"Only the provisions of the conveyance declaring that the property was held by Mrs Day and the defendant on trust for sale for themselves as beneficial joint tenants were inconsistent with her intention and any actual authority of Mr Froud."²¹⁴

It is, however, often problematic when it has to do with a claim for beneficial interest,

²⁰⁹ *Roy v Roy* [1991] WL 838489 (CA) at para 40.

²¹⁰ [2014] Ch 114 (CA).

²¹¹ *Day v Day* [2014] Ch 114 (CA).

²¹² *Day v Day* [2014] Ch 114 (CA) at 124.

²¹³ *Day v Day* [2014] Ch 114 (CA) at 115.

²¹⁴ *Day v Day* [2014] Ch 114 (CA) at 125.

where the legal estate is in the name of one spouse. Where a property is conveyed in the name of a single spouse without an express declaration of trust which recognises the beneficial interest of the other spouse, and the non-legal owner alleges that she had made some financial contributions to the acquisition of the property, the court is often faced with the task of determining what the common intention of the spouses would have been at the time of purchase if such were to have been reduced into writing.²¹⁵

Lord Upjohn is of the view that the beneficial interest in property would depend on spouses' agreement at the point of purchase,²¹⁶ and, where neither agreement exists nor is there an express declaration of trust,²¹⁷ the court usually adopts a strict approach when determining the beneficial interest of a spouse in a legal estate which is vested in the other spouse.²¹⁸ It is submitted that what the court does in such a case is to apply the doctrine of resulting or constructive trust to determine the beneficial interest in the property.²¹⁹

3.4.2 Absence of Express Declaration of Trust

Smithdale²²⁰ submits that clear intention is required for an express trust to come into existence. The absence of an express trust or written evidence to that effect, however, "... does not affect the creation or operation of ..." ²²¹ the doctrines of resulting or constructive trusts.²²² It is, thus, trite law that the doctrine of resulting or constructive trust applies only in circumstances where there is no declared trust or an agreement between spouses as to their beneficial entitlement to a property.²²³

It must, however, be noted that in recent times, the English courts have preferred to use the constructive trust doctrine instead of a resulting trust when faced with the task of resolving the property rights of spouses in the absence of an express

²¹⁵ *Gissing v Gissing* [1971] AC 886 (HL) at 1051.

²¹⁶ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 405.

²¹⁷ It is noted that, if the property in question is an immovable property (land), the express declaration of trust will be made by way of a deed of conveyance, lease, or evidenced in any other form of writing. See Miller, *Family Property and Financial Provision*, 22.

²¹⁸ See *Gissing v Gissing* [1971] AC 886 (HL) at 1051.

²¹⁹ See *Stack v Dowden* [2007] WL 1157953 (HL).

²²⁰ 2011 *Cambridge Student Law Review*, 74.

²²¹ Masson, Bailey-Harris and Probert, *Cretney's Principles of Family Law*, 130.

²²² Masson, Bailey-Harris and Probert, *Cretney's Principles of Family Law*, 130.

²²³ See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 405 – 406; *Gissing v Gissing* [1971] AC 886 (HL) at 905; *Pink v Lawrence* (1978) 36 P & CR 98 (CA) at 101.

declaration of trust.²²⁴ The study shall now consider how the English courts have applied these trust concepts to determine the property rights of spouses with particular reference to the “family property” or “matrimonial home”.

3.4.2.1 Resulting Trust

Where, for instance, the legal title to a property is conveyed in A’s name and B provides a part or whole of the monetary consideration, a resulting trust would arise in favour of B should A not intend to pass the beneficial interest to B.²²⁵ Simply put, the resulting trust doctrine will be applied by the court in favour of a spouse without legal title who has made a monetary contribution to the acquisition of a property.²²⁶ The spouse with the legal title will be held by the court to hold the property in trust for the other spouse to the extent of his or her contribution in the absence of any evidence to the contrary.²²⁷

This is how the orthodox presumption of resulting trust operates.²²⁸ By this, a trust is imposed on the spouse with the legal title in favour of the other spouse. For example, if a married couple acquires a house and registers it in either spouse’s name, a presumed resulting trust will arise in favour of the spouse without legal title if he or she can by evidence establish that he or she has made some contribution to the purchase price of the property.²²⁹ The beneficial interest of the property to the extent (or ratio) of the non-legal owner’s contribution will be held on a resulting trust by the legal owner for the non-legal owner. It is submitted that the court will, in the first instance, make a finding relative to who the actual purchaser of the property is and/or the ratio of contribution made by the parties to the purchase price of the property before the presumed resulting trust can be applied.²³⁰

On this issue, it is further submitted that the courts are often faced with the problem of identifying the nature of the contribution that could create a resulting trust. The

²²⁴ See *Stack v Dowden* [2007] WL 1157953 (HL); *Abbott v Abbott* [2007] WL 2126565 (PCA) and *Jones v Kernott* [2012] 1 AC 776 (SC(E)). See also Lee, 2008 *Law Quarterly Review*, 209 at 209 – 210; Smithdale, 2011 *Cambridge Student Law Review*, 74.

²²⁵ See Emiri and Giwa, *Equity and Trusts in Nigeria*, 423.

²²⁶ Smithdale, 2011 *Cambridge Student Law Review*, 74 at 76.

²²⁷ See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 389 where Lord Reid stated that “... a contributor to the purchase price will acquire a beneficial interest in the property ...”

²²⁸ Masson, Bailey-Harris and Probert, *Cretney’s Principles of Family Law*, 131.

²²⁹ See Leow and Liao, 2014 *Cambridge Law Journal*, 500.

²³⁰ Miller, *Family Property and Financial Provision*, 27.

authorities²³¹ are settled that, while a direct financial contribution to the initial purchase price of the property will create a beneficial interest in property, non-financial contributions will not.²³² The opinion has been expressed that “... the payment of mortgage instalments at a later date will not give rise to a resulting trust ...” unless there is a direct link with the purchase price.²³³

There is also a presumption in favour of joint legal owners who have made relevant contributions to the purchase of the property, especially in cases where they both assumed joint and several liabilities under the mortgage deed.²³⁴ This presumption may be rebutted if a spouse can show that he or she paid the entire purchase price of the property or that he or she solely discharged the mortgage, and that the other spouse’s name was needed only for the purpose of securing the mortgage finance and nothing more.²³⁵ This will depend on the facts of individual cases.

In *Carlton v Goodman*,²³⁶ Ms Carlton argued that her assumption of liability under the mortgage deed gave rise to the presumption that she had beneficial interest in the house which was bought by Mr Goodman from his landlord. The court, however, held that both Mr Goodman and Ms Carlton as joint tenants held the property in trust exclusively for the benefit of Mr Goodman. It was in evidence that the deposit and the mortgage payments were all met by Mr Goodman. It was the court’s stance that the parties had no intention that Ms Carlton should receive any share.

The applicability of this type of trust in relation to the property rights of spouses in the marital context was also confronted with the presumption of advancement in favour of the spouse with legal title who had made little or no contribution. The presumption of advancement will arise, for instance, where a husband purchased a property but registered it in the wife’s name or in their joint names as husband and wife. It will be presumed that it was the husband’s intention to make a gift to the wife unless a contrary intention is shown. According to Lord Evershed in *Silver v Silver*.²³⁷

“There is a rule of equity which still subsists, even though in this day and age one may feel that the presumption is more

²³¹ See for example *Curley v Parkes* [2004] EWCA Civ 1515 (CA).

²³² Masson, Bailey-Harris and Probert, *Cretney’s Principles of Family Law*, 132.

²³³ *McKenzie v McKenzie* [2003] 2 P & CR DG6 (Ch).

²³⁴ Masson, Bailey-Harris and Probert, *Cretney’s Principles of Family Law*, 133.

²³⁵ *Carlton v Goodman* [2002] EWCA Civ 545 (CA); *McKenzie v McKenzie* [2003] 2 P & CR DG6 (Ch).

²³⁶ [2002] EWCA Civ 545 (CA).

²³⁷ [1958] 1 WLR 259 (CA) at 261.

easily capable of rebuttal – a rule that if a husband makes a payment for or puts property into the name of the wife, he intends to make an advancement to her.”

A different position was taken by the House of Lords in *Pettitt v Pettitt*²³⁸ where the presumption of advancement was canvassed. In the words of Lord Reid:²³⁹

“I do not know how this presumption first arose, but it would seem that the judges who first gave effect to it must have thought either that husbands so commonly intended to make gifts in the circumstances in which the presumption arises that it was proper to assume this where there was no evidence, or that wives’ economic dependence on their husbands made it necessary as a matter of public policy to give them this advantage. I can see no other reasonable basis for the presumption. These considerations have largely lost their force under present conditions, and, unless the law has lost all flexibility so that the courts can no longer adapt it to changing conditions, the strength of the presumption must have been much diminished.”

Miller,²⁴⁰ however, doubts whether the presumption of advancement will be given any weight at present, particularly in the light of the conception of marriage as a partnership of equals. It is submitted that the courts prefer to scrutinise the evidence in an attempt to determine the intentions of the parties rather than rely on the presumption of advancement.

It is submitted that the relevance of the application of resulting trust within the marital context has been whittled down in the light of recent cases.²⁴¹ It is an opinion that “... it could no longer be presumed that couples would intend their beneficial interests to be coterminous with their financial contributions.”²⁴²

3.4.2.2 Constructive Trust²⁴³

In the determination of the property rights of parties, a constructive trust would arise “... whenever the circumstances are such that it would be unconscionable for the owner of the legal title to assert his own beneficial interest and deny the beneficial

²³⁸ [1969] 2 All ER 385 (HL).

²³⁹ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL).

²⁴⁰ *Family Property and Financial Provision*, 27. See also Masson, Bailey-Harris and Probert, *Cretney’s Principles of Family Law*, 134 who argued that in the presence of contrary evidence, no matter how slight, the presumption of advancement will be readily rebutted.

²⁴¹ *Stack v Dowden* [2007] WL 1157953 (HL), para 60, *Jones v Kernott* [2012] 1 AC 776 (SC(E)).

²⁴² Masson, Bailey-Harris and Probert, *Cretney’s Principles of Family Law*, 132 and 135. These authors state, however, that, where a property has been purchased for investment purposes, resulting trust can still be applicable.

²⁴³ See 2.7.3 above for the meaning of constructive trust.

interest of the other.”²⁴⁴

Rather than use the respective contributions of spouses to the purchase price of property to determine their beneficial interests, the courts have recently preferred to rely on the evidence of “common intention” between the spouses in order to determine whether or not they are to share in the ownership of the property.²⁴⁵ The reasons for this trend, or change in emphasis, are not without justification.

According to Lee²⁴⁶, “... the perceived artificiality of presumed intentions in the resulting trust doctrine has led courts to move away from it.” It has also been argued that the application of resulting trust within the marital context only gives one whatever ratio of contribution to the purchase price he or she made in acquiring the property which in most cases is “... not a true reflection of the state of affairs in the family home of a cohabiting couple.”²⁴⁷ It is also argued in favour of constructive trust that at the point of acquisition, spouses do not necessarily spell out what their specific rights to the property would be. Smithdale²⁴⁸ argues:

“The premise behind the common intention constructive trust approach appears to be that ownership of the family home, in reality, often does not revolve solely around the amount of purchase money advanced by each party. If parties agree to hold beneficial shares in the property in a certain way, and the non-legal owner acts on that to their detriment, the court will give effect to the arrangement via a constructive trust, rather than relying on a presumed resulting trust.”

During the subsistence of the marriage, spouses often regard each other as having a beneficial interest in an acquired property whether it was acquired in a “sole name” or “joint name”.²⁴⁹ Lord Reid in *Pettitt v Pettitt*²⁵⁰ noted: “It would be unnatural if at the time of acquisition there was always precise statement or understanding as to where ownership rested.” Even where spouses have not applied their minds to

²⁴⁴ Emiri and Giwa, *Equity and Trusts in Nigeria*, 424.

²⁴⁵ See *Stack v Dowden* [2007] WL 1157953 (HL), para 60; *Abbott v Abbott* [2007] WL 2126565 (PCA), para 6; *Jones v Kernott* [2012] 1 AC 776 (SC(E)); Lowe and Douglas, *Bromley's Family Law*, 157.

²⁴⁶ 2008 *Law Quarterly Review*, 209. See also Smithdale, 2011 *Cambridge Student Law Review*, 74 at 75.

²⁴⁷ Smithdale, 2011 *Cambridge Student Law Review*, 74 at 76.

²⁴⁸ 2011 *Cambridge Student Law Review*, 74 at 77.

²⁴⁹ See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 391.

²⁵⁰ [1969] 2 All ER 385 (HL) at 394.

where ownership rested, it is the duty of the court to determine it.²⁵¹ The task before the court at the breakdown of marriage is, thus, to determine what the spouses' common intentions²⁵² were with respect to the property. This is done by considering the entire conduct of the spouses in relation to the property in question.²⁵³ The court is, therefore, charged with the duty of finding out what the spouses did and said to each other before reaching a conclusion as to whether there was a shared beneficial interest.²⁵⁴

It is noted that, within the family context in relation to the ownership of "family property", constructive trust is also known as the common intention constructive trust because it is based on a common intention for a shared beneficial interest in property.²⁵⁵ It has been described as a better tool²⁵⁶ and a "sound theory"²⁵⁷ in the determination of the property rights of spouses with respect to "family property"; as "... it offers an equitable and just solution."²⁵⁸

In order to rely on the common intention constructive trust, the claimant must establish a beneficial interest in the property, and the court's duty is to ascertain the extent of the established interest.²⁵⁹ The claimant must prove that there exists a common intention between the parties that he or she has a beneficial interest in the

²⁵¹ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 398.

²⁵² According to the House of Lords in *Stack v Dowden* [2007] WL 1157953 (HL), para 60 (Lord Neuberger dissenting), the common intention of the parties can be expressed by the parties, inferred or imputed by the court. With the introduction of imputation to common intention, the House of Lords widened the doctrine of common intention with reference to constructive trust. See Smithdale, 2011 *Cambridge Student Law Review*, 74 at 81. Compare this with the cases of *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) and *Gissing v Gissing* [1971] AC 886 (HL) where the House of Lords disregarded any form of imputation by the court. In *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 398 it was held that in reaching a decision as to the ownership of property, "[t]he court does not devise or invent a legal result. Nor is the court influenced by the circumstances that those concerned may never have had occasion to ponder or to decide the effect in law of whatever were their deliberate actions. Nor is it material that they might not have been able – even after reflection – to state what was the legal outcome of whatever they may have done or said." This statement supports Lord Neuberger's views on the imputation of intention. According to him: "Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend... To impute an intention would not only be wrong in principle ... but it would also involve a judge in an exercise which was difficult, subjective and uncertain." See also *Stack v Dowden* [2007] WL 1157953 (HL), para. 126.

²⁵³ *Abbott v Abbot* [2007] WL 2126565 (PCA) paras 6 and 18.

²⁵⁴ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 398.

²⁵⁵ Lee, 2008 *Law Quarterly Review*, 209, Smithdale, 2011 *Cambridge Student Law Review*, 74 at 76.

²⁵⁶ Lee, 2008 *Law Quarterly Review*, 209.

²⁵⁷ Smithdale, 2011 *Cambridge Student Law Review*, 74 at 76.

²⁵⁸ Smithdale, 2011 *Cambridge Student Law Review*, 74 at 76. This author argues (at 83) that the common intention constructive trust should be preferable to presumed resulting trust only where there is an actual common intention between the spouses. According to him, the presumed resulting trust remains the appropriate tool where there exists no express or inferred common intention.

²⁵⁹ Masson, Bailey-Harris and Probert, *Cretney's Principles of Family Law*, 135.

property in relation to ownership and not mere occupation or use.²⁶⁰ There must be an understanding of some sort with regards to a “shared beneficial interest” in the property.²⁶¹ An intention, therefore, that each spouse conceives in his or her own mind without communicating it to the other spouse will not amount to a “common intention”.²⁶² This “common intention” may be expressed, inferred or imputed by the court.²⁶³

3.4.2.2.1 Establishing a Common Intention

3.4.2.2.1.1 Express Intention

With regards to the first limb of establishing an interest in the property, where it is proved by evidence that there exists an expressed oral agreement between the spouses which recognises their beneficial entitlement to the property,²⁶⁴ the court would readily give effect to their common intention and proceed to determine the interest of each spouse.²⁶⁵ Where, however, no express oral agreement exists between the spouses, the court will be faced with the responsibility of inferring or imputing a common intention from the spouses’ conduct in relation to the property.²⁶⁶

3.4.2.2.1.2 Inferring Intention

3.4.2.2.1.2.1 In Joint Ownership Cases

In cases where the legal title to a property is in the joint names of both spouses, the court will infer that it is the common intention of the spouses to share the beneficial

²⁶⁰ See *James v Thomas* [2007] EWCA Civ 1212 (CA) as cited by Masson, Bailey-Harris and Probert, *Cretney’s Principles of Family Law*, 136.

²⁶¹ *Lloyd’s Bank Plc. v Rosset* [1991] AC 107 (HL) at 132.

²⁶² See *Evans v Hayward* [1995] 2 FLR 511 (CA); Masson, Bailey-Harris and Probert, *Cretney’s Principles of Family Law*, 136.

²⁶³ It is noted that, before the decisions in *Stack v Dowden* [2007] WL 1157953 (HL), *Abbott v Abbott* [2007] WL 2126565 (PCA), common intention could be established only on the basis of a common agreement between the parties which can either be expressed or inferred from the conduct of the parties and the surrounding circumstances in relation to the property. See *Gissing v Gissing* [1971] AC 886 (HL); *Lloyd’s Bank Plc. v Rosset* [1991] AC 107 (HL); Lowe and Douglas, *Bromley’s Family Law*, 29. Imputation as a third basis of establishing common intention was introduced in *Stack v Dowden* [2007] WL 1157953 (HL), *Abbott v Abbott* [2007] WL 2126565 (PCA). See Baroness Hale’s dictum in the two cases. It has been argued that the introduction of “imputation” in establishing common intention is in contrast to the decision of the House of Lords in *Gissing v Gissing* where it was rejected. It should also be noted that the House of Lords in *Stack v Dowden* [2007] WL 1157953 (HL) did not expressly overrule *Gissing v Gissing* [1971] AC 886 (HL). See Smithdale, 2011 *Cambridge Student Law Review*, 74 at 80.

²⁶⁴ *Lloyd’s Bank Plc. v Rosset* [1991] AC 107 (HL) at 132.

²⁶⁵ *Grant v Edwards* [1986] Ch 638 (CA) at 647. See Pawlowski, 2015 *Trust Law International*, 3.

²⁶⁶ Masson, Bailey-Harris and Probert, *Cretney’s Principles of Family Law*, 138.

interest in the property unless the contrary is proved. For instance, in *Carlton v Goodman*²⁶⁷ where the parties were joint legal owners, but only one party had made contributions to the purchase of the property, the court held that the common intention which existed between the parties was for the beneficial interest in the property to be vested in only one of the legal owners.

3.4.2.2.1.2.2 In Single Ownership Cases

In single ownership cases, the onus will rest on the non-legal owner to prove that there was a common intention between the spouses that the property was to be shared²⁶⁸ and that he or she relied upon the common intention to his or her detriment.²⁶⁹ It is noted that mere common intention to share will not ground a claim under constructive trust.²⁷⁰

It has been suggested that a spouse's direct contribution to the purchase price of a disputed property,²⁷¹ a cash contribution to the total purchase price or initial deposit, or a contribution to the mortgage instalments will lead to the inference of a common intention between the spouses to have a proprietary interest in the property.²⁷²

The court can also draw an inference of common intention where a spouse contributes indirectly to the acquisition of the property.²⁷³ For instance, where there is an understanding between the spouses that the wife takes care of all household expenditures in order to enable the husband to pay for the initial deposit and mortgage instalments of the property,²⁷⁴ the court will readily draw an inference of common intention from the spouses' arrangement on the basis that the indirect

²⁶⁷ [2002] EWCA Civ 545 (CA).

²⁶⁸ Pawlowski, 2015 *Trust Law International*, 3.

²⁶⁹ Masson, Bailey-Harris and Probert, *Cretney's Principles of Family Law*, 135.

²⁷⁰ Smithdale, 2011 *Cambridge Student Law Review*, 74 at 83.

²⁷¹ *Lloyds Bank Plc v Rosset* [1991] AC 107 (HL) at 133.

²⁷² *Gissing v Gissing* [1971] AC 886 (HL) at 893. The House of Lords stated that where the legal title is in the husband's name but the wife contributes to the deposit and further makes an indirect contribution or substantial contributions to the running of the home which enabled the husband to pay the mortgage installments, she will be entitled to a beneficial interest in the property.

²⁷³ *Le Foe v Le Foe* [2001] 2 FLR 97 (Fam).

²⁷⁴ *Le Foe v Le Foe* [2001] 2 FLR 97 (Fam). It is submitted that had Mrs Gissing established by evidence that it was through her efforts or earnings that the husband was able to raise the initial loan or mortgage or that her domestic expenditures enabled the husband to meet the mortgage installment or repay the loan, a common intention would have been inferred by the court. See Lord Diplock's illustration in *Gissing v Gissing* [1970] AC 886 (HL) at 910 - 911 as to when a court is entitled to infer a common intention.

financial contribution of the wife was referable to the purchase price.²⁷⁵

Where the wife's indirect financial contribution to the mortgage enables the family economy to function, the court will infer that the spouses intend that the property will be shared.²⁷⁶ Buttressing this point, Masson, Bailey-Harris and Probert²⁷⁷ state:

“An indirect financial contribution would be referable to the purchase price where the legal owner could not have afforded to pay the mortgage instalments had it not been for the claimant's payment of other household expenses.”

It is submitted that Baroness Hale's dictum, in *Abbott v Abbott*,²⁷⁸ to the effect that, in establishing a common intention constructive trust, the parties' whole course of conduct must be taken cognisance of,²⁷⁹ should be relied upon by a claimant who did not make a financial contribution to the purchase of the property in dispute to establish a shared intention. As the law stands at present, this is possible only where a claimant has made improvements on the property which contributed significantly to its value.²⁸⁰ Such money spent on improving the property will necessarily create a beneficial interest in the property. It is the court's duty to find evidence from which it can draw the inference that there was a common intention between the parties for the claimant to have a beneficial interest in the property.²⁸¹ Lord Reid in *Pettitt v*

²⁷⁵ Lord Bridge in *Lloyds Bank Plc v Rosset* [1991] AC 107 (HL) at 133 had earlier stated that “...direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust.” According to him, “...it is at least extremely doubtful whether anything less will do.” In the light of the court's decision in *Abbott v Abbott* [2007] WL 2126565 (PCA) paras 5 - 6 which followed *Stack v Dowden* [2007] WL 1157953 (HL) para 26, however, “... the law has moved on...” since the decision in *Lloyds Bank Plc v Rosset*. At present, the parties' entire conduct with regard to the property must be considered in determination of their common intentions as to the ownership of the property. Compare this with *Gissing v Gissing* [1970] AC 886 (HL) at 892, where it was held: “If a wife wishes to rely on the ancient presumption that where a contribution is made to the cost of purchase of a house the contributor thereby has an interest she must show that there was a contribution and not that by reason of her conduct another person indirectly was enabled to make a contribution. Thus, the wife cannot rely on the mere fact that she bought, and paid the expenses of running, the family car thereby enabling her husband the more easily to pay for the matrimonial home as a circumstance entitling her to a share in the house. She must show that there was a common intention for her and her husband to pool their expenses in paying for the house.” It is submitted that the onus is on the claimant who relies on a common intention constructive trust to prove that there was in fact a mutual agreement that she will have a beneficial interest in the property.

²⁷⁶ Lowe and Douglas, *Bromley's Family Law*, 162.

²⁷⁷ *Cretney's Principles of Family Law*, 140.

²⁷⁸ [2007] WL 2126565 (PCA).

²⁷⁹ *Abbott v Abbott* [2007] WL 2126565 (PCA) at para 6.

²⁸⁰ See *Stack v Dowden* [2007] WL 1157953 (HL).

²⁸¹ *Gissing v Gissing* [1970] AC 886 (HL) at 892.

Pettitt²⁸² summarised this position thus:

“... if the spouse who owns the property acquiesces in the other making the improvement in circumstances where it is reasonable to suppose that they would have agreed to some right being acquired if they had thought about the legal position I can see nothing contrary to ordinary legal principles in holding that the spouse who makes the improvement has acquired such a right.”

In the light of the reluctance of English law to introduce the civilian community of property system, the suggestion of Emiri and Giwa²⁸³ for a complete shift from the common intention constructive trust to proprietary estoppel is instructive, as, according to them, it would offer a better deal for women claimants. According to the authors, common intention constructive trust and proprietary estoppel share some strong similarities in terms of the requirements of an agreement or understanding which a claimant relies upon to his or her detriment.²⁸⁴ They noted:

“Though distinct in some respects²⁸⁵ the courts are exhibiting a willingness to assimilate both in a pragmatic manner. This is motivated by a desire to be more generous to women claimants, with a view of taking into account her domestic labour and child care...”²⁸⁶

3.4.2.2.1.3 Imputation of Common Intention

It is trite law that, where there is no evidence as to the spouses' intentions (that is, absence of evidence of actual agreement) on where the beneficial interest in the

²⁸² [1969] 2 All ER (HL) 385 at 390.

²⁸³ *Equity and Trusts in Nigeria*, 430.

²⁸⁴ Emiri and Giwa *Equity and Trusts in Nigeria*, 430.

²⁸⁵ According to Emiri and Giwa *Equity and Trusts in Nigeria*, 430, while there is little or no discretion where a constructive trust is established, estoppel operates by discretion. In estoppel, the court is occupied with the need to do justice to the claimant. The researcher is, however, of the view that this distinction is fast becoming blurred in the light of the decisions of the House of Lords in *Stack v Dowden* [2007] WL 1157953 (HL) and the United Kingdom Supreme Court in *Jones v Kernott* [2012] 1 AC 776 (SC(E)) where the court introduced the element of imputation in the establishment of “common intention”. For in these cases, the courts are now seen to be engaged in a search of what is fair flowing from the entire conduct of the parties and what reasonable men would in their position have intended. The court is presently seen as doing substantial justice especially in constructive trust cases involving the beneficial interests of couple in a matrimonial property. The suggestion of Emiri and Giwa about the preference of the equitable doctrine of proprietary estoppel will, however, achieve a more pragmatic result in the bid to do substantial justice. The second distinction as spelt out by Emiri and Giwa is better founded. According to these authors, Emiri and Giwa *Equity and Trusts in Nigeria*, 430, “... while the constructive trust requires common intention between the parties (in the context of matrimonial home sharing), which fictional requires the meeting of two minds, proprietary estoppel on the other hand is raised by unilateral conduct that creates property expectation.”

²⁸⁶ Emiri and Giwa, *Equity and Trusts in Nigeria*, 430.

property lies, the court can readily infer from the conduct of the spouses what their intentions were.²⁸⁷

Where, by the evidence of the spouses, it is clear that they never intended to own the matrimonial property jointly, however, could the court impute intentions to the spouses in the light of such evidence?²⁸⁸ It is argued that it would not be legitimate for the court to impute intentions where there is evidence to the contrary.²⁸⁹ Lord Bridge had earlier, in *Lloyds Bank Plc v Rosset*,²⁹⁰ stated:

“In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. *In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do.*”²⁹¹

It is submitted that the courts in *Stack v Dowden*²⁹² and *Abbot v Abbott*²⁹³ took a different position from the position of Lord Bridge for refusing to recognise that work (domestic and manual labour) might generate a beneficial interest in a family home. Lord Walker in *Stack v Dowden*²⁹⁴ stated:

“Whether or not Lord Bridge's observation was justified in 1990, *in my opinion the law has moved on, and your Lordships should move it a little more in the same direction*²⁹⁵, while bearing in mind that the Law Commission may soon come forward with proposals which, if enacted by Parliament, may recast the law in this area.”

It was Baroness Hale in *Stack v Dowden*²⁹⁶ who by her *dicta* introduced “imputation” when ascertaining “common intention”. Holding on the ascertainment of “common

²⁸⁷ See *Lloyds Bank Plc v Rosset* [1991] 1 AC 107 (HL).

²⁸⁸ Masson, Bailey-Harris and Probert, *Cretney's Principles of Family Law*, 141.

²⁸⁹ Masson, Bailey-Harris and Probert, *Cretney's Principles of Family Law*, 141.

²⁹⁰ [1991] 1 AC 107 (HL) at 132 – 133.

²⁹¹ Words in italics are my emphasis.

²⁹² [2007] WL 1157953 (HL).

²⁹³ [2007] WL 2126565 (PCA).

²⁹⁴ [2007] WL 1157953 (HL) at para 26.

²⁹⁵ Italics are my emphasis.

²⁹⁶ [2007] WL 1157953 (HL).

intention”, her Ladyship remarked: “The search is to ascertain the parties’ shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.”²⁹⁷

It has, however, been argued that the approach adopted by Baroness Hale in introducing the element of “imputation” to “common intention” when establishing the existence of an intention for a beneficial share in a constructive trust model would have been misconceived.²⁹⁸ It has been argued that without overruling the House of Lords’ decision in *Gissing v Gissing*,²⁹⁹ which had earlier rejected “imputation” in the establishment of the existence of a “common intention” for a beneficial share, the subsequent introduction of “imputation” by Baroness Hale cannot be justifiably founded.³⁰⁰

According to Lord Neuberger (dissenting) in *Stack v Dowden*:³⁰¹ “To impute an intention would not only be wrong in principle ... but would also involve a judge in an exercise which was difficult, subjective and uncertain.”³⁰² It is pertinent to state that Lord Neuberger was reflecting on the quantification of beneficial interest when he rejected imputation.³⁰³ To Smithdale, imputation of common intention may lead to inequitable results and cause a potential loss to a legal owner.³⁰⁴

3.4.2.2.1.4 The Requirement of Detrimental Reliance

The foregoing brings us to the issue of detrimental reliance. In order to give rise to a constructive trust, a spouse who claims a beneficial interest in the property to which the other spouse has legal title is required to prove by evidence that she acted to her detriment or relied on an agreement which has significantly altered her position.³⁰⁵ In

²⁹⁷ *Stack v Dowden* [2007] WL 1157953 (HL) at para 60.

²⁹⁸ Smithdale, 2011 *Cambridge Student Law Review*, 74 at 80 – 81.

²⁹⁹ [1971] AC 886 (HL) at 898, per Lord Morris.

³⁰⁰ Smithdale, 2011 *Cambridge Student Law Review*, 74 at 80.

³⁰¹ [2007] WL 1157953 (HL).

³⁰² *Stack v Dowden* [2007] WL 1157953 (HL) at para 127.

³⁰³ *Stack v Dowden* [2007] WL 1157953 (HL) at para 125.

³⁰⁴ Smithdale, 2011 *Cambridge Student Law Review*, 74 at 83.

³⁰⁵ Masson, Bailey-Harris and Probert, *Cretney’s Principles of Family Law*, 142. See also *Eves v Eves* [1975] 3 All ER 768, (CA); *Grant v Edwards* [1986] Ch 638 (CA); *Lloyds Bank Plc v Rosset* [1991] AC 107 (HL) and *Cox v Jones* [2004] EWHC 1486 (Ch). It is noted that a spouse can also rely on the doctrine of proprietary estoppel to prevent the other spouse who has legal title from asserting strict legal rights to the property. For a spouse to succeed, he or she must prove (1) that the other spouse has made him or her believe, by way of some assurances, promises or representation, that he or she would be given some proprietary interest in the property; and (2) that he or she has relied on the

*Grant v Edwards*³⁰⁶ it was stated that detrimental reliance must be based on "... conduct on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house."³⁰⁷

The court held that there was sufficient evidence of detrimental reliance in *Eves v Eves*³⁰⁸ where the woman embarked on renovating a dilapidated house which belonged to the partner based on the partner's assurance to her that the house would have been registered in their joint names but for the fact that the woman was under the age of 21. The court perceived the wife's manual work to have been out of the ordinary.

In *James v Thomas*,³⁰⁹ however, the court held that the wife's labour contribution (without any further contribution) to the improvement of the building did not constitute sufficient evidence of detrimental reliance on the basis that both the man and the woman were making their lives together as husband and wife.

It is noted that the establishment of detrimental reliance will depend on the facts of individual cases. It can, however, be readily proved where a spouse has made a direct or an indirect financial contribution to the acquisition of the disputed property³¹⁰ or embarked on significant improvements to the value of the property with the reasonable acquiescence of the other spouse.³¹¹

3.4.2.2 Quantification of Interest under a Common Intention

This is the second element of a common intention constructive trust. The court, having established that a spouse has a beneficial interest in the disputed property under a common intention constructive trust, will be faced with the task of determining the extent or quantum of interest which the spouse has in the property.³¹²

assurances, promises or representation to his or her detriment. See Masson Bailey-Harris and Probert, *Cretney's Principles of Family Law*, 149 – 153.

³⁰⁶ [1986] Ch 638 (CA).

³⁰⁷ *Grant v Edwards* [1986] Ch 638 (CA) at 648.

³⁰⁸ [1975] 3 All ER 768 (CA).

³⁰⁹ [2007] ECWA Civ 212 (CA).

³¹⁰ *Cox v Jones* [2004] EWHC 1486 (Ch).

³¹¹ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 390.

³¹² It is submitted that such interest is dependent on the nature of the established interest whether created under an express, resulting or constructive trust. In the case of an express trust, the court, in

It will be recalled that, in the case of a resulting trust, the share of the spouses is proportionate to their financial contribution to the purchase price.³¹³ Lord Neuberger in *Stack v Dowden*³¹⁴ preferred the application of resulting trust in cases where the only evidence available before the court was the unequal contribution of the parties.³¹⁵ He, however, expressed the view that, where, besides the contributions, there is relevant evidence during acquisition, “[s]uch evidence would often enable the court to deduce an agreement or understanding amounting to an intention as to the basis on which the beneficial interest would be held”.³¹⁶ In his dissenting view he said:

“Such an intention may be expressed... or inferred, and must normally be supported by some detriment, to justify intervention by equity. It would be in this way that the resulting trust would become rebutted and replaced, or (conceivably) supplemented by a constructive trust”.³¹⁷

The law as it stands at present in constructive trust cases is, however, as follows: Where the court has established a common intention for a beneficial share and there is no agreement between the spouses on the quantum of interest which the spouse without legal ownership will acquire, the court's task is to look at the whole course of dealing between the spouses in relation to the property and to determine a share which it considers fair.³¹⁸

It is submitted that the court looks at the entire conduct of the spouses with regard to the property in order to ascertain their “shared or common intentions”.³¹⁹ In the absence of an expressed or inferred common intention as to the spouses’ respective

deciding the quantum of interest which each spouse acquires, gives effect to the wording of the deed of conveyance. Where the legal title is vested on both spouses and the deed of conveyance contains an express declaration of trust that they hold the property as joint tenants in common, therefore, spouses will be entitled to equal shares if they sever the joint interest. Where the proportion of their beneficial interest is also expressed in the deed of conveyance, the court will give effect to it. See Lowe and Douglas, *Bromley's Family Law*, 164 – 165.

³¹³ Masson, Bailey-Harris and Probert, *Cretney's Principles of Family Law* 145; Lowe and Douglas, *Bromley's Family Law*, 165.

³¹⁴ [2007] WL 1157953 (HL) at para 123.

³¹⁵ It is noted that Lord Neuberger's analysis and rejection of the constructive trusts model in *Stack v Dowden* [2007] WL 1157953 (HL) is based on the fact that the parties were unmarried and that there was a significant difference of contribution to the property.

³¹⁶ *Stack v Dowden* [2007] WL 1157953 (HL) at para 124.

³¹⁷ *Stack v Dowden* [2007] WL 1157953 (HL) at para 124.

³¹⁸ *Oxley v Hiscock* [2004] EWCA Civ 546 (CA) at para 69; *Jones v Kernott* [2012] 1 AC 776 (SC(E)) at 794. See also Smithdale, 2011 *Cambridge Student Law Review*, 74 at 78 and Pawlowski, 2015 *Trust Law Journal*, 3 at 4.

³¹⁹ Their “shared intentions” may be expressed, inferred or imputed. See *Stack v Dowden* [2007] WL 1157953 (HL) at 60.

shares in the disputed property, the court will impute a common intention to determine a share that is fair and reasonable.³²⁰

It must be noted that, in recent times, there has been an overlap between resulting trust and constructive trust in the determination of the beneficial entitlement of spouses to property commonly referred to as the “family home” or “matrimonial home”. In such cases, the courts have preferred to adopt the common intention constructive trust. This attitude of the court has generated several arguments amongst scholars in this field.³²¹

Masson, Bailey-Harris and Probert³²² have argued that, where it is established that the only evidence of the spouses’ intention for a beneficial interest in property was their unequal contributions to the purchase price, presumed resulting trust should apply to determine the shares of the parties in accordance with their unequal contributions. If, however, there was other evidence as to their intention, then a common intention constructive trust should apply to quantify their interest in the property.³²³

Smithdale³²⁴ argues that constructive trust should be adopted by the court where there is an “actual common intention”, but he argues further that resulting trust remains preferable where there is no express or inferred common intention.

While it is not within the confines of this thesis to evaluate the arguments surrounding the applicability and the preference of the common intention constructive trusts to the presumed resulting trusts, it is not a matter of debate that the English courts would readily invoke the common intention constructive trust in cases involving disputes between spouses concerning the beneficial interests in the “family property”. In the absence of an expressed intention for a beneficial interest,

³²⁰ See *Oxley v Hiscock* [2004] EWCA Civ. 546 (CA) at para 66; *Stack v Dowden* [2007] WL 1157953 (HL) at 60; *Jones v Kernott* [2012] 1 AC 776 (SC(E)) at 794. See also Pawlowski, 2015 *Trust Law Journal*, 3 at 4.

³²¹ See Lee, 2008 *Law Quarterly Review*, 209 – 213; Smithdale, 2011 *Cambridge Student Law Review*, 74 – 88; Leow and Liao, 2014 *Cambridge Law Journal* 500 – 503; Gardner, 2015 *The Conveyancer and Property Lawyer*, 332 – 340; Pawlowski, 2015 *Trust Law Journal*, 3 – 15. For instance, Emiri and Giwa *Equity and Trusts in Nigeria*, 423 have argued that resulting and constructive trusts are distinct both on historical and conceptual grounds and in the context of joint ownership cases.

³²² *Cretney’s Principles of Family Law*, 146.

³²³ Masson, Bailey-Harris and Probert, *Cretney’s Principles of Family Law*, 146.

³²⁴ 2011 *Cambridge Student Law Review*, 74 at 83.

the court would either infer an intention from the spouses' actions and statements (the conduct of the spouses) with regard to the property or impute an intention by deducing what the spouses "... as reasonable people, would have thought at the relevant time ..." ³²⁵ having regard "... to their whole course of dealing in relation to the property." ³²⁶

In *Jones v Kernott*, ³²⁷ the United Kingdom Supreme Court summarised the applicable rules in joint and single name cases as follows.

3.4.2.2.2.1 Joint Name Cases

In the absence of the express declaration of their beneficial interest where the cohabiting couple has joint responsibility for the mortgage:

(1) Both parties will be presumed to be joint tenants in law and in equity as equity follows the law. ³²⁸

(2) The presumption of (1) above is rebuttable by establishing in evidence (a) that the parties' common intention was different when the matrimonial home was acquired, or (b) that parties at some later time after acquisition "formed the common intention that their respective share would change." ³²⁹

(3) Their common intention must be objectively determined from their words and conduct which must be made manifest and reasonably understood by the other party. ³³⁰

(4) Where the respective shares of the parties in cases where they did not intend joint tenancy at the point of acquisition cannot be determined by direct evidence or inference, or where their original intention had been changed, on the basis of fairness the court will quantify the parties' interest taking cognisance of their entire conduct with regard to the property. ³³¹

³²⁵ *Jones v Kernott* [2012] 1 AC 776 (SC(E)) at 789.

³²⁶ *Jones v Kernott* [2012] 1 AC 776 (SC(E)) at 789. See also *Stack v Dowden* [2007] WL 1157953 (HL) at 69; Pawlowski, 2015 *Trust Law Journal*, 3 at 4.

³²⁷ [2012] 1 AC 776 (SC(E)) at 794.

³²⁸ *Jones v Kernott* [2012] 1 AC 776 (SC(E)) at 794.

³²⁹ *Jones v Kernott* [2012] 1 AC 776 (SC(E)) at 794.

³³⁰ *Jones v Kernott* [2012] 1 AC 776 (SC(E)) at 794.

³³¹ *Jones v Kernott* [2012] 1 AC 776 (SC(E)) at 794.

(5) Besides financial contributions, the court is entitled to consider other factors which will enable it to reach a conclusion on the respective shares of the parties either as intended by them or as deemed to be fair. Every case must be treated on its own merits.³³²

3.4.2.2.2 Single Name Cases

(1) Firstly, the court determines the existence of any intention for the non-legal owner to be entitled to a beneficial interest in the property.³³³

(2) If (1) above is answered in the affirmative, the court will then determine the quantum of such interest.³³⁴

(3) A presumption of joint beneficial ownership does not exist.³³⁵

(4) The existence of any common intention to be entitled to a beneficial interest in the property must be determined objectively from the parties' conduct.³³⁶

(5) If the common intention does not show the parties' respective shares in the property, the court will adopt the principles in 3.4.2.2.1 (4) and (5) above.³³⁷

The Supreme Court conclusively observed that “[t]he assumptions as to human motivation, which led the courts to impute particular intentions by way of the resulting trust, are not appropriate to the ascertainment of beneficial interest in the family home.”³³⁸

Emiri and Giwa³³⁹ have expressed the opinion “... that trust law only plays a role in the resolution of matrimonial disputes when there is no other means for the resolution of the problem.” It is submitted, from the totality of the foregoing, that the application of the resulting and constructive trust models in the determination of interest in the property of parties upon the breakdown of their relationships continues

³³² *Jones v Kernott* [2012] 1 AC 776 (SC(E)) at 794.

³³³ *Jones v Kernott* [2012] 1 AC 776 (SC(E)) at 794.

³³⁴ *Jones v Kernott* [2012] 1 AC 776 SC(E) at 794.

³³⁵ *Jones v Kernott* [2012] 1 AC 776 SC(E) at 794.

³³⁶ *Jones v Kernott* [2012] 1 AC 776 SC(E) at 794.

³³⁷ *Jones v Kernott* [2012] 1 AC 776 SC(E) at 794.

³³⁸ *Jones v Kernott* [2012] 1 AC 776 SC(E) at 779, Lord Walker of Gestingthorpe and Baroness Hale of Richmond JJSC. While this observation is very instructive, it is argued that, in respect of a married couple, where the property is a family home or matrimonial property, there should be a presumption of joint beneficial ownership even in single name cases.

³³⁹ *Equity and Trusts in Nigeria*, 424.

to gain much relevance in non-marital relationships as the English Parliament is yet to vest the courts in this sense with the discretion to redistribute such property.³⁴⁰ The same cannot, however, be said about the property rights of spouses upon the breakdown of marriage. In England, the Matrimonial Causes Act Cap 18 of 1973 confers on the English courts an extensive discretion (comprehensive power) to adjust spouses' property rights upon the breakdown of their marriage.³⁴¹ This will constitute the focal point of discussion in the next section of this chapter.

3.5 PROPERTY RIGHTS OF SPOUSES UNDER THE MATRIMONIAL CAUSES ACT CAP 18 OF 1973

The focus of English law at present is on “financial readjustment” of the spouses upon the breakdown of marriage. It is noted that sections 23 and 24 of the Matrimonial Causes Act Cap 18 of 1973 protect the disadvantaged spouse (most often the wife) upon marriage breakdown from any undue financial hardship which she may suffer. Upon divorce, decree of nullity of marriage or judicial separation, the English court is vested with jurisdiction to deal with all the “... economically viable assets of the two spouses...”³⁴² Of particular importance is section 25 of the Matrimonial Causes Act Cap 18 of 1973 which spells out the statutory guidelines for the exercise of the court's wide discretion. These sections will be discussed in their successive arrangement under the statute.

3.5.1 Financial Provision Orders

By section 23 of the Matrimonial Causes Act Cap 18 of 1973, the court is vested with the power to make financial provision orders for a spouse³⁴³ for the purpose of adjusting the financial status of the spouses and any children of the family upon the breakdown of marriage.³⁴⁴ A financial provision order for periodical or lump sum payment can be made upon the breakdown of marriage “... or at any time thereafter

³⁴⁰ See the views expressed by Lord Wilson JSC in *Jones v Kernott* [2012] 1 AC 776 (SC(E)) at 800.

³⁴¹ It should, however, be noted that the issue of ownership or beneficial interest in property between spouses has not been extinguished by the provisions of the Matrimonial Causes Act Cap 18 of 1973. A spouse who does not want to claim (or who has been precluded from claiming) any ancillary relief upon marriage breakdown may, therefore, commence a civil suit for the determination of her property right in respect of a disputed property. Lowe and Douglas, *Bromley's Family Law*, 131 – 132.

³⁴² Masson, Bailey-Harris and Probert, *Cretney's Principles of Family Law*, 340.

³⁴³ These are orders for periodic or lump sum provisions as stipulated by s 21(1) of Matrimonial Causes Act Cap 18 of 1973.

³⁴⁴ See s 23 (1)(a) – (f) of the Matrimonial Causes Act Cap 18 of 1973.

(whether, in the case of decree of divorce or nullity of marriage, before or after the decree is made absolute) ...”³⁴⁵

Section 23(1)(a) – (c) enables the court to make an order that a spouse shall make to the other spouse: periodical payments; or secure such periodic payment; or pay a lump sum or sums to the other spouse for such term as may be so specified. It is noted that the court can make an order for a lump sum payment for the purpose of enabling the recipient “... to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making an application for an order ...”³⁴⁶ under section 23 of the Act.

3.5.2 Property Adjustment Orders

Section 24 of the Matrimonial Causes Act Cap 18 of 1973 empowers the court to make property adjustment orders with regard to the property rights of the spouses in order to adjust their financial position. The court’s power under this section is comprehensive.³⁴⁷

A property adjustment order includes: a transfer of property;³⁴⁸ a settlement of property;³⁴⁹ a variation of settlement made on the spouses;³⁵⁰ or an order which extinguishes or reduces an interest in a settlement.³⁵¹ Of much relevance to this thesis are the provisions of section 24(1)(a) and (b) of the Matrimonial Causes Act Cap 18 of 1973.

3.5.2.1 Transfer of Property

By section 24(1)(a) of the Matrimonial Causes Act Cap 18 of 1973, upon the breakdown of marriage or at any time thereafter (before or after a decree of divorce or a decree of nullity of marriage is made absolute) the court is empowered to make:

“... (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of

³⁴⁵ S 23(1) of the Matrimonial Causes Act Cap 18 of 1973.

³⁴⁶ S 23(3)(a) of the Matrimonial Causes Act Cap 18 of 1973.

³⁴⁷ Wilkinson & De Haas, *Property Distribution on Divorce*, 1.

³⁴⁸ S 24(1)(a) of the Matrimonial Causes Act Cap 18 of 1973.

³⁴⁹ S 24(1)(b) of the Matrimonial Causes Act Cap 18 of 1973.

³⁵⁰ S 24(1)(c) of the Matrimonial Causes Act Cap 18 of 1973. This includes a settlement made by a will or codicil.

³⁵¹ S 24(1)(d) of the Matrimonial Causes Act Cap 18 of 1973.

such a child *such property as may be so specified, being property to which the first mentioned party is entitled, either in possession or reversion.*³⁵²

It is noted that, by this provision, the English court can, while exercising its discretion in conformity with the statutory guidelines stated in section 25 of the Matrimonial Causes Act Cap 18 of 1973, order that a spouse transfers his or her property to the other spouse. The operative word in this subsection is “transfer” which simply means a relinquishment of title to another. It is submitted that the “transfer” as contemplated under section 24(1)(a) of the Matrimonial Causes Act Cap 18 of 1973 implies the assignment of the totality or otherwise of a spouse’s interest in his or her property to the other spouse. In other words, the court can “... order an absolute transfer of the whole of the party’s interest in the property specified or any part of it.”³⁵³

Accordingly, in Miller’s³⁵⁴ viewpoint, for a judge to make an effective final order under section 24(1)(a) of the Matrimonial Causes Act Cap 18 of 1973, he must ascertain the particular property in question and ensure that there is no dispute of ownership between the spouse (that is, the owner of such property) and a third party. The disputed right and interest of a third party must, thus, be settled first before the court can effectively make an order under section 24(1)(a) of the Matrimonial Causes Act Cap 18 of 1973.³⁵⁵

It is further submitted that the powers of the English courts to vary or discharge orders for financial relief do not affect the order for a transfer of property.³⁵⁶ Upon the remarriage or the death of a spouse who is a beneficiary of the court’s order under section 24(1)(a) of the Matrimonial Causes Act Cap 18 of 1973, therefore, the property does not revert to the spouse who initially transferred it *via* a court order.

The researcher is of the opinion that this is a clear point of divergence between Nigerian and English laws on the property rights of spouses upon the breakdown of

³⁵² Words in italics are my emphasis.

³⁵³ Lowe and Douglas, *Bromley’s Family Law*, 1005.

³⁵⁴ *Family Property and Financial Provision*, 195.

³⁵⁵ Miller, *Family Property and Financial Provision*, 195.

³⁵⁶ By s 31 of the Matrimonial Causes Act Cap 18 of 1973, the English court has the power to vary, discharge suspend or revive certain orders for financial relief. It is submitted that s 31 of the Matrimonial Causes Act cap 18 of 1973 applies only to ss 23; 24(1)(b) – (d); 24A(1) which empowers the court to order the sale of a property; and pension sharing orders under s 24B of the Matrimonial Causes Act Cap 18 of 1973.

marriage.³⁵⁷ Simply put, Nigerian law, particularly section 72 of the Matrimonial Causes Act No 18 of 1970,³⁵⁸ does not contain a similar provision.³⁵⁹ Nigerian courts are not empowered by statute to transfer the property of a spouse (by way of a redistribution order) to another spouse.³⁶⁰ While section 24(1)(a) of the Matrimonial Causes Act Cap 18 of 1973 makes provision for the unconditional transfer of property between spouses, sections 72(1) and 73 of the Matrimonial Causes Act No 18 of 1970³⁶¹ (of Nigeria) provides only for a conditional settlement of property from one spouse to the other.³⁶²

3.5.2.2 Settlement of Property

By section 24(1)(b), the court can make:

“... an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them.”

The power to order settlement of property is mostly employed by the court in respect of the matrimonial home in order to provide a secured shelter for the spouse who in most cases has custody of the children.³⁶³ While this order subsists, the investment interest of either or both spouses is preserved.³⁶⁴ The court has a wide discretion either to divest a spouse of his or her entire interest in his or her property for the benefit of the other spouse and/or their children or grant a limited interest to a spouse or his or her children while leaving the beneficial owner with the reversion.³⁶⁵

Again, it is observed that the power to make a property settlement order is rarely exercised by Nigerian courts despite the clear provision of section 72(1) of the Matrimonial Causes Act No 18 of 1970³⁶⁶ which vests a Nigerian court with a similar power as contained in section 24(1)(b) of the Matrimonial Causes Act Cap 18 of

³⁵⁷ See 2.6 above.

³⁵⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

³⁵⁹ See 2.6 above at 52 – 53.

³⁶⁰ See 2.6 above at 52 – 53.

³⁶¹ Cap M7 Laws of the Federation of Nigeria, 2004.

³⁶² See s 73(1)(j) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

³⁶³ Masson, Bailey-Harris and Probert, *Cretney's Principles of Family Law*, 345.

³⁶⁴ Masson, Bailey-Harris and Probert, *Cretney's Principles of Family Law*, 345.

³⁶⁵ See Lowe and Douglas, *Bromley's Family Law*, 1005.

³⁶⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

1973.³⁶⁷

3.5.2.3 Variation; Extinction or Reduction of Marriage Settlement

In accordance with section 24(1)(c) of the Matrimonial Causes Act Cap 18 of 1973, the court can make "... an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement ... made on the parties to the marriage ..."³⁶⁸ The power to vary settlements includes any settlement made by will or codicil but excludes a settlement in the nature of a pension arrangement.³⁶⁹

The court is also empowered, by section 24(1)(d) of the Matrimonial Causes Act Cap 18 of 1973, to extinguish or reduce the interest of either spouses in any marriage settlement other than a settlement in the nature of a pension arrangement.

For the court to make an order under section 24(1)(c) and (d) of the Matrimonial Causes Act Cap 18 of 1973, there must be a "settlement"³⁷⁰ and the settlement must have been made in expectation of marriage or because of marriage³⁷¹ with particular reference to the interest of the spouses or their children.³⁷² According to Hill J in *Prinsep v Prinsep*,³⁷³ such settlement must be conferred on:

"... the husband in the character of husband or in the wife in the character of the wife, or upon both in the character of husband and wife ... The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both spouses as spouses and with reference to their marriage state."

It is pointed out that the orders made pursuant to sections 23 and 24(1)(b) - (d) of the Matrimonial Causes Act Cap 18 of 1973 are for the purpose of protecting the disadvantaged spouse from any undue hardship during the time that he or she gets

³⁶⁷ See 1.8; 2.6 above.

³⁶⁸ S 24(1)(c) of the Matrimonial Causes Act Cap 18 of 1973.

³⁶⁹ S 24(1)(c) of the Matrimonial Causes Act Cap 18 of 1973.

³⁷⁰ "Settlement" in this sense would consist of a variety of documents by which provision is made for one or both spouses. Miller, *Family Property and Financial Provisions*, 195.

³⁷¹ The benefit must be conferred on either of or both spouses in the character of spouse or spouses. See Lowe and Douglas, *Bromley's Family Law*, 1006. See also, Masson, Bailey-Harris and Probert, *Cretney's Principles of Family Law*, 346.

³⁷² Miller, *Family Property and Financial Provisions*, 194 – 196.

³⁷³ [1929] P. 225 (Fam) at 232 as cited by Miller, *Family Property and Financial Provisions*, 195.

readjusted or remarries or until he or she dies.³⁷⁴

3.5.3 Guiding Principles for Financial Provisions Orders and Property Adjustments Orders

Section 25 of the Matrimonial Causes Act Cap 18 of 1973 makes provision for matters of which the court should take cognisance in the exercise of its powers to make financial provisions and property adjustments upon the breakdown of marriage. These principles will be given a succinct consideration hereunder.

3.5.3.1 The Child's Welfare as First Consideration

Section 25(1) of the Matrimonial Causes Act Cap 18 of 1973 provides that a child's welfare shall be given the first consideration in the exercise of the court's powers and in the manner in which such power will be exercised with regard to all the circumstances of the case.

3.5.3.2 The Clean Break Principle (Spouse's becoming Self-sufficient)

The court is also charged with the responsibility of determining the manner in which the orders will be made taking cognisance of the circumstances of each case.³⁷⁵ In some cases, rather than make an order for a periodic payment to a spouse, the court could exercise its discretion to make a clean break order.³⁷⁶ The rationale behind this order is to avoid "... ongoing dependency following divorce ..."³⁷⁷ It "... enables the parties to achieve financial independence after divorce, rather than to impose continuing liability..."³⁷⁸ on them. In the bid to achieve a clean break, however, the court should exercise caution not to deny a claim for financial provision which can be satisfied only through periodic payments.³⁷⁹

A clean break order will be possible in a short childless marriage as in the case of

³⁷⁴ See s 28(1) and (2) of the Matrimonial Causes Act Cap 18 of 1973 which provide that such payments made pursuant to s 23 of the Matrimonial Causes Act Cap 18 of 1973 cease upon the death or remarriage of a recipient spouse. By s 23 of the Matrimonial Causes Act Cap 18 of 1973, a spouse who has remarried after the grant of a decree dissolving his or her marriage is stopped from applying to court for a financial provision order or for a property adjustment order against the other spouse.

³⁷⁵ 25(1) of the Matrimonial Causes Act Cap 18 of 1973.

³⁷⁶ See *White v White* [2001] 1 AC 596 (HL) at 604, *McFarlane v McFarlane*; *Miller v Miller* [2006] 2 AC 618 (HL).

³⁷⁷ Bainham, 2006 *Cambridge Law Journal*, 511 at 514.

³⁷⁸ Lowe and Douglas, *Bromley's Family Law*, 1028.

³⁷⁹ Ellman, 2007 *Law Quarterly Review*, 2 at 8.

Miller v Miller in *McFarlane v McFarlane*; *Miller v Miller*³⁸⁰ which lasted for two years and nine months or in a longer marriage where there are sufficient capital assets to take care of the possible future needs of the spouses³⁸¹ as demonstrated in *White v White*³⁸² and *McFarlane v McFarlane* in *McFarlane v McFarlane*; *Miller v Miller*.³⁸³ In the latter case, the court made a deferred clean break order by removing the “joint lives” order agreed by the spouses “... on the basis that it gave insufficient weight to the clean break principle, and replaced it with an extendable five-year term order.”³⁸⁴ It will also be possible amongst other situations where it would be unjust to impose a continuing obligation on a spouse³⁸⁵ or where a spouse has constantly refused and failed to make financial provisions for his or her family.³⁸⁶

3.5.3.3 Other Matters to be considered

Besides taking into consideration all the circumstances of each case when making a financial provision or property adjustment order,³⁸⁷ the court is, in particular, mandated to consider the matters listed in section 25(2) of the Matrimonial Causes Act Cap 18 of 1973. It provides:

“As regards the exercise of the powers of the court...above in relation to a party to the marriage, the court shall in particular have regard to the following matters—

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;**
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;**
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;**
- (d) the age of each party to the marriage and the duration of the marriage;**
- (e) any physical or mental disability of either of the parties to the marriage;**
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the**

³⁸⁰ [2006] 2 AC 618 (HL).

³⁸¹ Bainham, 2006 *Cambridge Law Journal*, 511 at 511.

³⁸² [2001] 1 AC 596 (HL) at 602. In this case an immediate clean break order was made by the court.

³⁸³ [2006] 2 AC 618 (HL).

³⁸⁴ Bainham, 2006 *Cambridge Law Journal*, 511 at 512.

³⁸⁵ *Seaton v Seaton* [1986] 2 FLR 398 (CA).

³⁸⁶ See Wilkinson and De Hass, *Property Distribution on Divorce*, 73 – 74.

³⁸⁷ S 25(1) of the Matrimonial Causes Act Cap 18 of 1973.

welfare of the family, including any contribution by looking after the home or caring for the family;
(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit ... which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.”

The courts³⁸⁸ have repeatedly stressed that the above-listed matters do not create a hierarchy, and the weight to be given to each of them would be contingent on the proper exercise of its discretion and the peculiar facts of each case.³⁸⁹ With the factors stated above, the court is properly guided in arriving at a fair (equitable) result when making financial provisions and property adjustment orders. Taking cognisance of the needs of the spouses, the need to provide compensation for any loss occasioned by the marriage and the “fairness” at least to share from the “marital pot”, therefore, the court will make a just award as it thinks fit.³⁹⁰

Section 25(2)(f) of the Matrimonial Causes Act Cap 18 of 1973 is of importance in this study. It is submitted that the above provision enables the court to give recognition to the spouses’ financial and non-financial contribution to the family’s welfare.³⁹¹ By this provision, a wife’s contribution as a homemaker, wife and mother is given equal consideration as a husband’s financial contribution.³⁹²

It was clarified by Baroness Hale in *Miller v Miller, McFarlane v McFarlane*³⁹³ that the term “contribution” as used in section 25(2)(f) of the Matrimonial Causes Act Cap 18 of 1973 does not imply financial contributions “... to the parties’ accumulated wealth, but to contributions to the welfare of the family ...”³⁹⁴ and, in that regard, spouses should be seen as contributing to the best of their abilities.³⁹⁵

³⁸⁸ See *Piglowska v Piglowska* [1999] 1 WLR 1360 (HL); *White v White* [2001] 1 AC 596 (HL).

³⁸⁹ *White v White* [2001] 1 AC 596 (HL) at 603 – 604. See also Masson, Bailey-Harris and Probert, *Cretney’s Principles of Family Law*, 374, Lowe and Douglas, *Bromley’s Family Law*, 1030.

³⁹⁰ Lowe and Douglas, *Bromley’s Family Law*, 1030.

³⁹¹ Lowe and Douglas, *Bromley’s Family Law*, 1044; Resetar, 2008 *Electronic Journal of Comparative Law*, 1 at 3.

³⁹² *White v White* [2001] 1 AC 596 (HL) at 605 – 606. See also Lowe and Douglas, *Bromley’s Family Law*, 1030.

³⁹³ [2006] 2 AC 618 (HL).

³⁹⁴ *Miller v Miller, McFarlane v McFarlane* [2006] 2 AC 618 (HL) at 662 – 663.

³⁹⁵ Eilman, 2007 *Law Quarterly Review*, 2 at 3.

In *Miller v Miller; McFarlane v McFarlane*,³⁹⁶ the House of Lords unanimously agreed that spouse's conduct as expressed in section 25(2)(g) of the Matrimonial Causes Act of 1973 and an assessment of the contribution of spouses should not affect their financial claims save in exceptional cases.

Under English law, in the determination of the property rights of spouses on marriage breakdown, there is a benchmark of equal division which can be departed from only if there is a good reason for doing so.³⁹⁷ Equal value is, thus, placed on the contribution of a breadwinner and that of the homemaker.

Finally, it must be noted that Nigerian courts do not wield a similar power as conferred on the English court by section 25 of the Matrimonial Causes Act Cap 18 of 1973. While what exists in England is the separation of property with judicial adjudication (discretion) to deal with "all the economically viable assets"³⁹⁸ of the two spouses upon the breakdown of marriage, in Nigeria there is complete separation of property without judicial discretion to redistribute the property of spouses.³⁹⁹ Strict property law applies.⁴⁰⁰

3.6 Other Orders

Besides making financial provision orders and property adjustment orders, the English court may make an order, or other suitable orders as the justice of each case demands. These orders include, amongst others: orders for the sale of property; pension sharing and compensation orders; and consent orders. These respective orders will be discussed succinctly.

3.6.1 Orders for Sale of Property

The order for the sale of property is a consequential or an ancillary order of a court.⁴⁰¹ The court can make this order as a further order only after it has made "... a secured periodical payments order, an order for the payment of a lump sum or a

³⁹⁶ [2006] 2 AC 618 at 619 (HL).

³⁹⁷ *White v White* [2001] 1 AC 596 (HL) at 606; Lowe and Douglas, *Bromley's Family Law*, 1082.

³⁹⁸ Masson, Bailey-Harris and Probert, *Cretney's Principles of Family Law*, 340.

³⁹⁹ See 2.7.2; 2.9 above.

⁴⁰⁰ See 2.7.2; 2.9 above.

⁴⁰¹ Lowe and Douglas, *Bromley's Family Law*, 1009.

property adjustment order ...”⁴⁰² The order is made:

“... for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest, either in possession or in reversion.”⁴⁰³

It is noted that the order for the sale of property does “... not take effect unless the decree has been made absolute.”⁴⁰⁴ The court also has the power to suspend the order made “... until the occurrence of an event specified by the court or the expiration of a period so specified.”⁴⁰⁵ Where the proceeds of the sale of property are used to secure periodic payments to a spouse, then, upon the death or re-marriage of that spouse, the order shall cease to have effect.⁴⁰⁶ In addition, in cases where a third party makes a claim for a beneficial interest in a property or in the proceeds of sale of the property in question, the court is mandated to allow the third party to put up representations concerning the order for sale, and such “... representations ... shall be included among the circumstances to which the court is required to have regard under section 25(1) ...”⁴⁰⁷ of the Matrimonial Causes Act Cap 18 of 1973.

3.6.2 Pension Sharing Orders and Pension Compensation Sharing Orders

A pension sharing order is a court order which specifies the percentage of a spouse’s pension to be transferred to the other spouse. On the other hand, the pension compensation sharing order is a court order which states that any compensation arising from the Pension Protection Fund must be shared between the spouses.⁴⁰⁸

Sections 24B and 24E of the Matrimonial Causes Act Cap 18 of 1973 empower the English courts to make pension sharing orders and pension compensation sharing orders respectively upon the grant of a decree of divorce or a decree of nullity of marriage or at any time before such decree is made absolute. Such orders take

⁴⁰² S 24A(1) of the Matrimonial Causes Act Cap 18 of 1973; Lowe and Douglas, *Bromley’s Family Law*, 1007.

⁴⁰³ S 24A(1) of the Matrimonial Causes Act Cap 18 of 1973.

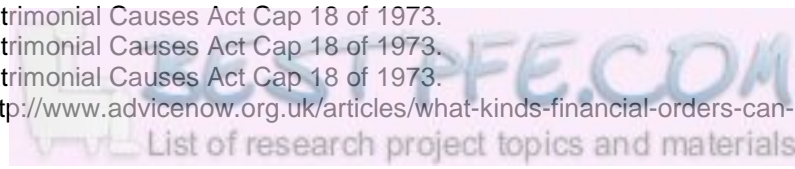
⁴⁰⁴ S 24A(3) of the Matrimonial Causes Act Cap 18 of 1973.

⁴⁰⁵ S 24A(4) of the Matrimonial Causes Act Cap 18 of 1973.

⁴⁰⁶ S 24A(5) of the Matrimonial Causes Act Cap 18 of 1973.

⁴⁰⁷ S 24A(6) of the Matrimonial Causes Act Cap 18 of 1973.

⁴⁰⁸ See Advicenow, <http://www.advicenow.org.uk/articles/what-kinds-financial-orders-can-court-make>.



effect only after the decree is made absolute.⁴⁰⁹

3.6.3 Consent Orders

Consent orders particularly take the form of negotiated settlements between spouses either before the marriage, during the marriage or at the time of divorce. Under this subsection, the researcher will discuss settlement agreements/separation agreements reached at the time of divorce, on the one hand, and premarital and postmarital agreements (which will be conveniently referred to as “marital property agreements/nuptial agreements”) reached before marriage and during the subsistence of marriage, on the other hand. In countries with the community of property regime, the latter types of agreements are referred to as antenuptial/prenuptial contracts and postnuptial contracts.

3.6.3.1 Settlement Agreements / Separation Agreements

Parties may reach an agreement concerning the financial provision orders and the property adjustment orders which they petition the court to make. Although such negotiated settlements are not automatic, as the court is still charged with the responsibility of scrutinising their contents to ensure that they do not offend public policy and meet the best interest of the children of the marriage,⁴¹⁰ spouses are, in recent years, encouraged to conclude such agreements.⁴¹¹

It has been argued that settlement agreements at the time of divorce would not only reduce the animosity and malignity⁴¹² which are often associated with divorce proceedings between spouses, but would also save financial resources which a full-length litigation would have milked away from spouses' pockets.⁴¹³

It is submitted that mutual adjustment of positions is a key to a successful settlement

⁴⁰⁹ S 24B(2) and 24E(2) of the Matrimonial Causes Act Cap 18 of 1973. For circumstances when the court may not make pension sharing orders or pension compensation sharing orders, see s 24B(3)-(5) and s 24E(3)-(10) of the Matrimonial Causes Act Cap 18 of 1973 respectively.

⁴¹⁰ See Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 582.

⁴¹¹ Lowe and Douglas, *Bromley's Family Law*, 1008.

⁴¹² According to Lord Scarman in *Minton v Minton* [1979] AC 593 (HL) at 608: “The law now encourages spouses to avoid bitterness after family breakdown and to settle their money and property problems.”

⁴¹³ Lowe and Douglas, *Bromley's Family Law*, 1008 citing *F v F* [1995] 2 FLR 45 (Fam) where the total costs of litigation for both spouses was about £1.5 million.

agreement.⁴¹⁴ The “... process of give-and-take and making concessions is necessary if a settlement is to be reached.”⁴¹⁵ When spouses reach a settlement, they have the terms and conditions of their agreement recorded in written form and are desirous that the agreement be made an order of court. The court, nonetheless, before making the consent order must first direct its attention to the considerations listed in section 25 of the Matrimonial Causes Act Cap 18 of 1973⁴¹⁶ and be satisfied that the consent order will meet the needs of justice.⁴¹⁷

It is held that, if the spouses have retained the services of legal practitioners and have been advised accordingly before reaching the agreement, then it will “... be *prima facie* evidence that its terms are reasonable ... provided it is not contrary to public policy.”⁴¹⁸ The need for a thorough disclosure of material facts by both parties has been emphasised by the court when reaching a settlement agreement.⁴¹⁹ Where the lack of disclosure of a material fact is so important that it could lead “... the court to make a substantially different order from that which it would have made had there been full disclosure ...”,⁴²⁰ the consent order reached by way of a settlement agreement would be set aside.⁴²¹

On the weight to be attached to a settlement agreement, it has been held that, where spouses have concluded the settlement agreement with the full knowledge of the relevant facts and on the advice of their legal advisers, in the absence of duress and undue influence, the court would give a considerable weight to a settlement agreement and enforce it.⁴²² It would not speak well of a spouse who seeks to renege on a settlement agreement by arguing that the other spouse was in a superior bargaining position at the time of the agreement. The argument can be sustained only if it is shown that the financially stronger spouse took an unfair

⁴¹⁴ See Sklansky and Yeazell, 2005 *The Georgetown Law Journal*, 683 at 696; Spîrchez, 2012 *Perspectives of Business Law Journal*, 115 at 118; Finka, 2013 *European Scientific Journal*, 125 at 128.

⁴¹⁵ Maiese, *Beyondintractability.org*, 2. See also Depoorter, 2010 *Cornell Law Review*, 957 at 963 – 964.

⁴¹⁶ Lowe and Douglas, *Bromley's Family Law*, 1009.

⁴¹⁷ See 7.2.1.4 below.

⁴¹⁸ See *Dean v Dean* [1978] Fam 161; Lowe and Douglas, *Bromley's Family Law*, 1009; Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 582.

⁴¹⁹ *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 (HL).

⁴²⁰ *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 (HL) at 445.

⁴²¹ See also *Rose v Rose* [2003] EWHC 505 (Fam); Lowe and Douglas, *Bromley's Family Law*, 1009 – 1010.

⁴²² See *Edgar v Edgar* [1980] 3 All ER 887 (CA).

advantage by exploiting the position,⁴²³ or if the wife found it impossible to maintain herself as a result of unforeseen circumstances.⁴²⁴ On the authority of *Barder v Calouri*,⁴²⁵ therefore, "... financial provision in a properly evidenced consent order made at the time of divorce may still be varied..."⁴²⁶ at a later date.⁴²⁷

3.6.3.2 Marital Property Agreements / Nuptial Agreements

The question that should point our way forward is: What is the status of marital property agreements under English law? It is pertinent to state that a nuptial agreement is not statutorily provided for by any statute in England. Questions concerning the weight to be attached to it and its enforceability have been subjected to judicial interpretation and application.⁴²⁸

Nuptial agreements are not completely binding on English courts.⁴²⁹ They could be binding subject to some safeguards.⁴³⁰ Such agreements do not preclude a spouse from applying to court for financial provisions or property adjustment orders upon the breakdown of marriage and they cannot override the court's powers as conferred on it by sections 23 – 25 of the Matrimonial Causes Act Cap 18 of 1973.⁴³¹ Prior to the decision of the court in *Radmacher v Granatino*,⁴³² the English court considered nuptial agreements to be part of the factors to be taken into consideration under section 25 of the Matrimonial Causes Act Cap 18 of 1973 when determining the

⁴²³ *Edgar v Edgar* [1980] 3 All ER 887 (CA).

⁴²⁴ *Wright v Wright* [1970] 3 All ER 209 (CA) at 214. See generally, Lowe and Douglas, *Bromley's Family Law*, 1010 – 1012 on the weight attached by the court to a settlement agreement.

⁴²⁵ [1988] AC 20 (HL).

⁴²⁶ Sloan, 2015 *Cambridge Law Journal*, 218 at 221.

⁴²⁷ There is an important point of legal principle which has been raised by the case of *Vince v Wyatt* [2015] 1 WLR 1228 (SC). In that case, there was no application for a financial provision order at the time of divorce in 1992 as there was no documentation to that effect. Ms Wyatt was able to secure only nominal child maintenance but could not secure substantial maintenance for herself and the children as Mr Vince in the 1990s lived in penury. Upon a drastic change of fortune for Mr Vince, Ms Wyatt brought an application seeking a better home for herself and her family and a fund that could maintain her for life given her limited earning capacity. In an application to have her claim struck out, the Supreme Court held that, since it was likely that no financial order was sought or made at the time of divorce in 1992, Ms Wyatt was not precluded from making her application in 2011. According to Sloan, 2015 *Cambridge Law Journal*, 218 at 221, the case of *Vince v Wyatt* [2015] 1 WLR 1228 (SC) underscores "... the importance of reaching an agreement at the time of divorce and having it enshrined in a consent order, even if the couple do not have any significant assets and even if the order simply dismisses all claims forever."

⁴²⁸ Lang, 2014 *Private Client Business* 248 at 248.

⁴²⁹ Lang, 2014 *Private Client Business* 248 at 248.

⁴³⁰ See *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)); Lowe and Douglas, *Bromley's Family Law*, 1014.

⁴³¹ Lang, 2014 *Private Client Business* 248 at 248.

⁴³² [2011] 1 AC 534 (SC(E)).

appropriate order(s) to make upon the breakdown of marriage.⁴³³ It is submitted that, in line with the decision of the Supreme Court in *Radmacher v Granatino*⁴³⁴ and the cases thereafter, the English court would likely give substantial weight to a nuptial agreement which was fairly and appropriately concluded.⁴³⁵ The Supreme Court⁴³⁶ held:

“The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties’ agreement addresses existing circumstances and not merely the contingencies of an uncertain future.”

It is noted that the position taken by the Supreme Court in regard to nuptial agreements (whether entered into before or after marriage) has generated a heated debate among family law scholars. While some authors have argued in support of the introduction of nuptial agreements into the English jurisdiction with an emphasis on spouses’ autonomy and the need for them to be given the freedom to make their own choices as they relate to the financial and property consequences of their marriage,⁴³⁷ others have opposed this argument.

Those opposed are proponents of the court’s wide discretion as conferred on it by section 25 of the Matrimonial Causes Act Cap 18 of 1973.⁴³⁸ They argue that the introduction of nuptial agreements to the sphere of English law will not only promote “... gender discrimination and ... exploitation of the wife’s labour ...”⁴³⁹ but also place a restriction on the redistributive powers of the court to make financial provisions and property adjustment orders.⁴⁴⁰ These authors opposed the need to uphold prenuptial agreements as was done in *Radmacher v Granatino*.⁴⁴¹

⁴³³ Herring, Harris and George, 2011 *Law Quarterly Review*, 335.

⁴³⁴ [2011] 1 AC 534 (SC(E)).

⁴³⁵ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 565 – 566.

⁴³⁶ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 564.

⁴³⁷ Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 586 – 588; 591 – 592.

⁴³⁸ Herring, Harris and George, 2011 *Law Quarterly Review*, 335 – 339.

⁴³⁹ Herring, Harris and George, 2011 *Law Quarterly Review*, 335 at 338.

⁴⁴⁰ Herring, Harris and George, 2011 *Law Quarterly Review*, 335 at 339.

⁴⁴¹ [2011] 1 AC 534 (SC(E)). It should be noted that in this case the Supreme Court gave the prenuptial agreement a decisive weight notwithstanding the fact that the spouses completed the

For one to take a standpoint in this debate, it would be necessary to examine carefully the reasons underpinning the Supreme Court's decision in *Radmacher v Granatino*⁴⁴² on the one hand, and the rationale behind the development of ancillary relief under English law (through case law) on the other hand. The respective arguments from the divide must also be appraised. While this study proceeds with this analysis, the reader must bear in mind that marital property (nuptial) agreements are understood differently from English law in continental (civil) jurisdictions like Germany and France which are the countries of origin of the spouses in *Radmacher v Granatino*.⁴⁴³

In England such agreements were initially regarded as being contrary to public policy.⁴⁴⁴ The current practice of the English court is to uphold a nuptial agreement which is voluntarily concluded by spouses with a complete understanding of its implications⁴⁴⁵ except in situations where it will be unfair to hold them bound by the agreement.⁴⁴⁶

In *Z v Z*,⁴⁴⁷ the English court upheld a nuptial agreement which was concluded in France by French spouses domiciled in England. The spouses had moved to England during their marriage, and divorce proceedings were issued in England. Although the default property regime in France is community of goods, both spouses *via* the nuptial agreement elected a separation of goods. It was the evidence before court that both spouses, according to French law, voluntarily concluded the agreement, fully appreciated its implications and they were both aware of the financial position of each other. Upholding the nuptial agreement, the court held that the wife's claim under English law was limited only to "needs and compensation".⁴⁴⁸

agreement without independent legal advice and did not undertake any financial disclosure. See Hamilton and Carroll, 2012 *Private Client Business*, 44 at 44 – 46.

⁴⁴² [2011] 1 AC 534 (SC(E)).

⁴⁴³ [2011] 1 AC 534 (SC(E)).

⁴⁴⁴ See the judgement of the Privy Council in *MacLeod v MacLeod* [2008] UKPC 64 (PCA) at para 31 where the Privy Council held that it is a "... long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense."

⁴⁴⁵ *Z v Z* [2011] EWHC 2878 (Fam).

⁴⁴⁶ *Hyman v Hyman* [1929] AC 601 (HL), *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)), *Z v Z* [2011] EWHC 2878 (Fam).

⁴⁴⁷ [2011] EWHC 2878 (Fam).

⁴⁴⁸ Taking into consideration the wife's maintenance claim, the court awarded her about 40 per cent of the global assets. The court's approach in awarding a substantial sum to the wife has been criticised as it represented a departure from the marital regime which the spouses have selected. See Hamilton and Carroll, 2012 *Private Client Business*, 44 at 46; Lang, 2014 *Private Client Business*, 248 at 250.

The High Court's decision in *Z v Z*⁴⁴⁹ followed the decision and the judicial guidance laid down in *Radmacher v Granatino*.⁴⁵⁰ In this case, Mr Granatino was of French origin from a well-to-do family while the wife was a German from an extremely wealthy family. They concluded a prenuptial agreement in Germany which was drafted by a German notary. In the agreement, the spouses waived their rights to financial provisions and property settlement should they divorce. They were married in London in 1998 where they lived comfortably and had two children. The wife's fortune was assessed at £100 million arising from the transfer of shares from her father, while the husband pursued an academic career at Oxford University. The parties divorced in 2006. The Supreme Court held that, since each party had entered into the agreement voluntarily with a complete understanding of its consequences and with the intention to be legally bound by it, it was only fair to hold that the agreement was legally binding on them.⁴⁵¹ Notably, the court "... awarded the husband only enough to enable him to be an adequate home-maker for his young daughters."⁴⁵²

At present, under English law, decisive weight is given to prenuptial agreements when awarding ancillary relief in the bid to recognise the private autonomy of parties to make such contracts.⁴⁵³

On the current status of nuptial agreements under English law, the Supreme Court held:⁴⁵⁴

"That although it was the court and not any prior agreement between the parties which would determine the appropriate ancillary relief when a marriage came to an end, the rule that agreements providing for the future separation of the parties to a marriage was contrary to public policy was obsolete and no longer applied; that, consequently, the court should give weight to an agreement, made between a couple prior to and in contemplation of their marriage, as to the manner in which their financial affairs should be regulated in the event of their separation in circumstances where it was fair to do so; that, in appropriate circumstances, the court could hold the parties to the agreement even when the result would be different from that which the court would otherwise have ordered; and that ... there was no material inherent distinction in policy terms between

⁴⁴⁹ [2011] EWHC 2878 (Fam).

⁴⁵⁰ [2011] 1 AC 534 (SC(E)).

⁴⁵¹ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)).

⁴⁵² Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 574.

⁴⁵³ See Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 574.

⁴⁵⁴ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 535, ratio 1.

ante-nuptial and post-nuptial agreements.”⁴⁵⁵

The Supreme Court went further to state the circumstances in which it would give full weight to an antenuptial agreement. It held thus:⁴⁵⁶

“That the court on an application for ancillary relief should apply the same principles when considering ante-nuptial agreements as it applied to post-nuptial agreements; that a nuptial agreement would carry full weight only if each party had entered into it of his or her own free will, without undue influence or pressure, having all the information material to his or her decision to enter into the agreement and intending that it should be effective to govern the financial consequences of the marriage coming to an end; and that ... the court should give effect to a nuptial agreement which was freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to the agreement.”

Most instructively, the Supreme Court highlighted the circumstances in which an antenuptial agreement would be rendered unfair. It held:⁴⁵⁷

“... a nuptial agreement could not be allowed to prejudice the reasonable requirements of any children of the family who were under the age of 18; that enforcement of a nuptial agreement could be rendered unfair by the occurrence of contingencies unforeseen at the time of the agreement or where, in the circumstances prevailing at the time of separation, one partner would be left in a predicament of real need while the other enjoyed a sufficiency; but that there was nothing inherently unfair in an agreement which made provision, in the event of the termination of the marriage, as to the disposal of existing property or property the receipt of which from a third party was anticipated.”

The following principles can be distilled from the decision of the Supreme Court in *Radmacher v Granatino*.⁴⁵⁸ The principles have been christened “Radmacher guidance”⁴⁵⁹ which should be considered when drafting marital property agreements with the “... prospects of the agreement being upheld by the court.”⁴⁶⁰ They are:

(1) In the determination of the appropriate ancillary relief (financial provisions or property adjustment) upon the breakdown of marriage, nuptial agreements do not oust the jurisdiction of the English courts.⁴⁶¹

⁴⁵⁵ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 535, ratio 1.

⁴⁵⁶ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 535, ratio 2.

⁴⁵⁷ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 535, ratio 3.

⁴⁵⁸ [2011] 1 AC 534 (SC(E)).

⁴⁵⁹ Lang, 2014 *Private Client Business*, 248 at 252.

⁴⁶⁰ Lang, 2014 *Private Client Business*, 248 at 252.

⁴⁶¹ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 542 – 543.

(2) The court applies the same principles to both antenuptial agreements and post-nuptial agreements.⁴⁶²

(3) The rule in *MacLeod v MacLeod*⁴⁶³ which says that nuptial agreements contradict public policy is old and has ceased to apply.⁴⁶⁴

(4) The court will enforce nuptial agreements if it is fair to do so.⁴⁶⁵

(5) In some situations, spouses could be bound by nuptial agreements even when the court would have made a different order if it exercised its discretion under the Act.⁴⁶⁶

(6) A nuptial agreement could justify a court in sanctioning as fair an unequal sharing of the product of the marriage.⁴⁶⁷

(7) An agreement will not necessarily be unfair if it excludes a spouse from laying claim to property acquired by way of inheritance and before the marriage.⁴⁶⁸

(8) The factors that would render a nuptial agreement unfair include the following:

(a) It prejudices "... the reasonable requirements of any children of the family";⁴⁶⁹

(b) Events occur which were not foreseen by the parties when the agreement was completed;⁴⁷⁰ and

(c) where, in the prevailing circumstances upon the breakdown of marriage, it fails to meet the needs of a spouse and leaves the spouse "... in a predicament of real need, while the other enjoyed a sufficiency or more ...".⁴⁷¹

⁴⁶² *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 558 – 560.

⁴⁶³ [2008] UKPC 64 (PCA).

⁴⁶⁴ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 558.

⁴⁶⁵ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 563. A nuptial agreement would not be enforced if there are prevailing circumstances which would render it unfair to hold that the spouses are bound by the agreement. See Baroness Hale's dissenting judgement in this case.

⁴⁶⁶ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 535.

⁴⁶⁷ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 565.

⁴⁶⁸ See *Miller v Miller*, *McFarlane v McFarlane* [2006] 2 AC 618 (HL).

⁴⁶⁹ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 564.

⁴⁷⁰ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 564 – 565.

⁴⁷¹ *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 565. In *Luckwell v Limata* [2014] EWHC 536 (Fam), the court held that on the basis of fairness, the husband's need for a home for himself and his children when they visit him must be met despite the fact that the nuptial agreement sought to prevent him from making any monetary claims on the wife's separate property or any gifts from her wealthy family. Refusing to uphold the nuptial agreement, and taking into consideration the fact that the

(9) A nuptial agreement carries full weight only if -⁴⁷²

(a) made voluntarily without undue influence or pressure;⁴⁷³

(b) there is a full material disclosure of the relevant information which will enable a spouse to decide whether or not to complete the agreement and what its terms should be;

(c) the consequences or implications of the agreement are fully understood and appreciated by the spouses;⁴⁷⁴ and

(d) the spouses intend that they should be legally bound by the agreement with regard to the financial consequences of the marriage upon breakdown.

As was observed earlier, the Supreme Court's decision in *Radmacher v Granatino*⁴⁷⁵ has been criticised. It has been argued that this decision has opened the floodgate of gender discrimination, and it is capable of exploiting a wife's labour which hitherto the English courts had sought to combat through the development of the law of ancillary relief.⁴⁷⁶ According to those who argue against the introduction and recognition of antenuptial agreements, the exercise of the court's discretion (as contained in sections 23 - 25 of the Matrimonial Causes Act of 1973), as opposed to the enforceability of prenuptial agreements upon the breakdown of marriage, ensures that the needs of the spouses are met, compensation for any loss caused by the marriage is provided, and the benefits of the marriage are shared.⁴⁷⁷

Summarily, the argument has been advanced that nuptial agreements are alien and at odds to the English legal tradition;⁴⁷⁸ against public policy,⁴⁷⁹ facilitate divorce,⁴⁸⁰

husband "... has no home, no current income, no capital, considerable debts and absolutely no further borrowing capacity ..." the court ordered that the sum of £1.24 million including a housing fund of £900, 000 until the youngest child attained the age of 22 be paid to the husband. The property would thereafter be sold with the wife receiving 45 per cent of the net proceeds; and the balance sum used to provide the husband with a home for life. See paras 143 and 148 of the court's judgment.

⁴⁷² *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 588 – 589.

⁴⁷³ In *Kremen v Agrest* [2012] EWHC 45 (Fam), the nuptial agreement was not upheld because the wife entered into it as a result of pressure from her husband. The court held the agreement to be unfair as it deprived her of her fair share of the capital assets and prejudiced the children's needs.

⁴⁷⁴ *GS v L* [2011] EWHC 1759 (Fam).

⁴⁷⁵ [2011] 1 AC 534 (SC(E)).

⁴⁷⁶ Herring, Harris and George, 2011 *Law Quarterly Review*, 335 at 338.

⁴⁷⁷ See *White v White* [2001] 1 AC 596 (HL) at 604 – 605; *Miller v Miller*, *McFarlane v McFarlane* [2006] 2 AC 618 (HL); Herring, Harris and George, 2011 *Law Quarterly Review*, 335 at 338.

⁴⁷⁸ Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 580.

⁴⁷⁹ *MacLeod v MacLeod* [2008] UKPC 64 (PCA).

are seen as a price for marriage,⁴⁸¹ and are too risky a venture to embark upon.⁴⁸²

The above arguments against the recognition of nuptial agreements have been confronted by a counter argument which the researcher regards as being appealing. It is said that marriage is a contract governed by special rules and that spouses who enter into such contracts should be permitted to negotiate their terms especially in relation to the financial consequences of their marriage.⁴⁸³ As it is a contract, parties are bound by its legal implications.⁴⁸⁴

It is submitted that the freedom granted by law to spouses to contract marriage should also be reflected in the freedom of the spouses to make arrangements for their financial and property rights should the marriage break down.⁴⁸⁵ The researcher argues that, when parties conclude a nuptial agreement, they do that with the intention that their marriage union remains permanent with the primary objective of defining their financial rights and responsibilities during the subsistence of the marriage and should there be a breakdown.

Marriage seen as a status implies that "... parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law

⁴⁸⁰ It is argued that, if it is true that nuptial agreements facilitate divorce, then settlement (separation) agreements as discussed above in 3.6.3.1 above are likewise void because "[b]y allowing people to conclude separation agreements, the law enables them to divorce more quickly, while a pre-nuptial agreement is concluded when the couple want to get married and thus hope at least not to use it." See Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 583.

⁴⁸¹ It is suggested that agreements with problematic contents should be scrutinised before determining whether to enforce the agreements or not. It has, however, been argued that "... it might be better to agree on everything necessary before the wedding rather than to enter a marriage based on erroneous understanding which later causes disappointment." See Rix LJ in *Radmacher v Granatino* [2009] EWCA Civ 649 (CA) at para 73. See also Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 588. Yes, even these days, people agree on: the number of children; where the spouses will cohabit immediately after marriage; and a host of other things before getting married. So why should a fair agreement based on how spouses' property rights should be determined in the eventual case of divorce generate any debate?

⁴⁸² See *Hyman v Hyman* [1929] AC 601 (HL) at 629 where the court refused to enforce an antenuptial agreement on the basis that "[t]he wife's right to maintenance is a matter of public concern, which cannot be bartered away ..." and it could place a personal burden on the state. Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 585, however, argued that "[t]he mere fact that an agreement could be risky ... is generally no reason to deny its conclusion. Not only in matrimonial law but also in commercial law, agreements can be risky. In both cases, parties can waive or modify rights which could be of great importance to their economic future. However, the courts generally enforce such agreements, while they deny the validity of marital property agreements."

⁴⁸³ Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 575.

⁴⁸⁴ Herring, Harris and George 2011 *Law quarterly Review*, 335 at 338.

⁴⁸⁵ Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 572 and 602 states: "Freedom of contract is not freedom without boundaries ..." as spouses in the context of family law could be vulnerable.

of the land lays down ... and their marriage also has legal consequences for other people and for the state.”⁴⁸⁶ It is submitted that nuptial agreements do not give the spouses unchecked autonomy to contract out the real needs of a spouse upon the breakdown of marriage as Herring, Harris and George have argued.⁴⁸⁷ In the recognition and enforcement of a nuptial agreement, the court’s discretion is still retained to protect the parties, their children, third parties and the state itself from any probable consequences which such an agreement might have on them.⁴⁸⁸

Within the permissible freedom to make nuptial agreements, the court’s discretion should still be retained where it thinks it would be unfair to uphold such agreement upon the breakdown of marriage.⁴⁸⁹ This is exactly what the judgment in *Radmacher v Granatino*⁴⁹⁰ exemplifies. The “Radmacher guidance” is a product of judicial activism in the absence of legislative guidance on how nuptial agreements should be designed.⁴⁹¹ Sanders⁴⁹² argues:

“As long as there is no legislative answer to these questions, a judge should at least retain discretion to re-adjust property arrangements inasmuch as necessary to ensure that, firstly, neither children nor the social welfare system will suffer under the agreement and, secondly, no divorced spouse alone has to bear the effects of choices the parties made together during their married life.”

It is also argued that, where a spouse does not receive a share of the matrimonial property as a result of a nuptial agreement, such a spouse can argue that he or she is entitled to a beneficial interest in the matrimonial property either under a common intention constructive trust⁴⁹³ or the equitable doctrine of proprietary estoppel in the light of their conduct throughout the marriage. It is submitted that this could be another approach towards ensuring that spouses, at least, receive a fair share of the fruits of their marriage upon its breakdown even after concluding a nuptial

⁴⁸⁶ Herring, Harris and George, 2011 *Law Quarterly Review*, 335 at 338.

⁴⁸⁷ See *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)); Herring, Harris and George, 2011 *Law Quarterly Review*, 335 at 338.

⁴⁸⁸ In the words of Rix LJ in *Radmacher v Granatino* [2009] EWCA Civ 649 (CA) at para 83, “... while the public interest in a fair and just exercise of the court’s discretion remains, there is fairness and justice too in a proper appreciation of party autonomy ...”

⁴⁸⁹ Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 572.

⁴⁹⁰ [2011] 1 AC 534 (SC(E)).

⁴⁹¹ There is no legislative guidance or requirement on how nuptial agreements are to be drafted both under German and English laws. See Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 592.

⁴⁹² 2010 *International and Comparative Law Quarterly*, 571 at 601.

⁴⁹³ Sanders, 2010 *International and Comparative Law Quarterly*, 571 at 602.

agreement.

More important is the report of the English Law Commission in 2014⁴⁹⁴ which recommended the recognition of binding nuptial agreements to be known as “Qualifying Nuptial Agreements” through an Act of Parliament. The agreement would be an enforceable contract, and it would give spouses the autonomy (while removing largely the court’s discretion except in relation to needs) to conclude a private arrangement on how their property rights (financial consequences of their marriage) would be determined upon the breakdown of marriage. Spouses would be excluded from contracting out of the financial needs of either spouse or their responsibility towards any children of the marriage.⁴⁹⁵

According to the English Law Commission,⁴⁹⁶ for a “Qualifying Nuptial Agreement” to be binding, it must meet the following formal requirements as summarised by Lang:⁴⁹⁷

- (a) It must be a valid contract devoid of any vitiating element like duress, undue influence or misrepresentation;
- (b) it has to be evidenced by deed which contains a signed statement that both spouses understand the full implication of the agreement and also that it will to an extent limit the power of the court to make financial provision orders upon the breakdown of marriage;
- (c) the contract must not be entered into within 28 days immediately preceding the marriage. It is noted that this applies only to antenuptial agreements and not postnuptial agreements;
- (d) there must be full material disclosure of the financial status of both spouses which must be made available to them at the time of contract; and
- (e) both spouses must seek and obtain separate legal advice before concluding the contract.

⁴⁹⁴ “Matrimonial Property, Needs and Agreements” (English Law Commission no 343), http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc343_matrimonial_property.pdf.

⁴⁹⁵ Lang, 2014 *Private Client Business*, 248 at 251.

⁴⁹⁶ “Matrimonial Property, Needs and Agreements” (English Law Commission no 343), 105 – 137, http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc343_matrimonial_property.pdf.

⁴⁹⁷ 2014 *Private Client Business*, 248 at 251.

3.7 Conclusion

From the foregoing, it is submitted that there is a new trend and a shift in judicial thinking in terms of how the property rights of spouses are determined upon marriage breakdown under English law.

In England, there currently exists a separation of property system with a wide discretion by the courts to deal with all the assets of the spouses on the breakdown of marriage. In Nigeria, there is a complete separation of property without judicial discretion to redistribute the property of spouses on the breakdown of marriage. The recognition of judicial discretion will be useful in the Nigerian context in order to prevent the unnecessarily harsh consequences of a complete separation of property system.

The extensive discretionary powers of the English courts to make financial provisions and property adjustment orders under sections 23 and 24 of the Matrimonial Causes Act Cap 18 of 1973 provide a protective covering for a disadvantaged spouse upon the breakdown of marriage from any untoward financial hardship which he or she may suffer by virtue of a complete separation of property system. Nigeria can indeed borrow a leaf from the English financial provisions and property adjustment orders. The distinction made by English law between the terms “transfer of property” and “settlement of property” does not exist under Nigerian law. This distinction is necessary when granting ancillary relief, in order to know the exact nature of the property order made by the court.

English judges exercise their discretion in a just and equitable fashion to do justice in deserving cases upon the consideration of the factors stated in section 25 of the Matrimonial Causes Act Cap 18 of 1973. The statutory guidelines provided by section 25 of the Matrimonial Causes Act Cap 18 of 1973 do not exist under Nigerian law. An incorporation of these guidelines into Nigerian law would, thus, give recognition to the indirect financial contribution of spouses to the acquisition of property. It would also recognise the non-financial contribution of a spouse to the welfare of the family in the determination of his or her proprietary interest.

It has been seen that the scope of the common intention constructive trust has been widened under English law in order for the court to be seen manifestly doing justice

in deserving cases, and there could be a possible intrusion of the doctrine of proprietary estoppel in determining the beneficial interest of spouses in relation to the matrimonial home. It is the researcher's viewpoint that the present attitude of the English court, with particular reference to the change in judicial reasoning as to the applicability of the common intention constructive trust in relation to the property rights of spouses, if emulated by Nigerian courts in the determination of the beneficial interest of spouses in property, would produce a better result in the light of the fact that the property rights of Nigerian spouses are currently determined in the same way as those of strangers. Nigerian courts could similarly develop and apply trust and equitable principles in the determination of the property rights of spouses.

The present reception and the enforceability of the "long-rejected" nuptial agreements in relation to ancillary relief and the limit of the exercise of the court's discretion in such matters point to "... the changing attitudes towards financial provision..."⁴⁹⁸ on the breakdown of marriage under English law. As is the case in Nigeria, nuptial agreements are not statutorily provided for in England. A similar recognition of nuptial agreements in Nigeria, based on the guidelines listed by the United Kingdom Supreme Court in *Radmacher v Granatino*,⁴⁹⁹ would help spouses to define their financial rights and responsibilities.

⁴⁹⁸ Lang, 2014 *Private Client Business*, 248 at 252.

⁴⁹⁹ [2011] 1 AC 534 (SC(E)).

**CHAPTER 4: PROPERTY RIGHTS OF SPOUSES ON MARRIAGE
BREAKDOWN: A PERSPECTIVE OF THE AUSTRALIAN
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4.1 INTRODUCTION

Just as Nigeria, Australia is a Commonwealth country. The country shares a past similar to that of Nigeria in respect of the application of strict common law principles in the determination of the property rights of spouses on marriage breakdown. Similarly, the provisions of the Married Women's Property Act, 1882¹ are also applicable to Australia, and the Australian courts² followed the line of interpretation given to section 17 of the Married Women's Property Act, 1882³ by the English Courts.⁴ It will be recalled that the English courts had held that section 17 of the Married Women's Property Act, 1882⁵ did not vest the court with the discretion to redistribute the property of spouses as it deemed just and equitable.⁶

The position taken by the English courts⁷ as well as Australian courts⁸ is that the courts are precluded from divesting a legal owner of his or her right in a property in order to vest a proprietary interest in a spouse without legal ownership.⁹ Upon the breakdown of marriage, therefore, the courts cannot vary the established property

¹ [45 & 46 Vict. Cap 75]. It will be recalled as noted in Chapter three of this thesis that this Act introduced the doctrine of the separate estate of the spouses. See Bromley, *Bromley's Family Law*, 441.

² The Australian court system has both a federal and state hierarchy. In the hierarchical structure, the Federal Circuit Court of Australia (formerly Federal Magistrates' Courts of Australia) and the State Magistrates' Courts are the least. They are courts of summary jurisdiction. These courts also handle family law cases. Above these courts are the Federal Court, State Supreme Courts, the Family Court of Australia and the Western Australia Family Court. It is noted that the Federal Court, which deals with Commonwealth law, is the approximate equivalent of the State Supreme Courts. Both courts handle civil and criminal cases and exercise original and appellate jurisdictions. While the Federal Court sits over appeals from the Federal Circuit Court of Australia, the Family Court of Australia, in its respective divisions, entertains appeals from the State Magistrate's Courts in respect of matters which are concerned with family law. The Full Court of the Federal Court, the Full Court/Court of Appeal of a State Supreme Court, the Full Court of the Family Court and the Court of Appeal of the Northern Territory Supreme Court are the penultimate courts in Australia. Accordingly, they exercise appellate jurisdictions over courts below them. The highest court in Australia is the High Court. It hears appeals from other courts below it and its decisions are final. It should be noted that Family Courts are courts with special jurisdiction created under Part IV of the Family Law Act No 53 of 1975 (Cth). Under the Act, however, matrimonial causes can be instituted in the Family Court, the Supreme Court of each State or Territory, the Federal Circuit Court of Australia or in the Magistrates' court of a State or Territory. The Full Court of the Family Court exercises appellate jurisdiction by hearing appeals from a judge of the Full Court or the judgement of the Supreme Court of each State or Territory. See ss 21, 21A, 28(2), 28(3), 39(1), 39(1A), 39(5) and 39(5AA) of the Family Law Act No 53 of 1975 (Cth).

³ [45 & 46 Vict. Cap 75].

⁴ Davies, 1967 *Western Australia Law Review*, 48 at 60.

⁵ [45 & 46 Vict. Cap 75]

⁶ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 395; *Gissing v Gissing* [1971] AC 886 (HL) at 904.

⁷ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 395; *Gissing v Gissing* [1971] AC 886 (HL) at 904.

⁸ *Wirth v Wirth* (1956) 98 CLR 228; *Martin v Martin* (1959) 110 CLR 297.

⁹ *Gissing v Gissing* [1969] 1 All ER 1043 (CA) at 1052, per Edmund Davies LJ's dissenting judgement.

interests of spouses under the Married Women's Property Act, 1882.¹⁰

Although the Married Women's Property Act, 1882¹¹ is said to have introduced and recognised the separate property rights of married women in Australia, the negative implications of the Act, particularly to married women upon divorce, led to the enactment of the Matrimonial Causes Act No 104 of 1959 (Cth).¹² The Matrimonial Causes Act No 104 of 1959 (Cth) thus empowered the Australian court to exercise its discretion on the breakdown of marriage to settle property for the benefit of either or both spouses and the children of the marriage by taking cognisance of what is just and equitable in line with the facts of each case.¹³ The interpretation given to section 86 of the Act and the extensive discretion conferred on the court to settle property occasioned uncertainties in this area of law.

The uncertain state of the law finally led to a reform of the matrimonial property¹⁴ regime in Australia. In 1975, the Family Law Act No 53 of 1975 (Cth) was birthed. It repealed the Matrimonial Causes Act No 104 of 1959 (Cth) which failed to give recognition to the multitude of contributions which spouses (especially the female spouses) were capable of making to the property and family welfare during the subsistence of the marriage.¹⁵

¹⁰ [45 & 46 Vict. Cap 75]; see *Wirth v Wirth* (1956) 98 CLR 228; *Martin v Martin* (1959) 110 CLR 297; *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 388, 395, 398, 405 and 411; *Gissing v Gissing* [1971] AC 886 (HL) at 904.

¹¹ [45 & 46 Vict. Cap 75].

¹² According to Sackville, 1970 *Melbourne University Law Review*, 353 at 356 in Australia, the separate property regime was disadvantageous to married women.

¹³ See s 86 of the Matrimonial Causes Act No 104 of 1959 (Cth).

¹⁴ It has been suggested that the use of the expression "matrimonial property" within the Australian context could be inappropriate and capable of confusing one as to how the property rights of spouses are defined. See *Wirth v Wirth* (1956) 98 CLR 228 at 231 – 232; *Hepworth v Hepworth* (1963) 110 CLR 309 at 317 and *Stanford v Stanford* [2012] HCA 52, para 39 where the courts served a reminder that "community of ownership" does not have a place in the Australian jurisdiction which is governed by the common law. It held: "Questions between husband and wife about the ownership of property that may be then, or may have been in the past, enjoyed in common are to be 'decided according to the same scheme of legal titles and equitable principles as govern the rights of any two persons who are not spouses.'" [at para 39]. To this extent the High Court of Australia in *Stanford's* case (at paragraph 39) urged judges to bear this salient principle in mind when exercising the power to alter the property rights of spouses under section 79 of the Family Law Act No 53 of 1975 (Cth). According to Ingleby, 2005 *International Journal of Law, Policy and Family*, 137 at 139 in Australia, "[t]here is no category of 'matrimonial' property." All the property of the spouses is considered by the court in the exercise of its discretion, although issues as to when and how such property was acquired could be relevant. See also Bartfeld, *The High Court Decision in Stanford v Stanford – Lots of Questions - Very Few Answers*, 19; Stidston, 2013 <http://www.westminsterlaw.com.au/wp-content/uploads/2013/05/Stanford-v-Stanford-A-tale-of-two-enquiries.pdf>, 1 at 7. The expression "matrimonial property" is defined in 1.7 above.

¹⁵ Dickey, *Family Law*, 473.

The Family Law Act No 53 of 1975 (Cth) commenced on the 5th day of January, 1976, and for the first time provides statutory guidelines for the exercise of the court's discretion in "spousal maintenance proceedings"¹⁶ and proceedings for the "alteration of property interest"¹⁷ of spouses. The Act gives recognition to both the financial and non-financial contributions of spouses to property and to their contributions to the family welfare as being capable of creating a proprietary interest,¹⁸ subject, however, to the court's discretion. The court is also empowered by virtue of this Act to make a declaration in respect of the existing title of each spouse or their respective rights in relation to a disputed property.¹⁹

The researcher notes with emphasis that the Family Law Act No 53 of 1975 (Cth) has gone through a series of amendments.²⁰ Notable among these are the 1983 and 2000 amendments. In 1983, among the amendments made was a new provision which allowed the commencement of property proceedings at any time,²¹ whether before or after the divorce, provided the dispute had arisen out of a marital relationship.²² In 2000, the Family Law Act No 53 of 1975 (Cth) incorporated and recognised financial agreements made between spouses before their marriage,²³ during their marriage²⁴ and after a divorce order had been made²⁵ as binding on the spouses.²⁶ Such agreements are capable of ousting the court's jurisdiction to alter the property interest of the spouses if made in compliance with the provisions of the

¹⁶ Ss 72 – 77 of the Family Law Act No 53 of 1975 (Cth).

¹⁷ S 79 of Family Law Act No 53 of 1975 (Cth).

¹⁸ Dickey, *Family Law*, 473.

¹⁹ S 78 of the Family Law Act No 53 of 1975 (Cth).

²⁰ With particular reference to the relevant sections of the Family Law Act No 53 of 1975 (Cth) (Part VIII which deals with "property, spousal maintenance and maintenance agreements" and Part VIIIA which deals with "financial agreements") which will be discussed in this chapter, the principal Act was amended by the Family Law Amendment Act No 63 of 1976; No 72 of 1983; No 181 of 1987; No 120 of 1988; No 124 of 1989; No 84 of 1997; No 143 of 2000; No 138 of 2003; Nos 20 and 98 of 2005; No 22 of 2006; No 115 of 2008 and No 122 of 2009. Despite these amendments, the Act will, for the sake of convenience and clarity, be cited as the Family Law Act No 53 of 1975 (Cth). It should be noted that the Family Law Act No 53 of 1975 (Cth) as used in this thesis is that which is contained in Compilation No 75, compiled on the 14th day of October 2015 and registered on the 30th day of October 2015. As at the time of writing this thesis, this is the extant Act.

²¹ See fn 197 at 189 below for the limitation period created by the Family Law Act No 53 of 1975 (Cth) to commence property settlement proceedings on marriage breakdown.

²² See CCH Australia Limited, *Australian Family Law Guide*, 3 – 4; Dickey, *Family Law*, 477.

²³ S 90B of the Family Law Act No 53 of 1975 (Cth).

²⁴ S90C of the Family Law Act No 53 of 1975 (Cth).

²⁵ S 90D of the Family Law Act No 53 of 1975 (Cth).

²⁶ S 90G of the Family Law Act No 53 of 1975 (Cth).

Act.²⁷

Currently, the matrimonial property system in Australia is the separation of property system with judicial discretion to alter the proprietary rights of the spouses on marriage breakdown whenever it is considered just and equitable.²⁸ An author aptly described the matrimonial property system in Australia as creating "... a statutory 'equitable distribution' scheme for the division of property on marriage breakdown."²⁹ Until the court makes an order, a spouse does not have a legal or an equitable interest in the property of the other spouse.³⁰

On the basis of the above assertion, the extant law in Australia will be analysed *vis-a-vis* recent case laws which have properly directed the compass of the law. Sections 78 and 79 of the Family Law Act No 53 of 1975 (Cth) will be thoroughly examined. As a result of the direct reference made to section 75 of the Family Law Act No 53 of 1975 (Cth) by section 79 of the same Act, the provisions of section 75 will also be examined. This chapter will also analyse the binding nature of financial agreements in Australia and seek to discover the rationale behind its introduction in 2000.

In the sections that follow, an analysis of the issues discussed above in relation to the property rights of spouses in Australia will be done in detail. First is a discussion on the Matrimonial Causes Act No 104 of 1959 (Cth) as it relates to settlement of property upon marriage breakdown.

²⁷ By the provision of s 71A of the Family Law Act No 53 of 1975 (Cth), where there is a binding financial agreement between spouses, the provisions of Part VIII of the Family Law Act No 53 of 1975 (Cth) will not apply. S 90G of the Family Law Act No 53 of 1975 (Cth) states when a financial agreement can be said to be binding. In cases where a spouse is unable to support himself or herself upon divorce, however, any provision in a financial agreement which limits or ousts the court's jurisdiction to make orders in respect of the maintenance of such a party will not be upheld. See s 90F of the Family Law Act No 53 of 1975 (Cth).

²⁸ There are shared similarities between the Australian and English matrimonial property systems. Both countries retain wide statutory discretion in their respective legislation (the Family Law Act No 53 of 1975 (Cth) and the Matrimonial Causes Act Cap 18 of 1973) with certain guidelines (without specifying the weight to be attached to them) which the courts must consider in the exercise of their discretion. The courts in both countries are also permitted to exercise their discretion to adjust the property rights of spouses in respect of all the property of the spouses. The property is not restricted to property acquired during the subsistence of the marriage. See Ingleby, 2005 *International Journal of Law, Policy and Family*, 137 at 138 – 139. See also Dickey, *Family Law*, 472; Parkinson, *Australian Family Law in Context*, 564.

²⁹ Wade, 1988 – 1989 *Family Law Quarterly*, 41 at 45.

³⁰ Dickey, *Family Law*, 471 – 472.

4.2 PROPERTY RIGHTS OF SPOUSES UNDER THE MATRIMONIAL CAUSES ACT NO 104 OF 1959 (CTH)

The regime which governed the property rights of spouses before 1882 was known as the “unity of property regime”.³¹ Just like the “common law doctrine of the legal unity of husband and wife”,³² there was no separation of property between spouses.³³ The wife’s interest in property was subsumed in the husband’s.³⁴ Upon marriage, therefore, a wife’s property was immediately vested in the husband.³⁵ She was deprived of any right to own property or ask for a share on the breakdown of marriage.³⁶

Immediately after the enactment of the Married Women’s Property Act, 1882,³⁷ a new system of property regime came into place, the separate property system which recognised the distinct right of a married woman over her property.³⁸ She thereafter possessed the legal right over her property in terms of control and ownership.³⁹ The Married Women’s Property Act, 1882,⁴⁰ however, did not empower the court to alter the property interest of spouses on marriage breakdown.⁴¹ This made married women who owned property at the time of divorce only to be the sole beneficiaries of the regime of separate property system created by the Act.⁴²

The system of separate property regime did not favour married women who had less property at the time of divorce,⁴³ who were financially disadvantaged⁴⁴ and had acted as a homemaker during the subsistence of the marriage.⁴⁵ In such cases, husbands who were breadwinners and acquired property during the marriage laid a total claim to the property to the exclusion of their wives on the breakdown of

³¹ Dickey, *Family Law*, 467.

³² Masson, Bailey-Harris and Probert, *Cretney Principles of Family Law*, 87.

³³ Cowie, <http://www.austlii.edu.au/au/journals/AUJIGendLaw/2009/6.pdf>, 1 at 4 - 5.

³⁴ Cowie, <http://www.austlii.edu.au/au/journals/AUJIGendLaw/2009/6.pdf>, 1 at 4 - 5.

³⁵ Dickey, *Family Law*, 467.

³⁶ Wade, 1988 – 1989 *Family Law Quarterly*, 41 at 48.

³⁷ [45 & 46 Vict. Cap 75].

³⁸ Dickey, *Family Law*, 467.

³⁹ Wade, 1988 – 1989 *Family Law Quarterly*, 41 at 48.

⁴⁰ [45 & 46 Vict. Cap 75].

⁴¹ See *Wirth v Wirth* (1956) 98 CLR 228; *Martin v Martin* (1959) 110 CLR 297.

⁴² Dickey, *Family Law*, 467.

⁴³ Cowie, <http://www.austlii.edu.au/au/journals/AUJIGendLaw/2009/6.pdf>, 1 at 13.

⁴⁴ Cowie, <http://www.austlii.edu.au/au/journals/AUJIGendLaw/2009/6.pdf>, 1 at 14.

⁴⁵ Dickey, *Family Law*, 467; Cowie, <http://www.austlii.edu.au/au/journals/AUJIGendLaw/2009/6.pdf>, 1 at 14.

marriage.⁴⁶

The strict application of the law in the determination of the beneficial interests of spouses in property led to unfavourable results.⁴⁷ The contributions of a married woman as a homemaker to the matrimonial home and family welfare could not vest in her any beneficial interest in property.⁴⁸ Married women, on the one hand, and individuals in formal contractual relationships on the other hand, were treated alike.⁴⁹ Property law (known as “a law for strangers”)⁵⁰ which is an embodiment of the ordinary rules of law and equity continued to govern the property interests of Australian spouses until the enactment of the Matrimonial Causes Act No 104 of 1959 (Cth).⁵¹

In 1959, there was an intervention by the Commonwealth Parliament in Australia.⁵² The Matrimonial Causes Act No 104 of 1959 (Cth), which was enacted that year, vested the court with the power, in proceedings for principal matrimonial relief,⁵³ to make a settlement of property on a spouse or for the benefit of any child of the marriage.⁵⁴ The Australian court was thus empowered to alter the property interest of spouses on the breakdown of marriage.⁵⁵ It will be appropriate at this stage to discuss the property provisions as stated in section 86 of the Matrimonial Causes Act No 104 of 1959 (Cth).

4.2.1 Property Settlement as a Maintenance Order (Section 84 vs. Section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth))

By section 84(1) of the Matrimonial Causes Act No 104 of 1959 (Cth), the court is empowered to make maintenance provisions for a spouse by taking cognisance of “... the means, earning capacity and conduct of the parties to the marriage and all

⁴⁶ Wade, 1988 – 1989 *Family Law Quarterly*, 41 at 48; Cowie, <http://www.austlii.edu.au/au/journals/AUJIGendLaw/2009/6.pdf>, 1 at 14.

⁴⁷ Wade, 1988 – 1989 *Family Law Quarterly*, 41 at 48; Dickey, *Family Law*, 470; Cowie, <http://www.austlii.edu.au/au/journals/AUJIGendLaw/2009/6.pdf>, 1 at 13.

⁴⁸ Dickey, *Family Law*, 472; Cowie, <http://www.austlii.edu.au/au/journals/AUJIGendLaw/2009/6.pdf>, 1 at 14.

⁴⁹ See Cowie, <http://www.austlii.edu.au/au/journals/AUJIGendLaw/2009/6.pdf>, 1 at 14.

⁵⁰ Dickey, 1988 *University of South Wales Law Journal*, 158 at 162; Dickey, *Family Law*, 474.

⁵¹ See *Pearson v Pearson* [1961] VR 693 at 699.

⁵² Wade, 1988 – 1989 *Family Law Quarterly*, 41 at 48.

⁵³ Such proceedings for principal matrimonial relief include “proceedings for a decree of dissolution of marriage; nullity of marriage, judicial separation; restitution of conjugal rights; or jactitation of marriage.” See s 5 of the Matrimonial Causes Act No 104 of 1959 (Cth).

⁵⁴ S 86 of the Matrimonial Causes Act No 104 of 1959 (Cth).

⁵⁵ Dickey, *Family Law*, 476.

other relevant circumstances.”⁵⁶

Section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) provides as follows:

“The court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.”

It has been noted that section 84 and section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) “... overlap and may be exercised separately or in combination to produce a total result which in the circumstances of the case is just and equitable.”⁵⁷ A distinction, however, exists between the two sections.⁵⁸ The distinction lies in the means but not in the end result achieved by the sections.⁵⁹ The end result of both sections is to produce “... a just and equitable arrangement of proprietary rights and interests, ancillary to one of the forms of principal relief for which the Act provides.”⁶⁰

On the distinction between section 84 and section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth), Windeyer J, in *Sanders v Sanders*,⁶¹ has this to say:

“The basic distinction between s. 84 and s. 86 (1) is that a provision for maintenance under s. 84 does not involve an order relating to some particular item of property or an interest therein. An order may be made under s. 84 providing simply for periodic payments, or for a lump sum, by way of maintenance. The party liable to perform it may then satisfy the obligation out of any resources available to him (or her). That is a matter for him (or her) to decide. An order under s. 86 (1), on the other hand, must be for a ‘settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion)’.”

It is submitted that there is a slim line of distinction between sections 84 and 86(1) of the Matrimonial Causes Act of 1959 (Cth). The clearest and major distinction between the two sections is that under section 84 (maintenance order), an order of court will not necessarily be directed at a specific property although the order made

⁵⁶ See also s 84(2) of the Matrimonial Causes Act No 104 of 1959 (Cth).

⁵⁷ *Sanders v Sanders* (1967) 116 CLR 366 at 380.

⁵⁸ *Sanders v Sanders* (1967) 116 CLR 366 at 380.

⁵⁹ *Sanders v Sanders* (1967) 116 CLR 366 at 380.

⁶⁰ *Sanders v Sanders* (1967) 116 CLR 366 at 380.

⁶¹ (1967) 116 CLR 366 at 380.

could be secured on a particular property, while an order for property settlement under section 86(1) is directed at a specific property.⁶²

The distinction will ultimately depend on the nature of the court order made by virtue of the exercise of its power under section 87 of the Matrimonial Causes Act of 1959. A court, exercising the powers conferred on it by section 87 of the Matrimonial Causes Act No 104 of 1959 (Cth) in relation to an order for maintenance or property settlement, is empowered to make “*any or all*”⁶³ of the⁶⁴ fourteen (14) orders listed in the section.

A court can by way of making an order for maintenance under section 84 of the Matrimonial Causes Act No 104 of 1959 (Cth), make a *permanent order*⁶⁵ or an *order for a lifetime*,⁶⁶ for the benefit of a spouse, in respect of a property⁶⁷ inclusive of an order for the execution of a deed or any instrument, or a title document produced for the purpose of effectively carrying out the order made.⁶⁸ An order of this nature is, thus, tantamount to a property settlement order pursuant to section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) as a means of providing maintenance under section 84 of the Matrimonial Causes Act No 104 of 1959 (Cth).⁶⁹

By the provision of section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth), the Australian court was empowered to exercise its discretion to settle the property of a spouse or both spouses on the other spouse.⁷⁰ It is of little importance whether the property to be settled belonged solely to a spouse. In the exercise of the court’s power under section 86 of the Matrimonial Causes Act No 104 of 1959 (Cth), the court is permitted to deprive the legal owner of his proprietary interest in the

⁶² To the extent of this distinction, the case of *Smee v Smee* (1965) 7 FLR 321 cannot be disturbed for it remains a good law. In that case, the New South Wales Court of Appeal made an order that since s 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) was couched in the terms that it provided for the settlement of a certain or ascertainable property which belonged to either spouse, an order for the payment of a specified sum by the husband to the wife to enable the wife acquire a matrimonial home cannot be founded on s 86(1). See Sackville, 1970 *Melbourne University Law Review*, 353 at 375; 377.

⁶³ Words in italics are my emphasis.

⁶⁴ See s 87(1) of the Matrimonial Causes Act of No 104 1959 (Cth).

⁶⁵ Words in italics are my emphasis.

⁶⁶ Words in italics are my emphasis.

⁶⁷ See s 87(1)(h) of the Matrimonial Causes Act of No 104 1959 (Cth).

⁶⁸ See s 87(1)(d) of the Matrimonial Causes Act of No 104 1959 (Cth).

⁶⁹ *Sanders v Sanders* (1967) 116 CLR 366 at 375.

⁷⁰ Wade, 1988 – 1989 *Family Law Quarterly*, 41 at 48.

property or alter the same for the benefit of the other spouse. It is, however, noted that the court's discretion to distribute the property of spouses upon divorce must be done "... in a just and equitable fashion."⁷¹

The High Court of Australia, in *Sanders v Sanders*,⁷² stated that the concept of settlement as used in section 86 of the Matrimonial Causes Act No 104 of 1959 (Cth) has a wide meaning.⁷³ The court can, by virtue of section 86(1) of the Act, settle property upon a spouse by way of providing maintenance to her and the children of the family.⁷⁴ Under an application for maintenance brought pursuant to section 84 of the Matrimonial Causes Act No 104 of 1959 (Cth), therefore, the court can exercise its power to settle the property of a spouse on the other spouse subject to the provisions of section 87(1)(j) of the Act.

By section 87(1)(j) of the Matrimonial Causes Act No 104 of 1959 (Cth), the court is empowered to discharge or vary any order made in form of settlement of property when circumstances arise for doing so. Such circumstances would include a situation where a spouse who is the beneficiary of the order remarries.⁷⁵ The order will be discharged in this respect upon an application to the court.⁷⁶ The court is also empowered to modify or suspend an order which is contingent upon the happening of an event or time.⁷⁷

Upon a *decree nisi* for the dissolution of the marriage between the spouses in *Sanders v Sanders*,⁷⁸ the Supreme Court of Norfolk Island made a maintenance order which included the settlement of the matrimonial home and appurtenant to it and the land on which it is built and its appurtenance on the wife. The effect of this order was that the wife should exercise the right of ownership over the matrimonial home.⁷⁹ The house which was the subject matter of settlement was unfortunately burnt down by fire and the wife brought an application seeking an order to compel the husband to rebuild the matrimonial home or to secure a suitable home for her

⁷¹ Wade, 1988 – 1989 *Family Law Quarterly*, 41 at 48.

⁷² (1967) 116 CLR 366 at 375, 382.

⁷³ See also *Mullane v Mullane* (1983) 158 CLR 436 at 443.

⁷⁴ *Sanders v Sanders* (1967) 116 CLR 366 at 375.

⁷⁵ S 87(1)(j)(i) of the Matrimonial Causes Act No 104 of 1959 (Cth).

⁷⁶ S 87(1)(j)(i) of the Matrimonial Causes Act No 104 of 1959 (Cth).

⁷⁷ S 87(1)(j)(ii) of the Matrimonial Causes Act No 104 of 1959 (Cth).

⁷⁸ (1967) 116 CLR 366.

⁷⁹ *Sanders v Sanders* (1967) 116 CLR 366 at 371.

and the children of the marriage inclusive of the payment to her of the insurance money in respect of the insured property. The Supreme Court entered judgement in favour of the wife.

On appeal, by the husband, to the High Court to have the entire order of the Supreme Court set aside on the ground that the court would not have made an order for settlement of property since it had no such application before it, Barwick CJ observed that section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) is complementary to sections 84 and 87⁸⁰ of the same Act.⁸¹ A maintenance order can conveniently be made by settling the matrimonial home on a custodial spouse whether or not it was specifically sought for in such proceedings.⁸²

Holding that the wife's application was properly constituted under section 87(1)(j) of the Act, being a variation of the court's initial order, the High Court warned that where there is "... a claim for maintenance in general terms ..." ⁸³ (whether or not such a claim can be construed to be a claim for settlement) and the court is disposed towards settling a property on the claimant, it must be brought to the notice of the respondent and ample opportunity must be given to him to make his defence before the order for settlement is decided upon.⁸⁴

It is submitted that when the court decides to exercise its wide powers as conferred on it by section 87 of the Matrimonial Causes Act No 104 of 1959 (Cth), it must do so on a just and equitable ground. A judge is not expected to exercise his discretion based on his idiosyncrasy or his personal conclusion that a spouse's conduct was

⁸⁰ S 87 of the Matrimonial Causes Act No 104 of 1959 (Cth) spells out the wide powers of the court with regard to maintenance, custody and property settlement proceedings under the Act. It outlines the different ways in which the court's powers can be exercised. By s 87(1)(a) – (c) of the Matrimonial Causes Act No 104 of 1959 (Cth), the court can make an order for a lump sum, a periodic sum or for a secured periodic sum. In order to enable a court's order to be performed, the court could "... order that any necessary deed or instrument be executed ..." or a document(s) of title be produced. See s 87(1)(d) of the Matrimonial Causes Act No 104 of 1959 (Cth). By section 87(1)(h) of the Act, the court is empowered *inter alia* to make a permanent order, a fixed term order, an order for a lifetime, during the spouses' joint lives or until such a period when it makes a further order. It could impose terms and conditions on any order made (s 87(1)(h)) and by s 87(1)(j) the court has the power to discharge, vary, revive or suspend its order(s) in respect of an order for maintenance, custody or settlement of property.

⁸¹ *Sanders v Sanders* (1967) 116 CLR 366 at 375.

⁸² *Sanders v Sanders* (1967) 116 CLR 366 at 375. At 380, it was held that "[a]n order under s 86(1) may be a means of providing maintenance."

⁸³ *Sanders v Sanders* (1967) 116 CLR 366 at 377.

⁸⁴ *Sanders v Sanders* (1967) 116 CLR 366 at 377.

reprehensible.⁸⁵

In *Mullane v Mullane*,⁸⁶ a consent judgement⁸⁷ was entered under section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) in respect of a petition brought by the wife. The order of the trial court read *inter alia*:

“That by consent the Petitioner have the exclusive occupation of the property situate at and known as Number Thirty-four Careebong Road, French's Forest and being the land comprised in Certificate of Title Volume 7705 Folio 182 until such time as all three of the said children of the marriage shall have become self-supporting or the Petitioner shall have remarried whichever event shall first occur.”⁸⁸

In an application by the wife to have the order amended so as to enable her to receive two-thirds of the proceeds of the sale of the house when sold upon the expiration of the period of her occupation, the High Court held that the property settlement order which was initially made was in terms of providing maintenance for the wife and children which is capable of being varied or modified.⁸⁹ According to the High Court:

“There is no reason why a court, in particular circumstances, cannot provide maintenance for the wife and children of a marriage by securing to them for a suitable period the occupation of the matrimonial home. The inclusion of the condition that the right to occupy the home shall continue until ‘the children of the marriage shall have become self-supporting’ is a strong indication that the order is properly categorised as an order for maintenance.”⁹⁰

In the opinion of the High Court, the nature of the order made in *Mullane’s* case under section 86(1) of the Act was in terms of enjoyment and use (occupation) of the property and did not imply an alteration of the property interest of the spouses in the property⁹¹ as was argued by the counsel of the husband/respondent which formed the basis of the Full Court’s⁹² denial of jurisdiction to allow the trial court to entertain

⁸⁵ *Sanders v Sanders* (1967) 116 CLR 366 at 380.

⁸⁶ *Mullane v Mullane* (1983) 158 CLR 436.

⁸⁷ This is an enforceable judgement made by a court based on an agreement between the parties to a case.

⁸⁸ *Mullane v Mullane* (1983) 158 CLR 436 at para 2.

⁸⁹ *Mullane v Mullane* (1983) 158 CLR 436 at 445.

⁹⁰ *Mullane v Mullane* (1983) 158 CLR 436 at 445.

⁹¹ *Mullane v Mullane* (1983) 158 CLR 436 at 445.

⁹² By s 4 of the Family Law Act No 53 of 1975 (Cth), a “Full Court” means “(a) 3 or more Judges of the Family Court sitting together, where a majority of those Judges are members of the Appeal Division; or (b) in relation to particular proceedings: (i) 3 or more Judges of the Family Court sitting together, where, at the commencement of the hearing of the proceedings, a majority of those Judges were

the wife's application for an amendment of the earlier order.⁹³

The High Court relied basically on the condition attached to the property settlement order to construe it as being an order for maintenance which is subject to modification or discharge.⁹⁴ The court observed that where section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) "... refers to a settlement of property, it should be understood as using that expression in a sense which is closely related to the meaning which the expression bears in the law of real and personal property."⁹⁵

4.2.2 Settlement of Property as Altering Interests in Property (Transfer)

Under this head, the discussion will be centred on the settlement of a specific property under section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth). The researcher will discuss settlement as a means of transfer or the relinquishment of a proprietary interest from one spouse to the other spouse upon the breakdown of marriage. This will be done with the aid of judicial authorities which interpreted section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) as capable of altering an interest in property.

Upon the commencement of the Matrimonial Causes Act No 104 of 1959 (Cth) in February, 1961,⁹⁶ it was observed that some trial judges⁹⁷ were reluctant to take complete advantage of the extensive discretion to settle property granted to them by the provisions of section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth).⁹⁸ On the one hand, a restricted interpretation was given to section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) with regards to the condition upon which the court could settle a specific property on a spouse on the breakdown of marriage,⁹⁹ while, on the other hand, a wide interpretation was adopted which accommodated (within the meaning of the term "settlement") the transfer of a

members of the Appeal Division; or (ii) 2 Judges of the Family Court sitting together, where those Judges are permitted, by subsection 28(4), to complete the hearing and determination, or the determination, of those proceedings."

⁹³ *Mullane v Mullane* (1983) 158 CLR 436 at 446.

⁹⁴ *Mullane v Mullane* (1983) 158 CLR 436 at 445.

⁹⁵ *Mullane v Mullane* (1983) 158 CLR 436 at 445.

⁹⁶ Barwick, 1961 *The Sydney Law Review*, 409.

⁹⁷ See *Smee v Smee* (1965) 7 FLR 321.

⁹⁸ Neville, 1975 *The Modern Law Review*, 397 at 401.

⁹⁹ *Smee v Smee* (1965) 7 FLR 321. See Sackville, 1970 *Melbourne University Law Review*, 353 at 374.

specific property to a spouse or a charge over an asset¹⁰⁰ which belongs to a spouse on marriage breakdown.¹⁰¹

In *Lansell v Lansell*,¹⁰² the validity and the interpretation of the provision of section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) was challenged by an ex-husband. In an application for property settlement brought under the section by the ex-wife in 1962, fourteen (14) years after the dissolution of their marriage, the ex-wife claimed for an order directing the ex-husband to "... execute a registrable transfer of a certain land, of which he was the registered proprietor under the Transfer of Land Act 1958 (Vict.), to the petitioner for life with remainder to the two children as tenants in common in equal shares."¹⁰³ Although it was in evidence that when the decree for divorce was made absolute in 1948, the court had made no order for ancillary relief, the ex-husband opposed the application *inter alia* that section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) could not apply after divorce and was also not applicable to any property acquired after divorce.¹⁰⁴

Holding that the order sought by the ex-wife was one which required the settlement of property on her, in line with section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth),¹⁰⁵ the court held further that an order made pursuant to the section was in the form of an ancillary relief which was anchored upon any proceedings for a principal relief as defined by the Matrimonial Causes Act No 104 of 1959 (Cth).¹⁰⁶ Such an order could be made by the court in a divorce proceeding after the decree had been made absolute,¹⁰⁷ and, since the order for ancillary relief was not made upon divorce,¹⁰⁸ the petition for divorce had not yet been completed. The application

¹⁰⁰ This simply means the right of a person to receive money or some other interests in the asset of another.

¹⁰¹ See *Horne v Horne* (1962) 3 FLR 381 (NSW) at 393 – 394; Sackville, 1970 *Melbourne University Law Review*, 353 at 374.

¹⁰² (1964) 110 CLR 353.

¹⁰³ *Lansell v Lansell* (1964) 110 CLR 353 at 356. Exercising its powers under s 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth), the court in *Treweeke v Treweeke* [1967] 1 NSWLR 284 ordered the husband to settle on the wife and children his interest in a substantial trust. The trust was to be settled on the wife for her life time or until remarriage, and the remainder on the children. According to Sackville, 1970 *Melbourne University Law Review*, 353 at 375, "... section 86 permitted the judge to distribute the matrimonial assets between the parties in a manner that conserved the assets, yet took account of the parties' needs for the future, given that they were to be divorced."

¹⁰⁴ *Lansell v Lansell* (1964) 110 CLR 353 at 357.

¹⁰⁵ *Lansell v Lansell* (1964) 110 CLR 353 at 364.

¹⁰⁶ See s 89 of the Matrimonial Causes Act No 104 of 1959 (Cth); *Lansell v Lansell* (1964) 110 CLR 353 at 361, 365.

¹⁰⁷ *Lansell v Lansell* (1964) 110 CLR 353 at 362.

¹⁰⁸ *Lansell v Lansell* (1964) 110 CLR 353 at 365.

for property settlement was, thus, proper by virtue of the ex-wife's application.¹⁰⁹

On the ex-husband's contention that the court could not exercise its power under section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) in relation to a property which had been acquired after the dissolution of marriage, the High Court ruled that the wording of section 86(1) which made reference to the "... property to which the parties are, or either of them is, entitled ...", is not restricted to a property acquired by the spouse(s) before the breakdown of marriage.¹¹⁰

More importantly, on the settlement of property under section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) as a means of redistributing the property of spouses or readjusting their proprietary rights, the High Court held:¹¹¹

"A readjustment of the property rights of the spouses may be required if consequential injustice to one or both of the spouses and to the children is not to result. The making of a settlement may be a way of carrying to completion, or nearer completion, the task of dealing fully with the relationship which is the subject of the matrimonial cause. Orders with respect to maintenance are familiar as one means of dealing with an economic situation arising from the granting of substantive matrimonial relief. Orders varying ante-nuptial or post-nuptial settlements, as provided for by s. 86(2), provide another example: see *Dewar v. Dewar* (1960) 106 CLR 170, at p 174. The orders which s. 86(1) authorises are more akin to the latter than to the former, for in considering under s. 86(1) what is just and equitable in the circumstances the court is not restricted to considerations relevant to maintenance; but they share with both the character of relief incidental to, because consequential upon, the dissolution of a marriage or the granting of one of the other forms of relief which identify a cause as a matrimonial cause in the ordinary English sense of the expression."

It is submitted that a property settlement order under section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) is one means of dealing with the economic situation which arises between the spouses on the breakdown of marriage.¹¹² On the breakdown of marriage, the financial and economic status of a spouse, especially the woman, is drastically affected.¹¹³ In most cases a property settlement order may

¹⁰⁹ *Lansell v Lansell* (1964) 110 CLR 353 at 368.

¹¹⁰ *Lansell v Lansell* (1964) 110 CLR 353 at 362.

¹¹¹ *Lansell v Lansell* (1964) 110 CLR 353 at 362.

¹¹² See *Lansell v Lansell* (1964) 110 CLR 353 at 362. Sackville, 1970 *Melbourne University Law Review*, 353 at 377.

¹¹³ According to Wade, 1985 *Federal Law Review* 76 at 83, "[m]arriage not only leads to the acquisition of assets, but also to the loss of assets – namely the homemaker's earning capacity, job skills and professional contacts" which in most cases a property settlement order reached on the basis of equality cannot satisfy.

not be sufficient to satisfy the losses suffered by a homemaker.¹¹⁴ It could possibly take the woman a longer period to readjust herself financially compared to the time taken by the man.¹¹⁵ In order to create a fair balance between the spouses, therefore, section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) was used to alter or adjust a spouse's proprietary rights for the benefit of the other spouse in a proceeding for a matrimonial cause as defined by section 5(1)(a) and (b) of the Matrimonial Causes Act No 104 of 1959 (Cth).¹¹⁶

In *Smee v Smee*,¹¹⁷ the New South Wales Court of Appeal had reasoned that, while exercising its powers to readjust the property rights of the spouses, with the mind-set to do justice and equity in deserving cases pursuant to section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth), one of the major factors to be considered is whether the wife, who is the claimant, assisted in the acquisition of the property by virtue of her monetary contribution or services.

The limitation placed by *Smee v Smee*¹¹⁸ on the exercise of the court's discretion under section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) has been rejected.¹¹⁹ In rejecting this restrictive approach, the High Court in *Sanders v Sanders*¹²⁰ held that, even in cases where the court decides to exercise its discretion under section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth), either in order to provide maintenance to a spouse or to adjust their property rights or their

¹¹⁴ Wade, 1985 *Federal Law Review*, 76 at 83.

¹¹⁵ Wade, 1985 *Federal Law Review*, 76 at 83 states that upon the breakdown of marriage, the male spouse "... often walks away from the marriage with an array of marketable skills and contacts which have been built up while the homemaker spouse has progressively lost those same assets." See also Wade, 1988-1989 *Family Law Quarter* 41 at 58 where he notes with particular reference to the Australian Institute of Family Law Survey conducted between 1983 and 1985 that "[t]hree years after separation, men were economically better off and women worse off than in their pre-separation days." See Lawson, 1994 *University of Tasmania Law Review* 294 at 296 referring to the empirical study carried out by the Australian Institute of Family Studies (AIFS) in McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia*, 12. See also Graycar, 1995 *Victoria University Wellington Law Review*, 9 at 11, 20 where the author examines the economic and social disadvantages encountered by women in the Australian society especially following divorce. According to her, compared to men, it takes women a very long time to be financially stable after marriage breakdown.

¹¹⁶ *Lansell v Lansell* (1964) 110 CLR 353 at 370; Sackville, 1970 *Melbourne University Law Review*, 353 at 377.

¹¹⁷ (1965) 7 FLR 321 at 334.

¹¹⁸ (1965) 7 FLR 321 at 334.

¹¹⁹ The courts in *Treweeke v Treweeke* [1967]1 NSW 284 and *Dempsey v Dempsey* (1967) 11 FLR 61 refused to follow the narrow approach adopted in *Smee v Smee* (1965) 7 FLR 321 on the ground that the powers conferred by Part VIII of the Matrimonial Causes Act No 104 of 1959 (Cth) (sections 84, 86 and 87) were extensive, directed only at reaching "... an equitable financial solution on the dissolution of marriage." – Sackville, 1970 *Melbourne University Law Review*, 353 at 376.

¹²⁰ (1967) 116 CLR 366.

moral claims to property, the powers of the court must not be limited to cases where the claiming spouse has made a monetary contribution to the acquisition of the property.¹²¹

On the further clarification of the extent of the court's power under section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth), Barwick CJ, in *Sanders v Sanders*,¹²² stated:

"... in an appropriate case, although one of the parties has no legal or equitable right to property vested in the other, or to any greater interest in property than is already wholly or partially vested in him or her, the Court hearing the matrimonial cause may make orders settling that property on that one or increasing the beneficial interest of that one in property already wholly or partially vested in him or her as the case may be. No doubt, cogent considerations of justice founded on the conduct and circumstances of the parties would need to be present if such orders were to be made. *But, if those considerations are present, settlements beyond the provision of mere maintenance, or the determination and enforcement of rights, legal or equitable, in my opinion, can be made.*"¹²³

From the foregoing, it is submitted that, in an application for the settlement of a specific property on a spouse pursuant to section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth), the court must look, not only at the financial contribution of the spouse (if any), but also at all other relevant factors which could warrant the exercise of its discretion in that regard.¹²⁴ For a court to settle property on a spouse, as a means of altering the property rights of the other spouse on the breakdown of marriage, the justice of the case must demand the exercise of that discretion and it would depend on the facts of the case and the evidence placed before the court.¹²⁵

Sackville¹²⁶ argues with particular reference to the High Court's decision in *Sanders v Sanders*:¹²⁷

"The High Court's analysis of section 86 is both important and sensible as it permits the courts to vary existing property rights having regard to the breakdown of the marriage and the need to reorganise the parties' relationship for the future. ... Under section 86, while past history is of course relevant, the court is not confined to the circumstances in which the parties

¹²¹ *Sanders v Sanders* (1967) 116 CLR 366 at 375.

¹²² (1967) 116 CLR 366 at 376.

¹²³ Words in italics are my emphasis.

¹²⁴ *Sanders v Sanders* (1967) 116 CLR 366 at 381.

¹²⁵ *Sanders v Sanders* (1967) 116 CLR 366 at 376.

¹²⁶ 1970 *Melbourne University Law Review*, 353 at 377.

¹²⁷ (1967) 116 CLR 366.

happened to acquire their assets... rather it is entitled to look to the future, in the light of the new situation in which the parties find themselves. Therefore the court may take account of events likely to occur in the future, such as the remarriage of either party and may distribute the matrimonial assets in a manner calculated to conserve them. This interpretation means that the rigidities of the separate community of property regimes may be avoided, yet effect may be given to the economic partnership view of marriage.”

On the importance of section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth), it is submitted that the alteration of the existing property rights of a spouse on marriage breakdown had long been permitted under the Australian matrimonial property system since the commencement of the Matrimonial Causes Act No 104 of 1959 (Cth).¹²⁸ The wide interpretation of section 86(1) by Australian courts encouraged the exercise of its discretion in that manner.¹²⁹

It must, however, be noted that the discretion of the court to readjust the proprietary rights of spouses on marriage breakdown was limited only to proceedings for a principal relief as defined by paragraph (a) and (b) of section 5(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) which relates to a “matrimonial cause”.¹³⁰ A property settlement order under section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) is, thus, at best an ancillary relief.¹³¹ It is noted that the successor to the Matrimonial Causes Act No 104 of 1959 (Cth)¹³² took care of this limitation.¹³³

Before discussing the current matrimonial property system in Australia, it is necessary to make a brief reference to the provisions of section 86(2) of the Matrimonial Causes Act No 104 of 1959 (Cth).

4.2.3 Variation of Antenuptial or Postnuptial Settlement on Marriage Breakdown under the Matrimonial Causes Act No 104 of 1959 (Cth)

By section 86(2) of the Matrimonial Causes Act No 104 of 1959 (Cth), the court is

¹²⁸ Sackville, 1970 *Melbourne University Law Review*, 353 at 384.

¹²⁹ Sackville, 1970 *Melbourne University Law Review*, 353 at 384.

¹³⁰ *Lansell v Lansell* (1964) 110 CLR 353 at 365.

¹³¹ *Lansell v Lansell* (1964) 110 CLR 353 at 361.

¹³² The Family Law Act No 53 of 1975 (Cth).

¹³³ Dickey, *Family Law*, 476 argues that this limitation will be of little importance in the light of the fact that most spouses would readily seek for an order for property settlement only on the breakdown of marriage. The author, however, notes that there could also be real limitation with regards to spouses who conscientiously object to divorce proceedings and would in the alternative prefer to seek a property settlement order independently of a proceeding for the dissolution of marriage or any other principal relief. This argument is also applicable to spouses who would prefer to sever all property rights without going through the inconvenience of expensive divorce proceedings.

empowered to adjust the proprietary rights of spouses in respect of any antenuptial or postnuptial settlement made on either or both spouses.¹³⁴ An order pursuant to this subsection for the benefit of a spouse or both spouses and/or the children of the marriage is made on the consideration of what is just and equitable. It provides:

“The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of, the marriage of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.”¹³⁵

Discussing the concept of “settlement” as used in section 9 of the Matrimonial Causes Act of 1875¹³⁶ (Q) and encapsulated in section 86(2) of the Matrimonial Causes Act No 104 of 1959 (Cth), the High Court of Australia in *Dewar v Dewar*¹³⁷ held:

“It must be conceded that in applying the provision the conception of "settlement" had been carried to lengths which might seem a little surprising. But it must be borne in mind that the essential purpose of s. 9 is to enable the Court to inquire into post-nuptial and ante-nuptial dispositions of property in favour of one or other or both of the parties to the marriage which because of the dissolution of that marriage should be reconsidered and to empower the Court to make orders for what appears in the changed circumstances a just application of the property.”

According to the High Court in *Lansell v Lansell*,¹³⁸ an order made pursuant to section 86(2) of the Matrimonial Causes Act No 104 of 1959 (Cth) deals with the economic situation which arises from the breakdown of marriage.¹³⁹

4.3 CURRENT MATRIMONIAL PROPERTY SYSTEM IN AUSTRALIA

The current matrimonial property system in Australia is contained in the property provisions as set out in Part VIII¹⁴⁰ of the Family Law Act No 53 of 1975 (Cth). In line with the objectives of this study, only the property provisions which relate to civil marriages will be analysed and discussed.¹⁴¹ In this respect, the discussion will be

¹³⁴ Dickey, *Family Law*, 476.

¹³⁵ S 86(2) of the Matrimonial Causes Act No 104 of 1959 (Cth).

¹³⁶ [39 Vic. No 13]. See also s 85A(1) of the Family Law Act No 53 of 1975 (Cth).

¹³⁷ (1960) 106 CLR 170 at 175.

¹³⁸ (1964) 110 CLR 353 at 362.

¹³⁹ *Lansell v Lansell* (1964) 110 CLR 353 at 362.

¹⁴⁰ This part deals with “property, spousal maintenance and maintenance agreements.”

¹⁴¹ It is noted that the Family Law Act No 53 of 1975 (Cth) also makes provisions for *de facto* relationships.

focussed on the matrimonial property system created by the present legislation.

It will be recalled that the Matrimonial Causes Act No 104 of 1959 (Cth) restricted the time to apply for a property settlement¹⁴² and gave the courts extensive powers to adjust the proprietary rights of spouses on marriage breakdown. The powers vested in the courts were so wide that the fate of litigants remained unknown until the eventual pronouncement by the court on the extent of their rights in relation to their separate and individual property. The court's power to distribute property between spouses on marriage breakdown was highly discretionary and unpredictable under the Matrimonial Causes Act No 104 of 1959 (Cth). There were no statutory guidelines which enabled the court to exercise its discretion in a particular manner. The only requirement was for the court to distribute property in line with whatever it deemed "... just and equitable in the circumstances of the case."¹⁴³

With the coming into force of the Family Law Act No 53 of 1975 (Cth), the limitation placed on the application for the alteration of property interest was removed.¹⁴⁴ The new Act, however, retained the "... equitable property distribution scheme ..." ¹⁴⁵ created by its predecessor and urged courts to take into consideration various factors¹⁴⁶ before exercising the discretion to alter the proprietary rights of spouses.

The factors to be considered included the financial contributions of spouses to the purchase or improvement of the property¹⁴⁷ and their non-financial contributions to the improvement of the property¹⁴⁸ or to the welfare of the family¹⁴⁹ amongst others. Without a legislative direction as to the weight to be accorded to those factors;¹⁵⁰ the alteration of property interest was again left wholly to the court's wide discretion.¹⁵¹

In Australia, the separate property system still applies, albeit with judicial discretion to alter the interests of spouses in their property when it is thought equitable to do

¹⁴² See s 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth); *Lansell v Lansell* (1964) 110 CLR 353 at 365.

¹⁴³ See s 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth).

¹⁴⁴ Dickey, *Family Law*, 477.

¹⁴⁵ Wade, 1988-1989 *Family Law Quarterly*, 41 at 50.

¹⁴⁶ See s 79(4) of the Family Law Act No 53 of 1975 (Cth).

¹⁴⁷ S 79(4)(a) of the Family Law Act No 53 of 1975 (Cth).

¹⁴⁸ S 79(4)(b) of the Family Law Act No 53 of 1975 (Cth).

¹⁴⁹ S 79(4)(c) of the Family Law Act No 53 of 1975 (Cth).

¹⁵⁰ Parkinson, *Australian Family Law in Context*, 564.

¹⁵¹ Wade, 1988-1989 *Family Law Quarterly*, 41 at 51; Dickey, 1988 *University of New South Wales Law Journal*, 158.

so.¹⁵² The statutory requirement for the exercise of judicial discretion is negatively worded: “The court shall not make an order under this section unless it is satisfied ...”¹⁵³ In other words, a spouse’s right for an alteration of property interest is entirely discretionary under the Act.¹⁵⁴ Hence, before the court exercises its power to alter the property rights of spouses under section 79 of the Family Law Act No 53 of 1975 (Cth), a spouse is precluded from exercising any legal or beneficial right over a property which belongs solely to the other spouse.¹⁵⁵ Simply put, no legal or equitable interest in property is conferred on a spouse by the Family Law Act No 53 of 1975 (Cth) before the court makes an order.¹⁵⁶ Bryant CJ and Thackray J stated, in *Bevan v Bevan*,¹⁵⁷ that “... spouses do not have rights to property by operation of s 79 unless and until an order is made altering the rights they have, as determined by principles of common law and equity.”

Should the court decide not to exercise its discretion to alter the proprietary rights of spouses on marriage breakdown, the only option available to a spouse who believes he or she has some legal or equitable interests in a disputed property is to apply for a declaration of his or her interest in such property and for a consequential order in that regard.¹⁵⁸ A consideration of the two (2) principal property orders which the courts can make under the Family Law Act No 53 of 1975 (Cth) will be instructive. They are contained in sections 78 and 79 of the Act.¹⁵⁹

4.3.1 The Concept of Property under Part VIII of the Family Law Act No 53 of 1975 (Cth)

*In the Marriage of Duff*¹⁶⁰ it was held that “[p]roperty is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have.”

By section 4 of the Family Law Act No 53 of 1975 (Cth), property “... in relation to the

¹⁵² See s 79(2) of the Family Law Act No 53 of 1975 (Cth).

¹⁵³ S 79(2) of the Family Law Act No 53 of 1975 (Cth)

¹⁵⁴ Dickey, *Family Law*, 471 – 472; Parkinson, *Australian Family Law in Context*, 564.

¹⁵⁵ *In the Marriage of Tozer* [1989] FamCA 49, para 63; Parkinson, *Australian Family Law in Context*, 529.

¹⁵⁶ See *In the Marriage of Fisher* [1986] HCA 61, para 7 per Mason and Deane JJ; Dickey, *Family Law*, 471; 508.

¹⁵⁷ *Bevan v Bevan* [2013] FamCAFC 116, para 80.

¹⁵⁸ S 78 of the Family Law Act No 53 of 1975 (Cth).

¹⁵⁹ See 4.3.2; 4.3.3 below.

¹⁶⁰ (1977) 29 FLR 46 at 56 quoting *Jones v Skinner* (1836) 5 LJ Ch 85.

parties to a marriage¹⁶¹ or either of them—means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion ...”¹⁶² *In the Marriage of Duff*,¹⁶³ the court held that the expression “in possession or reversion” as used in section 4 of the Family Law Act No 53 of 1975 (Cth) “...is descriptive of the entitlement and not the property and it removes any fetter upon the court in dealing with property under this Act by limiting the nature of the entitlement thereto to entitlement in possession.”¹⁶⁴

Arising from the foregoing, an interest in property under section 79 of the Family Law Act No 53 of 1975 (Cth) will include both legal and equitable interests which must be of a proprietary nature.¹⁶⁵ In this respect, property will include both real and personal property.¹⁶⁶ With reference to personal property, it will include a chose in possession and an equitable and a legal chose in action.¹⁶⁷

It is noted that under section 79 of the Family Law Act No 53 of 1975 (Cth), only present and future interests in property will be considered by the court where it decides to alter the property interests of the spouses.¹⁶⁸ Interests which are subject to the happening of an event(s), also called contingent interests,¹⁶⁹ are not regarded as property which could be made subject to a court’s order under section 79 of the Family Law Act No 53 of 1975 (Cth).¹⁷⁰ *In the Marriage of Crapp (No 2)*,¹⁷¹ the court held:

“An order can only be made ... under s. 79 where a party has a present or future interest in a particular item of property. Clearly

¹⁶¹ “A party to a marriage includes a reference to a person who was a party to a marriage that has been: (a) terminated by divorce (in Australia or elsewhere); or (b) annulled (in Australia or elsewhere); or (c) terminated by the death of one party to the marriage.” See s 4(2) of the Family Law Act No 53 of 1975 (Cth).

¹⁶² This is the statutory definition of property and it is derived from the provisions of s 45 of English Matrimonial Causes Act of 1857 [20 & 21 Vict. Cap 85]. See Dickey, *Family Law*, 482.

¹⁶³ (1977) 29 FLR 46.

¹⁶⁴ *In the Marriage of Duff* (1977) 29 FLR 46 at 56.

¹⁶⁵ *Mullane v Mullane* (1983) 158 CLR 436 at 445. See also *Bevan v Bevan* [2013] FamCAFC 116, para 67.

¹⁶⁶ Dickey, *Family Law*, 483.

¹⁶⁷ Shares in an incorporated company, an interest in a partnership business, rights under a contract, and interests of a beneficiary in a deceased estate amongst others will constitute property under the Family Law Act No 53 of 1975 (Cth). See *In the Marriage of Duff* (1977) 29 FLR 46 at 55 – 57; *In the Marriage of Miller* (1977) 30 FLR 286 at 294; *In the Marriage of Best* [1993] FamCA 107, paras 65 – 70; 94. See generally, Dickey, *Family Law*, 483 – 484.

¹⁶⁸ Dickey, *Family Law*, 484.

¹⁶⁹ Dickey, *Family Law*, 484, 486.

¹⁷⁰ *In the Marriage of Crapp (No 2)* [1979] FLC 90-615.

¹⁷¹ [1979] FLC 90-615 at 78,176.

where a party has a present interest, no difficulties arise, and by 'future interest' in the above sense I take it to mean a situation where a party has an established interest in an item of property but the date of receipt is postponed to some future time. *That is different from the case where a party may become entitled to an interest in property in the future provided that certain events occur in the meantime.*"¹⁷².

It is noted, however, that the superannuation interests of spouses are at present subject to a court's order under section 79 of the Family Law Act No 53 of 1975 (Cth).¹⁷³ The court can allocate or split the superannuation interests between spouses when making a property order.¹⁷⁴ Section 90MC(1) of the Family Law Act No 53 of 1975 (Cth)¹⁷⁵ provides that "[a] superannuation interest is to be treated as property for the purposes of paragraph (ca) of the definition of *matrimonial cause*¹⁷⁶ in section 4."¹⁷⁷

It is equally noted that property which is made subject to an order of court under section 79 of the Family Law Act No 53 of 1975 (Cth) is required to be alienable.¹⁷⁸ With particular reference to orders made pursuant to sections 78 (declaration of property interests)¹⁷⁹ and 114 (an order for injunction)¹⁸⁰ of the Family Law Act No 53 of 1975 (Cth), however, the property need not be alienable.¹⁸¹

¹⁷² Words in italics are my emphasis.

¹⁷³ Dickey, *Family Law*, 488.

¹⁷⁴ See s 90MA of the Family Law Act No 53 of 1975 (Cth). Spouses can also by an agreement have their superannuation interests split between each other.

¹⁷⁵ As amended in December, 2002.

¹⁷⁶ In paragraph (ca) of the interpretative section (s 4) of the Family Law Act No 53 of 1975 (Cth), matrimonial cause is defined as "... proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings: (i) arising out of the marital relationship; (ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or (iii) in relation to the divorce of the parties to that marriage, the annulment of that marriage or the legal separation of the parties to that marriage, being a divorce, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that divorce, annulment or legal separation is recognised as valid in Australia under section 104." Property proceedings can, thus, only be instituted under the Family Law Act No 53 of 1975 (Cth) "... only if they constitute a 'matrimonial cause' as defined in s 4(1)." See Dickey, *Family Law*, 492.

¹⁷⁷ By section 90AD(1) and (2)(Pt VIII A A) of the Family Law Act No 53 of 1975 (Cth), a debt owed by a spouse is regarded as property within the meaning of paragraph (ca) of s 4 of the Family Law Act No 53 of 1975 (Cth). It provides: "(1) For the purposes of this Part, a debt owed by a party to a marriage is to be treated as property for the purposes of paragraph (ca) of the definition of *matrimonial cause* in section 4; (2) For the purposes of paragraph 114(1)(e), *property* includes a debt owed by a party to a marriage."

¹⁷⁸ See Dickey, *Family Law*, 489.

¹⁷⁹ *In the Marriage of Zorbas* (1990) 101 FLR 53 at 57.

¹⁸⁰ *In the Marriage of Senior* (1989) 97 FLR 271 at 282.

¹⁸¹ See Dickey, *Family Law*, 490.

4.3.2 Property Interests Declaration

Section 78(1) of the Family Law Act No 53 of 1975 (Cth) provides:

“In proceedings between the parties to a marriage with respect to existing title or rights in respect of property, the court may declare the title or rights, if any, that a party has in respect of the property.”

It is submitted that, by virtue of the above provision, the Family Courts of Australia are empowered to make a declaration on the legal and equitable interests¹⁸² of spouses in relation to existing title or rights to property.¹⁸³ The discretionary¹⁸⁴ power of the courts under this provision is exercisable only in respect of declarations to property and nothing more.¹⁸⁵

The courts cannot, in declaring the property interests of the spouses, vary their interests on the basis of what is just and fair.¹⁸⁶ They are obliged to make their orders in accordance with the ordinary common law, equity and statutory principles.¹⁸⁷ It is argued, therefore, that section 78(1) of the Family Law Act No 53 of 1975 (Cth) will accommodate applications for a declaration of property interests based on equity and trust principles.¹⁸⁸

It follows that, where there is any dispute concerning the title or interests in property between spouses, a spouse can conveniently rely on the doctrine of common intention constructive trust, the principles of resulting trust,¹⁸⁹ proprietary estoppel, unjust enrichment, or the concept of unconscionability to establish an interest in property.¹⁹⁰

¹⁸² Parkinson, *Australian Family Law in Context*, 531.

¹⁸³ *In the Marriage of Matusewich* (1978) Fam LR 258 at 265 – 268; *Pavone v Pavone and Ors* [2015] FamCA 100, para 57; Dickey, *Family Law*, 503; Stidston, 2013 <http://www.westminsterlaw.com.au/wp-content/uploads/2013/05/Stanford-v-Stanford-A-tale-of-two-enquiries.pdf>, 1 at 7.

¹⁸⁴ The use of the word “may” in s 78(1) of the Family Law Act No 53 of 1975 (Cth) indicates that the nature of the power conferred on Family Courts is discretionary. See Dickey, *Family Law*, 503.

¹⁸⁵ See *In the Marriage of Zorbas* (1990) 101 FLR 53 at 57.

¹⁸⁶ Dickey, *Family Law*, 504.

¹⁸⁷ Dickey, *Family Law*, 504; Stidston, 2013 <http://www.westminsterlaw.com.au/wp-content/uploads/2013/05/Stanford-v-Stanford-A-tale-of-two-enquiries.pdf>, 1 at 7.

¹⁸⁸ Stidston, 2013 <http://www.westminsterlaw.com.au/wp-content/uploads/2013/05/Stanford-v-Stanford-A-tale-of-two-enquiries.pdf>, 1 at 7.

¹⁸⁹ Stidston, 2013 <http://www.westminsterlaw.com.au/wp-content/uploads/2013/05/Stanford-v-Stanford-A-tale-of-two-enquiries.pdf>, 1 at 7.

¹⁹⁰ See *Baumgartner v Baumgartner* [1987] HCA 59, paras 30 – 36. Emiri and Giwa, *Equity and Trusts in Nigeria*, 432 state that the concept of unconscionability “... relies on the constructive trust to

It should be noted that there must be an existing dispute between the spouses before a declaration of property interests can be made.¹⁹¹ Before a declaratory order is made, there must be an issue as to the title or existence of any interests of a spouse in the property in dispute.¹⁹²

Besides declaratory orders, the court is also vested with the power to make consequential orders for the purpose of giving effect to any order made under section 78(1) of the Family Law Act No 53 of 1975 (Cth). Section 78(2) of the Family Law Act No 53 of 1975 (Cth) goes further to state:

“Where a court makes a declaration under subsection (1), it may make consequential orders to give effect to the declaration, including orders as to sale or partition and interim or permanent orders as to possession.”

The consequential orders which the court can make under this subsection are neither limited to orders for the sale of property or the partitioning of same, nor are they limited to an interim or a permanent order concerning possession. The consequential orders of the court may include, amongst other things, its general powers as stated in section 80 of the Family Law Act No 53 of 1975 (Cth).¹⁹³

4.3.3 Property Interests Alteration

By section 79(1) of the Family Law Act No 53 of 1975 (Cth), where the court exercises its power under the Act, it is empowered to make an order which alters the spouses' interests in property belonging to either or both spouses. The relevant portions of section 79(1) provide as follows:

“In property settlement proceedings, the court may make such order as it considers appropriate:
(a) in the case of proceedings with respect to the property of the parties to the marriage or either of them—altering the interests of the parties to the marriage in the property; or
(b)
including:
(c) an order for a settlement of property in

raise an equity for the claimant wherever it is thought unconscionable for the other party to rely on legal title with a view of frustrating the intendment of the relationship.”

¹⁹¹ Dickey, *Family Law*, 504; Parkinson, *Australian Family Law in Context*, 532.

¹⁹² *In the Marriage of Lanceley* [1994] FamCA 94, paras 49; 54.

¹⁹³ This will include the power to order the payment of money, transfer of property, settlement of property, execution of deeds or instruments of title or any order which it thinks fit will serve the interest of justice in the case. See s 80(1) of the Family Law Act No 53 of 1975 (Cth). See also *In the Marriage of Schreiber and Dixon (formerly Schreiber)* (1977) FLR 409 at 420; *In the Marriage of Matusewich* (1978) Fam LR 258 at 265 – 268; Dickey, *Family Law*, 505.

- (d) **substitution for any interest in the property; and an order requiring:**
(i) either or both of the parties to the marriage; or
(ii);
to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.”¹⁹⁴

It follows that, upon the alteration of interest in the property which belongs to either or both spouses, the court is further empowered in substitution of the altered interest to make a property settlement order. The court can also, by virtue of its order, mandate a spouse(s) to make a property settlement or property transfer “... for the benefit of either or both of the parties to the marriage or a child of the marriage ...” It is noted that, where a spouse dies before an order under section 79(1) of the Act is carried out, such an order will be enforceable “... on behalf of, or against ... the estate of the deceased spouse.”¹⁹⁵

It should also be noted that, unlike England where property adjustment is made only as an ancillary relief on the grant of a principal relief under the Matrimonial Causes Act,¹⁹⁶ in Australia spouses can apply for a property settlement proceedings at any time immediately after marriage as the Act does not restrict such applications to proceedings for a principal relief.¹⁹⁷ Whether or not a property settlement order will be made by the court during a happy “intact marriage”,¹⁹⁸ however, remains for the

¹⁹⁴ It is noted that settlement of property as used in this section could imply “... the creation of successive interests in property, ... transfer of property by one spouse to the other, and the alteration of a party’s legal or equitable rights in property.” See *In the Marriage of Mullane* (1980) 43 FLR 201 (Family Court); *In the Marriage of Duff* (1977) 29 FLR 46 at 54 – 55. See also Dickey, *Family Law*, 521.

¹⁹⁵ S 79(1A) of the Family Law Act No 53 of 1975 (Cth).

¹⁹⁶ See s 24 of the Matrimonial Causes Act Cap 18 of 1973.

¹⁹⁷ It should be noted that property settlement proceedings must be made within 12 months in cases where there is a breakdown of marriage. S 44(3) of the Family Law Act No 53 of 1975 (Cth) creates a 12 month limitation period for the commencement of property settlement proceedings after a *decree nisi* has been made absolute or upon a decree of nullity of marriage. Proceedings shall not be instituted after the expiration of the period except by the leave of court or consent of the parties. Where proceedings are instituted after the expiration of the time allowed by the Act, the court may, on the application of a spouse grant leave. The court is, however, mandated not to grant leave after the expiration of the period created by the Act except where its refusal would result to hardship on either spouses or a child of the marriage. See s 44(4) of the Family Law Act No 53 of 1975 (Cth). By s 43(3AA) of the Family Law Act No 53 of 1975 (Cth), the court is obliged to dismiss consent proceedings under s 44(3) of the Act where the consent of a spouse was acquired by fraud, duress or unconscionable conduct and it would in the circumstance amount to a miscarriage of justice to allow the continuation of such proceedings. Note that, in the case of an appeal, a maximum period of 28 days is allowed after the date of the appellate judgement. See Rule 22.03 Family Law Rules 2004 which replaced the Family Court Rules 1984.

¹⁹⁸ See *Stanford v Stanford* [2012] HCA 52.

court to decide on the consideration of what is just and equitable.¹⁹⁹ In *Stanford v Stanford*,²⁰⁰ the husband's argument that the court lacked jurisdiction under section 79 to alter the property rights of the spouses in a subsisting and intact marriage was met with rejection by the High Court.²⁰¹

An order made pursuant to section 79(1) of the Family Law Act No 53 of 1975 (Cth) will alter the legal or equitable proprietary interests of spouses in their individual or joint property, thereby giving "... rise to an interest in property which is defeasible on assignment or transfer to a third party, or on the occurrence of some other event, or which the holder is enjoined from assigning or transferring."²⁰² To this extent, the court can, by its order, make a transfer of the totality of the proprietary interest of one spouse to the other spouse.²⁰³

4.3.3.1 Can the Court Vary or Set Aside a Property Order?

A property order made by the court under section 79(1) of the Family Law Act No 53 of 1975 (Cth) is not generally opened to a variation or review.²⁰⁴ In limited circumstances, however, a property order which alters the property interests of the spouses can be set aside upon the application of a spouse against whom the

¹⁹⁹ S 79(2) of the Family Law Act No 53 of 1975 (Cth). See *Stanford v Stanford* [2012] HCA 52; *Daniels v Daniels* [2015] FCCA 2569, para 59 where the courts were of the view that they would readily make an order where it is established that there is no common use of the property (particularly where the marriage has broken down) or the situation which exists between the spouses in relation to the property is inequitable.

²⁰⁰ [2012] HCA 52.

²⁰¹ *Stanford v Stanford* [2012] HCA 52, paras 27 and 28. The argument in *Stanford v Stanford* [2012] HCA 52, para 26, that a property settlement order cannot be made in view of the fact that the marriage between the spouses had not broken down and to do otherwise would amount to the court exercising its discretion in such a manner that would be contrary to its duty to protect and preserve the institution of marriage, confronted the Family Court for twelve years before the High Court ultimately pronounced on the issue. In *Sterling v Sterling* [2000] FamCA 1150, which was similar to *Stanford v Stanford* [2012] HCA 52 but for the fact that on medical evidence, the wife (the applicant) had to be institutionalised for the remaining part of her life, the court of first instance and the majority of the full court made a property settlement order in favour of the wife (on the basis of permanent incapacitation which had forced a total physical separation between the spouses) despite the husband's argument that the marriage had not broken down as he was involuntarily separated from the wife by virtue of the wife's illness. Although special leave was granted to the husband to appeal to the High Court (see *Sterling v Sterling* [2001] HCA 445), the case was settled soon thereafter. See Wilson and Coggins, *The Blended Family Blues: Obtaining Property Orders over the Assets of an Intact Relationship in a Blended Family*, 14. In *Starkey v Starkey & Anor* [2009] FamCA 432 the court was of the opinion that the fact of non-separation is not a bar to the exercise of the court's jurisdiction to make a property settlement order under s 79 of the Family Law Act No 53 of 1975 (Cth) except in exceptional circumstances. In this case, the court exercised its discretion affirmatively. See also *Polik v Polik* [2012] FamCA 335, paras 9 and 108.

²⁰² *Mullane v Mullane* (1983) 158 CLR 436 at 445.

²⁰³ *In the Marriage of Best* [1993] FamCA 107, paras 122 – 123; Dickey, *Family Law*, 516.

²⁰⁴ *Mullane v Mullane* (1983) 158 CLR 436 at 445.

application was made.²⁰⁵ The order for variation or setting aside is at the court's discretion;²⁰⁶ and, where the court considers it fit to exercise its discretion to set aside a property order, it can "... make another order under section 79 in substitution for the order so set aside."²⁰⁷

For a court to set aside or vary a property order under section 79 of the Family Law Act No 53 of 1975 (Cth), the applicant must establish amongst other things:

(a) that consequent upon fraud, duress, lack of material disclosure of the financial position of the other spouse or false evidence amongst others, there exists a miscarriage of justice;²⁰⁸

(b) that the execution of a property order or a part of it has not been feasible in the light of the present circumstances;²⁰⁹

(c) that there has been default on the part of a spouse who is obliged to execute a property order, and, in the light of such default, justice will be served if an order is made to set aside, vary or substitute the initial order;²¹⁰ or

(d) that as a result of an exceptional circumstance which has arisen with regards "... to the care, welfare and development of a child of the marriage, ... or where the applicant has caring responsibility for the child ... the applicant, will suffer hardship if the court does not vary the order or set the order aside and make another order in substitution for the order ...".²¹¹

Where all the parties to the original proceedings for property settlement consent that the court varies or sets aside a property order which was made in that proceedings, then, on the application of the spouse against whom the order was made or who was affected by such order, the court may as it deems fit exercise its discretion to make a new "... order under section 79 in substitution for the order so set aside."²¹²

It would appear from the foregoing that the discretion given to the court to revise

²⁰⁵ S 79A of the Family Law Act No 53 of 1975 (Cth).

²⁰⁶ S 79A of the Family Law Act No 53 of 1975 (Cth).

²⁰⁷ S 79A of the Family Law Act No 53 of 1975 (Cth).

²⁰⁸ S 79A(1)(a) of the Family Law Act No 53 of 1975 (Cth).

²⁰⁹ S 79A(1)(b) of the Family Law Act No 53 of 1975 (Cth).

²¹⁰ S 79A(1)(c) of the Family Law Act No 53 of 1975 (Cth).

²¹¹ S 79A(1)(d) of the Family Law Act No 53 of 1975 (Cth).

²¹² S 79A(1A) of the Family Law Act No 53 of 1975 (Cth).

property orders is not closed as spouses could, when there is a change of circumstances of an exceptional nature or where it is no longer practicable for a spouse to carry out the order of court, make an application to the court to set aside or vary a property order.

The exercise of the court's discretion in this regard depends on the nature of the previous property order made. Where the order made was for the transfer of the proprietary interest in property, it is highly unlikely that the court would set aside an order of that nature. This is so because, in the case of a transfer of property from one spouse to the other, the entire proprietary interest in the property which is capable of being "... defeasible on assignment or transfer to a third party ..." ²¹³ passes to the receiving spouse.

Where the initial property order under section 79 of the Family Law Act No 53 of 1975 (Cth) was in respect of an equitable interest by way of property settlement for the benefit of a custodial spouse, however, the court could possibly exercise its power to vary, set aside, and or substitute the order, if it considers it appropriate to do so in accordance with the relevant factors set out in section 79A(1) of the Act. ²¹⁴

It should, however, be noted that, whether or not a court can alter the property orders made pursuant to section 79 of the Family Law Act No 53 of 1975 (Cth), it is charged with the statutory duty to endeavour to end the financial relations of spouses in a property settlement and spousal maintenance proceedings ²¹⁵ save the "... maintenance payable during the subsistence of a marriage ..." ²¹⁶. Section 81 of the Family Law Act No 53 of 1975 (Cth) provides:

"In proceedings under this Part, other than proceedings under section 78 or proceedings with respect to maintenance payable during the subsistence of a marriage, the court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them."

By this provision, the court severs the financial relationship between the spouses together with their rights and liabilities. The financial independence of the spouses is guaranteed upon the breakdown of marriage which will possibly lead to an end to

²¹³ *Mullane v Mullane* (1983) 158 CLR 436 at 445.

²¹⁴ *Mullane v Mullane* (1983) 158 CLR 436 at 445.

²¹⁵ See *Mallet v Mallet* [1984] HCA 21, para 2, per Gibbs CJ.

²¹⁶ S 81 of the Family Law Act No 53 of 1975 (Cth).

litigation. It is submitted that section 81 of the Family Law Act No 53 of 1975 (Cth) is a statutory codification of the clean break principle under English law.

4.3.3.2 When should Judicial Discretion be exercised?

A property alteration order is a product of the exercise of judicial discretion.²¹⁷ This discretion, however, must be exercised within the confines of legal principles and not on a mere assumption of what seems to be morally right to the judge in the case before him.²¹⁸ Section 79(2) of the Family Law Act No 53 of 1975 (Cth) provides: “The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.”

Whether or not the just and equitable requirement of section 79(2) of the Family Law Act No 53 of 1975 (Cth) is a threshold issue²¹⁹ has been hotly debated.²²⁰ It has been argued in some quarters that this is a “statutory pre-condition”²²¹ or a threshold issue²²² which must be satisfied before an order is made under section 79 of the Act.²²³ It is the court’s duty to make a finding that it will be just and equitable to alter the existing property rights of the spouses.²²⁴ In *Sebastian v Sebastian (No 5)*,²²⁵ while analysing the decision in *Stanford v Stanford*²²⁶ on the proper approach to adopt in the determination of an application under section 79 of the Family Law Act No 53 of 1975 (Cth), the court²²⁷ held that:

“What is clear from the above is that *before* examining what order should be made pursuant to an assessment of the factors identified in s 79(4), the Court *must* be satisfied that pursuant to s 79(2) it is just and equitable to make an order.”

²¹⁷ *Bevan v Bevan* [2013] FamCAFC 116, para 83.

²¹⁸ *Stanford v Stanford* [2012] HCA 52, para 38; *Bevan v Bevan* [2013] FamCAFC 116, para 67.

²¹⁹ See *Stanford v Stanford* [2012] HCA 52, paras 37 – 40. The majority in *Bevan v Bevan* [2013] FamCAFC 116, para 81, did not agree that the just and equitable requirement should be treated as a threshold issue.

²²⁰ See *Bevan v Bevan* [2013] FamCAFC 116, paras 84 – 89.

²²¹ Skinner, 2014 www.rowanskinnerlegal.com.au, 4.

²²² Bartfeld, *The High Court Decision in Stanford v Stanford – Lots of Questions - Very Few Answers*, 11; Stidston, 2013 <http://www.westminsterlaw.com.au/wp-content/uploads/2013/05/Stanford-v-Stanford-A-tale-of-two-enquiries.pdf>, 1 at 6. Wilson and Coggins, *The Blended Family Blues: Obtaining Property Orders over the Assets of an Intact Relationship in a Blended Family*, 33 concluded that arising from *Stanford v Stanford* [2012] HCA 52, the just and equitable requirement is a “preliminary question”.

²²³ See *Stanford v Stanford* [2012] HCA 52, paras 37 – 40; *Sebastian v Sebastian (No 5)* [2013] FamCA 191, para 143.

²²⁴ Parkinson, 2013 *Australian Family Lawyer*, 4.

²²⁵ [2013] FamCA 191.

²²⁶ [2012] HCA 52.

²²⁷ *Sebastian v Sebastian (No 5)* [2013] FamCA 191, para 143.

It was reasoned before the decision in *Stanford v Stanford*,²²⁸ that the just and equitable requirement when making a property order "... permeates the entire decision making process, and it is not impermissible to consider it at an earlier point if the particular case requires it."²²⁹

The Full Court in *Bevan v Bevan*²³⁰ adopted the above viewpoint when it held that a description of the separate enquiry in section 79(2) of the Family Law Act No 53 of 1975 (Cth) as a threshold issue is misleading and wrong.²³¹ To the court, it is better described as a requirement which must be borne in mind in the entire property settlement proceedings because it is directed to both sections 79(2) (whether an order should be made) and 79(4) (on the kind of order to make if any) of the Family Law Act No 53 of 1975 (Cth).²³²

To this extent, it has been said that, while the separate issues arising from sections 79(2) and 79(4) of the Family Law Act No 53 of 1975 (Cth) must not be conflated,²³³ they are intertwined because the wording of the Act directly links them.²³⁴ In order not to conflate the separate issues, therefore, judges are cautioned to desist from assessing in percentages or monetary terms the financial and non-financial contributions of spouses and other issues stated in section 79(4) of the Family Law Act No 53 of 1975 (Cth) until the question of the "just and equitable" nature of the order is addressed.²³⁵

By section 79(2) of the Family Law Act No 53 of 1975 (Cth), there is a caveat on the judge not to alter the property rights of spouses until he or she has taken into consideration all the circumstances of the case before him, and he or she is satisfied based on the evidence adduced, that it will be just and equitable to make the order. The court is enjoined to answer this question first before exercising its discretion

²²⁸ [2012] HCA 52.

²²⁹ *Martin v Newton* [2011] FamCAFC 233, para 306. See also *Manolis v Manolis (No 20)* [2011] FamCAFC 105 at para 65.

²³⁰ [2013] FamCAFC 116.

²³¹ *Bevan v Bevan* [2013] FamCAFC 116, paras 86.

²³² *Bevan v Bevan* [2013] FamCAFC 116, paras 86 and 87.

²³³ *Stanford v Stanford* [2012] HCA 52, para 40.

²³⁴ *Bevan v Bevan* [2013] FamCAFC 116, paras 87 and 88.

²³⁵ *Bevan v Bevan* [2013] FamCAFC 116, para 89. Finn J at para 167 expressed the view that a general rule will be for the judge to first identify at the earliest point in his judgement the existing property interests of the spouses and the orders sought in view of those interests.

under section 79(1) of the Act.²³⁶

The High Court has stated that the expression: “just and equitable” lacked an exhaustive definition²³⁷ and “[i]t is not possible to chart its metes and bounds.”²³⁸ A conclusion as to what is just and equitable will, thus, depend on the peculiar facts of each case²³⁹ and the conclusion reached relative to such facts by the court.²⁴⁰ It is added that the matters set out in section 79(4) are not to be ignored in arriving at a conclusion.²⁴¹

In *Stanford v Stanford*,²⁴² the court of first instance (the Magistrate Court of Western Australia) made an order for a property settlement which required a possible sale of the spouses’ matrimonial home and the division of the proceeds should the husband fail to pay the wife 42.5% of her interest in the property as determined by the court. In the words of the Duncanson M:

“As a result of the division arrived at based on my assessment of the contribution of the parties to this long marriage, the needs of both will be catered for and I am satisfied therefore that the outcome is one which is just and equitable.”²⁴³

Overturning the judgement, the Full Court of the Family Court of Australia held that the magistrate did not consider the just and equitable requirement against the implication of the judgement on the property rights of the husband when the magistrate made the property settlement order.²⁴⁴ The Full Court could not ascertain the rationale behind the property settlement order made by the magistrate bearing in mind the fact that the marriage was still intact (though there was an involuntary separation of the spouses occasioned by the wife’s ailment) and the husband was in occupation of the matrimonial home while meeting the reasonable needs of the sick

²³⁶ *Mahon v Mahon* [2015] FCCA 510 para 93.

²³⁷ *Stanford v Stanford* [2012] HCA 52, para 36; *Bevan v Bevan* [2013] FamCAFC 116, paras 83 – 84.

²³⁸ *Stanford v Stanford* [2012] HCA 52, para 36.

²³⁹ *Stanford v Stanford* [2012] HCA 52, para 46. Finn J in *Bevan v Bevan* [2013] FamCAFC 116, para 166 stated: “The point in the decision making process at which the question of whether it is just and equitable to alter property interests of either party is to be addressed must depend on the circumstances of each particular case. There can be no hard and fast rule.” See also *Livingstone v Livingstone* [2015] FCCA 1863, para 164.

²⁴⁰ *Bevan v Bevan* [2014] FamCAFC 19, para 92.

²⁴¹ *Bevan v Bevan* [2013] FamCAFC 116, para 84. See also Skinner, 2014 www.rowanskinnerlegal.com.au, 15 where it was argued that an answer to s 79(2) of the Family Law Act No 53 of 1975 (Cth) can only be given after a consideration of the provisions of s 79(4) of the Family Law Act No 53 of 1975 (Cth).

²⁴² [2012] HCA 52, para 8.

²⁴³ *Stanford v Stanford* [2012] HCA 52, para 9.

²⁴⁴ *Stanford v Stanford* [2012] HCA 52, para 10.

wife who was in a nursing home having suffered a stroke and developed dementia.²⁴⁵

The wife died before the Full Court delivered judgement in this case. It was held that “... the wife did not have a need for a property settlement as such and that her reasonable needs could be met in other ways particularly by maintenance ...”²⁴⁶ The Full Court,²⁴⁷ however, proceeded to order that upon the death of the husband, the 42.5% which represented the deceased wife’s interests in the matrimonial home should be paid to her legal personal representatives. Justifying its order as capable of producing a just and equitable outcome,²⁴⁸ it reasoned that the long duration of the marriage together with the deceased wife’s contributions, established a moral obligation which requires a property settlement order in her favour.²⁴⁹

On appeal to the High Court,²⁵⁰ the part of the Full Court’s judgement which had held that the magistrate had erred to have made a property settlement order without considering whether or not the order made would be just and equitable in relation to the present circumstances of the marriage, was upheld. The Full Court’s reason for proceeding to grant a property settlement order was faulted, however, because it failed to consider separately the question “... whether, had the wife not died, it would have been just and equitable to make a property settlement order.”²⁵¹ This was in the view of the fact that her reasonable needs had been met by the husband.²⁵² The High Court said:²⁵³

“Section 79(4)(a)-(c) required that the contributions which the wife made to the marriage should be taken into account in

²⁴⁵ *Stanford v Stanford* [2012] HCA 52, para 10.

²⁴⁶ *Stanford v Stanford* [2012] HCA 52, para 10.

²⁴⁷ *Stanford v Stanford* [2012] HCA 52, para 12.

²⁴⁸ *Stanford v Stanford* [2012] HCA 52, para 12.

²⁴⁹ *Stanford v Stanford* [2012] HCA 52, para 12.

²⁵⁰ *Stanford v Stanford* [2012] HCA 52, para 47.

²⁵¹ S 79(8)(a) of the Family Law Act No 53 of 1975 (Cth) provides that property settlement proceedings commenced by a spouse under s 79 of the Act can be continued by the legal personal representative of spouse who died before the proceedings were completed. The court, however, is charged with the duty of considering whether a property order would have been made if the spouse had been alive and whether upon the death of the spouse it would still be appropriate to make such an order. If the court’s answers on these issues are in the affirmative, then it will proceed to make a property order as it thinks fit under s 79(1) of the Family Law Act No 53 of 1975 (Cth). A property order made under s 79(8) of the Family Law Act No 53 of 1975 (Cth) is enforceable on behalf of a deceased spouse or against his or her estate. See s 79(8)(b)(i) – (iii) and (c) of the Family Law Act No 53 of 1975 (Cth). See also *Stanford v Stanford* [2012] HCA 52, para 48.

²⁵² *Stanford v Stanford* [2012] HCA 52, paras 48 and 49.

²⁵³ *Stanford v Stanford* [2012] HCA 52, para 51.

'considering what order (if any) should be made' under s 79. It may readily be assumed that the length of the parties' marriage directly affected the extent of the contributions the wife had made. But, as already noted, the inquiries required by s 79(4) are separate from the "just and equitable" question presented by s 79(2). The two inquiries are not to be merged. And neither the inquiry whether it would have been just and equitable to make a property settlement order if the wife had not died, nor the separate inquiry whether it was *still* just and equitable to do so, was to be merged with or supplanted by an inquiry into what division of property should be made by applying the matters listed in s 79(4)."

In *Bevan v Bevan*,²⁵⁴ the spouses were informally separated for sixteen (16) years and the husband had told the wife that she could retain and deal with the property in Australia for herself and the children of the marriage. The husband gave the wife a power of attorney in this regard. They were divorced on the 22nd day of July, 2010, and, on the 20th day of July, 2011, the husband commenced property settlement proceedings which were opposed by the wife. The trial judge granted a property order under section 79 of the Family Law Act No 53 of 1975 (Cth) on the grounds that it was just and equitable to do so.²⁵⁵ In the court's opinion, it is not mandated when determining the just and equitable requirement to consider the representations made by spouses during the subsistence of their marriage or before separation.²⁵⁶ The court went on to say that "[t]he essential inquiry is not what the parties thought or said from time to time, but what their entitlement is at law."²⁵⁷ The magistrate then ordered that the property should be divided in a ratio of 60:40 in favour of the wife.²⁵⁸

On appeal by the wife that the just and equitable requirement had not been satisfied in view of the facts and circumstances of the case, the Full court²⁵⁹ held that the trial judge was wrong not to have considered the representations made by the husband to the wife as these were relevant in the determination of the question of whether "... it is just and equitable to make the order." The Full Court further held that the long delay in commencing the proceedings, "... in the face of repeated prior representations, was highly relevant in the exercise of the s 79 discretion."²⁶⁰ Based

²⁵⁴ [2013] FamCAFC 116.

²⁵⁵ See *Bevan v Bevan* [2013] FamCAFC 116, para 56.

²⁵⁶ See *Bevan v Bevan* [2013] FamCAFC 116, para 47.

²⁵⁷ See *Bevan v Bevan* [2013] FamCAFC 116, para 47.

²⁵⁸ See *Bevan v Bevan* [2013] FamCAFC 116, para 56.

²⁵⁹ *Bevan v Bevan* [2013] FamCAFC 116, para 111.

²⁶⁰ *Bevan v Bevan* [2013] FamCAFC 116, para 123; *Bevan v Bevan* [2014] FamCAFC 19, paras 6 and 91. Compare the position taken by the court in this case with that of the English courts when there is a long delay in commencing proceedings for financial provisions under the Matrimonial

Causes Act Cap 18 of 1973. English authorities have held that in a case of long delay by a spouse to bring an application for financial provisions thereby creating an impression to the other spouse that no claim will be made against him or her, the application is liable to be dismissed. See *Foster v Foster* (1977) 7 Fam. Law 112 where the Court of Appeal denied an application for financial provisions made by the wife after 25 years of separation from the husband. The spouses had been married in 1937 and were separated in 1949 after which the husband lived with another woman. It was in evidence that the husband paid the wife £ 2000 per week after separation. Upon divorce in 1973, the wife sought a financial order in her favour. The Court of Appeal held that in view of the short duration of the marriage, *the long period of separation and the wife's failure to apply for financial provision* (emphasis added) until the husband had acquired joint assets with another woman, it would not be right to grant the wife's application. In *Chambers v Chambers* (1979) 10 Fam. Law 22 where the wife had been separated from the husband for 21 years before filing a petition for divorce wherein she sought orders for financial provision, the court was of the view that financial claims may fail where litigation has been unduly delayed after divorce. According to Smith, Jackson and Newton, *Jackson's Matrimonial Finance and Taxation*, para 5.7: "Whatever the length of the marriage, a claim may fail if it is left dormant for too long, in which case one factor may be that the husband's assets have been built up with another woman. It has been said that after a long lapse of time a party should be entitled to take the view that there would be no revival or institution of financial claims against them; the longer the lapse of time the more secure he or she should feel, and the less should any such claim be encouraged or entertained." See also *Rossi v Rossi* [2006] EWHC 1482 (Fam), paras 25 – 32. In this case, although it was found that the totality of the wife's assets were acquired after separation, the court, in dismissing the husband's claim for ancillary relief, held that the husband's claim to share in the wife's assets would have failed because of the 12 years' delay on his part to bring the application; noting that a grant of such application would be highly prejudicial to the wife. In *Hope v Knight* [2010] EWHC 3443 (Ch), para 14 where the wife had delayed for about 19 years (after a separation agreement had been made between the spouses) before seeking a reasonable financial provision for herself and the daughter of the marriage against the estate of the deceased husband, the court held: "It is well settled that among the many circumstances of the case that the court can take into account, whether under the Matrimonial Causes legislation or under the 1975 Act, the delay in asserting a claim that could have been asserted earlier. It seems to me that, so far as any capital provision is concerned, in the case of Julie, her conscious decision not to make before Michael's death any claim, despite knowing all along of the Isle of Man money, makes it unjust that she should now seek a capital adjustment nineteen years after the separation agreement when Michael is not around to give such explanations as may be available." The court in para 19 further held that "... the significance of delay was not limited to a case of delay following divorce but also applied to cases of delay following separation." Similarly, the Court of Appeal in England in *Vince v Wyatt* [2013] 1 WLR 3525 (CA), para 60, per Jackson LJ, held: "In the family context, there is no statutory bar to bringing a claim for financial relief ten, twenty or even thirty years after the divorce. Nevertheless, in my view the court should not allow either party to a former marriage to be harassed by claims for financial relief which (a) are issued many years after the divorce and (b) *have no real prospect of success. It must be an abuse of the court's process to bring such proceedings.*" (Emphasis added). On appeal to the Supreme Court, *Vince v Wyatt* [2015] 1 WLR 1228 (SC) at 1243 – 1246, the Court of Appeal's reason for dismissing the wife's application (which was based on the fact that the application has no real prospect of success and thus amounts to an abuse of court's process) which was brought 31 years after the marriage was broken down was, however, rejected on the basis that it was inconsistent with the court's duty under s 25 of the Matrimonial Causes Act Cap 18 of 1973. Allowing the wife's application to proceed (although observing that it is bound to face formidable difficulty (at 1243 – 1246, paras 30, 34 and 36)), the Supreme Court stated that the court is charged with the duty under s 25(1) of the Matrimonial Causes Act Cap 18 of 1973 to consider the entire circumstances of the case with regard to the application. It is submitted that, while there is a statutory bar in bringing an application for property settlement in Australia by virtue of s 44(3) of the Family Law Act No 53 of 1975 (Cth) which is only excusable if it is shown by an applicant that manifest injustice will result either to the spouse or the child of the marriage if the bar is enforced; in England there is no statutory bar as revealed in the cases discussed above. It has, however, been a product of judicial decisions to dismiss applications which are brought after a long period of separation. In doing this, the court must consider the entire circumstances of the case as required by s 25 of the Matrimonial Causes Act Cap 18 of 1973.

on these considerations,²⁶¹ the husband's application for the alteration of property interests was dismissed and the wife's appeal allowed.²⁶²

In order to satisfy the just and equitable requirement, the court must be guided by three fundamental propositions.²⁶³ Firstly, it must determine the respective rights of the spouses in their separate and joint property in accordance with the ordinary rules of law and equity. This must be based on "... the existing legal and equitable interests of the parties in the property."²⁶⁴

In Australia, it is pertinent to make a finding as to which spouse owns a particular asset. This is necessary because a consideration under section 79 of the Family Law Act No 53 of 1975 (Cth) usually commences with a proper identification of the existing property interests of the husband and wife.²⁶⁵

Secondly, the court's power to make an order under section 79 of the Family Law Act No 53 of 1975 (Cth) must be founded on established legal and equitable principles²⁶⁶ and not in an unfettered exercise of judicial discretion.²⁶⁷ There is, thus, no room for "palm tree justice" in the exercise of the court's power to alter the property rights of spouses under section 79 of the Family Law Act No 53 of 1975 (Cth).²⁶⁸ According to the High Court:²⁶⁹

"... the power to make a property settlement order is not to be exercised in an unprincipled fashion, whether it is just and equitable to make the order is not to be answered by assuming that the parties' rights to or interests in marital property are or should be different from those that then exist."

It is submitted that, under the Australian matrimonial property regime, questions

²⁶¹ *Bevan v Bevan* [2014] FamCAFC 19, paras 91 and 93.

²⁶² *Bevan v Bevan* [2014] FamCAFC 19, para 93.

²⁶³ *Stanford v Stanford* [2012] HCA 52, para 36. The Full Court of the Family Court in *Bevan v Bevan* [2014] FamCAFC 19, paras 28, 91 and 93 followed the fundamental propositions laid down in *Stanford v Stanford* [2012] HCA 52, para 36 by rejecting the husband's application for an alteration of the existing property interests in his favour. The court having found that the wife is the legal owner of all the assets went on to conclude that, based on evidence, it would be unjust to alter the wife's proprietary interests in the assets.

²⁶⁴ *Stanford v Stanford* [2012] HCA 52, para 37.

²⁶⁵ *Bevan v Bevan* [2013] FamCAFC 116, para 36.

²⁶⁶ See *In Re Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 257.

²⁶⁷ In *Wirth v Wirth* (1956) 98 CLR 228 at 231 – 232 the High Court stated that the power conferred on the court to determine the property rights of spouses as it thinks fit is founded "... upon the law and not upon judicial discretion". See also *Stanford v Stanford* [2012] HCA 52, para 38 and *Bevan v Bevan* [2013] FamCAFC 116, para 80.

²⁶⁸ *In Re Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 257.

²⁶⁹ *Stanford v Stanford* [2012] HCA 52, para 39.

between married spouses which concern the ownership of property on marriage breakdown are ascertained using ordinary principles of property law that also apply to unmarried people.²⁷⁰ This reaffirms the separation of property system. Section 79 addresses only the issue of whether the separate and joint property rights and interests as determined by the court should be altered in view of the present circumstances in which spouses find themselves.²⁷¹

Thirdly, the court's determination of what is just and equitable must not begin with the assumption that a spouse should necessarily be entitled to have a legal right or equitable interest in a matrimonial property or in the property of a spouse by virtue of the factors listed in section 79(4) of the Family Law Act No 53 of 1975 (Cth)²⁷² which also contains some moral obligations.²⁷³ Reference to moral obligations does not necessarily answer the "just and equitable" question in relation to a property settlement order.²⁷⁴ Accordingly, a separate consideration must be given to sections 79(2) and 79(4) of the Family Law Act No 53 of 1975 (Cth).²⁷⁵ The consideration must begin with section 79(2) before proceeding to section 79(4) of the Family Law Act No 53 of 1975 (Cth) to determine the extent and manner of the alteration of existing interests in property.²⁷⁶

The three fundamental propositions discussed above are aimed at one objective only. The alteration of property right must be done in a principled fashion, and the court should at all times, when it decides to exercise its discretion to alter the existing legal and equitable property interests of spouses, have a "principled reason"²⁷⁷ for doing so. The court, therefore, having being guided by the fundamental propositions,²⁷⁸ will then decide as to whether or not it will be just and equitable to exercise its discretion.

²⁷⁰ *Hepworth v Hepworth* (1963) 110 CLR 309 at 317; *Stanford v Stanford* [2012] HCA 52, para 39.

²⁷¹ *Stanford v Stanford* [2012] HCA 52, para 39.

²⁷² *Stanford v Stanford* [2012] HCA 52, para 40. Note that section 79(4) of the Family Law Act No 53 of 1975 (Cth) makes provision for the factors which the court must consider before deciding what property distribution order to make in the circumstance. See 4.3.4 below.

²⁷³ See s 79(4)(b) and (c) of the Family Law Act No 53 of 1975 (Cth).

²⁷⁴ *Stanford v Stanford* [2012] HCA 52, paras 51 and 52.

²⁷⁵ *Stanford v Stanford* [2012] HCA 52, para 40.

²⁷⁶ *Bevan v Bevan* [2013] FamCAFC 116, para 81; *Mahon v Mahon* [2015] FCCA 510 para 93.

²⁷⁷ *Stanford v Stanford* [2012] HCA 52, para 41.

²⁷⁸ The view is expressed that when courts conscientiously follow the stated fundamental propositions, the institution of marriage will be preserved and protected. See *Stanford v Stanford* [2012] HCA 52, para 41.

Reaffirming the above three fundamental propositions laid down in *Stanford v Stanford*,²⁷⁹ the Family Court of Australia in *Bevan v Bevan*²⁸⁰ reiterated the legislative intention behind section 79(2) of the Family Law Act No 53 of 1975 (Cth) as expressed by Strauss J in *Ferguson v Ferguson*:²⁸¹

“It seems to me that the main purpose of sec. 79(2) is to ensure that the Court will not alter the property rights of the parties, unless it is satisfied that cogent considerations of justice require it to do so, and that, if the Court decides that it is requisite to make any order under the section, the Court must be satisfied that the alterations so ordered will go no further than the justice of the matter demands.”²⁸²

It is, however, noted that the just and equitable requirement of section 79(2) of the Family Law Act No 53 of 1975 (Cth) will be answered in the affirmative easily in most cases where it is established by evidence that the marital union between the spouses has broken down irretrievably, the spouses have “voluntarily separated”,²⁸³ or that they have stopped living like a marital couple.²⁸⁴

It is submitted that, when a marital relationship degenerates, the need for the common use of matrimonial property is lost. The “common use of property” being the rationale behind the property arrangement of spouses, who at present see each other as enemies instead of “love birds” (as is usually the situation), is defeated. A breakdown of marriage, thus, puts an end to every stated and unstated assumption of the spouses with regards to their property interests during the subsistence of their marriage. Since there will no longer be a need for the common use of any property acquired by either or both spouses, the court will answer the question that “... it is just and equitable to make the order”²⁸⁵ affirmatively

²⁷⁹ [2012] HCA 52, para 36.

²⁸⁰ *Bevan v Bevan* [2013] FamCAFC 116, para 67.

²⁸¹ (1978) FLC 90-500 at 77615.

²⁸² See also *Beneke v Beneke* [1996] FamCA 82, para 28.

²⁸³ *Sebastian v Sebastian (No 5)* [2013] FamCA 191, para 143. This case was based on a voluntary separation of the spouses and the court had no difficulty in arriving at a conclusion that it will be just and equitable to make property settlement order.

²⁸⁴ *Stanford v Stanford* [2012] HCA 52, para 42; *Daniels v Daniels* [2015] FCCA 2569, para 59. It was held in *Stanford v Stanford* [2012] HCA 52, paras 43 and 44 that involuntary separation of spouses will not meet the just and equitable requirement for the alteration of the property interest of spouses. According to their Lordships: “It does not permit a court to disregard the rights and interest of the parties in their respective property and to make whatever order may seem to it to be fair and just.” – para 43.

²⁸⁵ See s 79(2) of the Family Law Act No 53 of 1975 (Cth); *Stanford v Stanford* [2012] HCA 52, para 42. See also *Bevan v Bevan* [2013] FamCAFC 116, para 70 where the Family Court suggested that since in most cases the just and equitable requirement will be met where the spouses have ceased to

The reverse will be the case in situations where the spouses were “involuntarily separated”²⁸⁶ as was the case in *Stanford v Stanford*.²⁸⁷ It would be pretty difficult to determine the just and equitable requirement in such cases of “particular and unusual circumstances” affirmatively.²⁸⁸ *In the Marriage of Jennings*²⁸⁹ where the spouses were involuntarily separated as a result of the illness of a spouse (the husband) who was hospitalised, and the wife kept paying him visits and taking care of his reasonable needs to the best of her ability, the court held that an order under section 79 of the Family Law Act No 53 of 1975 (Cth) would be unfair and unjust as “... there is nothing to be gained by embarking upon a full property application in the circumstances of parties who have formed no intent to separate; where one is suffering illness and is hospitalised and where the other continues to visit and partake in his care to the extent that she is able.”²⁹⁰

The High Court in *Stanford v Stanford*²⁹¹ noted that other circumstances could exist which may lead to the conclusion that it would be just and equitable to make a property settlement order. It is pointed out that a “... demonstration of one party’s unmet needs that cannot be answered by a maintenance order ...”²⁹² could be one of such instances. This gives credence to the earlier authority of *Farr v Farr*²⁹³ which is to the effect that property settlement proceedings can be commenced either on the breakdown of marriage or upon marital difficulties.²⁹⁴

It is also suggested that the just and equitable requirement will be answered in the affirmative in cases where both spouses seek a property alteration order²⁹⁵ or where

be in a marital union, the crucial importance of s 79(2) of the Family Law Act No 53 of 1975 (Cth) as canvassed in *Stanford v Stanford* [2012] HCA 52, para 42 is not likely to have any effect in such cases but will continue to remind judges that the underpinning factor for the alteration of property rights between spouses must be founded on a just and equitable requirement. It, however, remains a requirement for the trial judge to show that an affirmative answer was given to section 79(2) before proceeding to make a property settlement order. See *Bevan v Bevan* [2013] FamCAFC 116, para 82.

²⁸⁶ *Sebastian v Sebastian (No 5)* [2013] FamCA 191, para 143, per Young J.

²⁸⁷ [2012] HCA 52.

²⁸⁸ *Sebastian v Sebastian (No 5)* [2013] FamCA 191, para 143, per Young J.

²⁸⁹ [1997] FamCA 29.

²⁹⁰ Compare this case with *Sterling v Sterling* [2000] FamCA 1150 where an order for property settlement was granted where a spouse was totally incapacitated and institutionalised.

²⁹¹ [2012] HCA 52, para 45.

²⁹² *Stanford v Stanford* [2012] HCA 52, para 45.

²⁹³ [1976] FLC 90 – 133.

²⁹⁴ See also *Polik v Polik* [2012] FamCA 335, paras 81 – 87 and 108.

²⁹⁵ *Bevan v Bevan* [2013] FamCAFC 116, paras 165 and 168; *Livingstone v Livingstone* [2015] FCCA 1863, para 171.

they give consent to the alteration of their property rights²⁹⁶ as against cases where one spouse applies for alteration and the other spouse objects.²⁹⁷

4.3.4 What Property Order should be made and how is it determined?

Where the court decides to exercise its discretion, it is further required to take into consideration the factors spelt out in section 79(4) of the Family Law Act No 53 of 1975 (Cth).²⁹⁸ These factors guide the court in deciding what order to make, that is, the extent and manner to which the property interests of the spouse(s) should be altered.²⁹⁹ It is noted that a property alteration order made upon the consideration of section 79(4) of the Family Law Act No 53 of 1975 (Cth) must be just and equitable in all circumstances.³⁰⁰ A reproduction of the factors as contained in section 79(4) of the Family Law Act No 53 of 1975 (Cth) will be necessary to aid our discussion. They are:

- “(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and**
- (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and**
- (c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent; and**

²⁹⁶ In *Danson v Danson* [2015] FamCA 1167, para 116, the spouses were in agreement that, in the interests of justice, a property adjustment order should be made. The main contention in this case was the manner and extent of the adjustment of their property and superannuation interests. While the wife argued for a ratio of 70:30 division in her favour, the husband's argument favoured an equal division. See s 44(3) and 44(3AA) of the Family Law Act No 53 of 1975 (Cth) which referred to the possibility of consent proceedings for property settlement under s 79 of the same Act.

²⁹⁷ *Bevan v Bevan* [2013] FamCAFC 116, para 165.

²⁹⁸ *Bevan v Bevan* [2013] FamCAFC 116, para 170.

²⁹⁹ *Bevan v Bevan* [2014] FamCAFC 19, para 28.

³⁰⁰ See *Woolams v Woolams* [2004] FCWA 32, para 70; *Teal v Teal* [2010] FamCAFC 120, para 70 and *Bevan v Bevan* [2013] FamCAFC 116, para 86.

- (d) the effect of any proposed order upon the earning capacity of either party to the marriage; and
- (e) the matters referred to in subsection 75(2) so far as they are relevant; and
- (f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and
- (g) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.”

It is noted that section 79(4)(a) to (c) of the Family Law Act No 53 of 1975 (Cth) enjoins the court to consider both the financial and non-financial contributions made by each spouse to the acquisition and development of property together with their contributions to the welfare of the family.³⁰¹ This will include the contribution of “stay-at-home mothers”.³⁰² The researcher will return shortly to a discussion on the weight accorded to the factors listed in subsections (a) to (c) of Section 79(4) of the Act.³⁰³

The implications of a court order on their earning capacity,³⁰⁴ the several factors listed in section 75(2) of the Family Law Act No 53 of 1975 (Cth),³⁰⁵ any previous order of the court in respect of a spouse or child of the marriage,³⁰⁶ and the present and future obligations of the spouses to any child of the marriage³⁰⁷ must also be given careful consideration before a court arrives at an appropriate order to make in the circumstances.

In order to make an appropriate order, judges usually adopt a “four step process”.³⁰⁸

³⁰¹ *Daniels v Daniels* [2015] FCCA 2569, para 51.

³⁰² *Mahon v Mahon* [2015] FCCA 510, para 105.

³⁰³ It is noted that the Act did not specify the weight to be given to these factors. They are in the discretion of the court to decide. See *Mallet v Mallet* [1984] HCA 21, para 2, per Gibbs CJ.

³⁰⁴ S 79(4)(d) of the Family Law Act No 53 of 1975 (Cth).

³⁰⁵ S 79(4)(e) of the Family Law Act No 53 of 1975 (Cth). Section 75(2) of the Act highlights the various factors which a court must consider when making an order for spousal maintenance. This will include, amongst other things, the age, health, income, property, employment capacity, standard of living, duration of marriage of the spouses and the issue of care and custody of a child of the marriage.

³⁰⁶ S 79(4)(f) of the Family Law Act No 53 of 1975 (Cth).

³⁰⁷ S 79(4)(g) of the Family Law Act No 53 of 1975 (Cth).

³⁰⁸ See *In the Marriage of Ferraro* [1992] FamCA 64, paras 13 – 24, 114; *Hickey v Hickey and A-G of the Commonwealth* [2003] FamCA 395, para 39. In *Norman v Norman* [2010] FamCAFC 66, para 60, the Full Court referred to it as a “disciplined approach” or a “structured process of reasoning” which serves as a means to an end. In *Bevan v Bevan* [2013] FamCAFC 116, para 64, it was referred to as a “settled approach”. At para 72 of *Bevan’s case* [2013] FamCAFC 116, the court aptly described the “four step approach” as “... a shorthand distillation of the words of a statute which has but one ultimate requirement, namely not to make an order unless it is just and equitable to do so.” Judges have, however, been cautioned not to apply it rigidly or treat it as a statutory imperative because it is not a statutory but a judicial creation aimed at achieving a final result which should be seen as being just and equitable. See *Norman v Norman* [2010] FamCAFC 66, para 60; *Bevan v Bevan* [2013]

This entails:

1. An identification and valuation of the property and liabilities of spouses;³⁰⁹
2. Identify and assess the spouses' respective contributions to the property (together with previously owned property) as stated in section 79(4)(a) to (c) of the Family Law Act No 53 of 1975 (Cth);³¹⁰
3. Identify and consider the factors stated in section 79(4)(d) to (g) of the Family Law Act No 53 of 1975 (Cth), particularly paragraph (e) which incorporates by reference the relevant matters stated in section 75(2) of the Family Law Act No 53 of 1975 (Cth);³¹¹ and
4. Consider whether an order made based on the findings in (1) to (3) above is just and equitable.³¹²

Although the High Court in *Stanford v Stanford*³¹³ did not make a pronouncement approving or disapproving of the “four step process”,³¹⁴ its decision, as discussed above, was for courts to give an initial consideration to the question of whether it would be just and equitable to make any order under section 79(2) of the Family Law Act No 53 of 1975 (Cth) before proceeding to consider what order should be made.³¹⁵

Admitting that the just and equitable requirement permeates the entire provision of section 79 of the Family Law Act No 53 of 1975 (Cth),³¹⁶ it is submitted that the fourth step (stage) above, which enjoins the court to consider what order is just and equitable in the circumstance, is closely related to section 79(4) of the Family Law

FamCAFC 116, paras 61. See also Wilson and Coggins, *The Blended Family Blues: Obtaining Property Orders over the Assets of an Intact Relationship in a Blended Family*, 12.

³⁰⁹ *Hickey v Hickey and A-G of the Commonwealth* [2003] FamCA 395, para 39, 51; *Bevan v Bevan* [2013] FamCAFC 116, para 60; *Daniels v Daniels* [2015] FCCA 2569, para 50.

³¹⁰ *Hickey v Hickey and A-G of the Commonwealth* [2003] FamCA 395, para 39, 51; *Bevan v Bevan* [2013] FamCAFC 116, para 60; *Daniels v Daniels* [2015] FCCA 2569, para 50.

³¹¹ *Hickey v Hickey and A-G of the Commonwealth* [2003] FamCA 395, para 39, 51; *Bevan v Bevan* [2013] FamCAFC 116, para 60; *Daniels v Daniels* [2015] FCCA 2569, para 50.

³¹² *Hickey v Hickey and A-G of the Commonwealth* [2003] FamCA 395, para 39, 51; *Bevan v Bevan* [2013] FamCAFC 116, para 60; *Daniels v Daniels* [2015] FCCA 2569, para 50.

³¹³ [2012] HCA 52.

³¹⁴ In *Bevan v Bevan* [2013] FamCAFC 116, para 65, Bryant CJ and Thackray J stated that the decision in *Stanford v Stanford* [2012] HCA 52, para 41 is a reminder to the court of its obligation under the statute not to alter the property interests of the spouses except if there is a reasonable ground for doing so. To use the words of the statute: “... unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.”

³¹⁵ See *Stanford v Stanford* [2012] HCA 52, para 41; *Erdem v Ozsoy* [2012] FMCAfam 1323, para 116; *Mahon v Mahon* [2015] FCCA 510 para 93.

³¹⁶ *Bevan v Bevan* [2013] FamCAFC 116, para 86.

Act No 53 of 1975 (Cth).³¹⁷ This conclusion is reached on the basis that the court must first, have satisfied itself, [as required under section 79(2) of the Family Law Act No 53 of 1975 (Cth)] without placing a monetary evaluation on the contributions of each spouse to the property, that it will be just and equitable to make an order³¹⁸ before proceeding to make an appropriate (just and equitable) order (step four) based on its findings in steps one to three above.³¹⁹

It has, however, been indicated that the viewpoint of the High Court in *Stanford v Stanford*³²⁰ and the introduction of the “three fundamental propositions”³²¹ in that case, have to an extent modified the “four step process” laid down in earlier cases³²².³²³ It is submitted that, since 2012, after *Stanford v Stanford*³²⁴ was decided by the High Court, Family Court judges³²⁵ and scholars³²⁶ have tried to distil what the

³¹⁷ At this point, the court had concluded that it is just and equitable to make an order. It is then faced with the task of determining whether the order proposed to be made will be just and equitable in all the circumstances of the case. Again, the court looks at the effect which the impact of its order will have on the spouses and their finances. The researcher's viewpoint here is in agreement with the opinion and approach adopted by Young J in *Sebastian v Sebastian (No 5)* [2013] FamCA 191, paras 153 – 155 where he stated: “What remains uncertain is whether it is permissible for a Court to finally reflect upon and reconsider, on an overview basis, if the proposed orders are just and equitable. My own approach at that final stage has been to reflect upon and then ask of myself the question of whether the orders are just and equitable in their division of property, their structure and particularly in their monetary outcome (emphasis added). I asked Senior Counsel for both parties to make submissions on this issue. Both submitted that that *this Court was still required to assess the overall justice and equity of the proposed orders, most logically at the final stage* (emphasis added). They did not submit that *Stanford* had the effect of prohibiting this Court from doing so and I find that is wholly consistent with *Mallet v Mallet* [1984] HCA 21... and *Norbis v Norbis* [1986] HCA 17... as to the importance and role of s 79(2).” It will be recalled that in *Mallet v Mallet* [1984] HCA 21, para 3, per Gibbs CJ stated: “It is necessary for the court, in each case, after having had regard to the matters which the Act requires it to consider, to do what is just and equitable in all the circumstances of the particular case.” See also Stidston, 2013 <http://www.westminsterlaw.com.au/wp-content/uploads/2013/05/Stanford-v-Stanford-A-tale-of-two-enquiries.pdf>, 1 at 7.

³¹⁸ *Erdem v Ozsoy* [2012] FMCAfam 1323, para 116; *Bevan v Bevan* [2013] FamCAFC 116, paras 89, 167.

³¹⁹ *Erdem v Ozsoy* [2012] FMCAfam 1323, para 116; *Sebastian v Sebastian (No 5)* [2013] FamCA 191, paras 153, 154. It is noted that the just and equitable requirement is applicable, not only to the content (s 79(4) of the Family Law Act No 53 of 1975) of the final order proposed to be made, but also to the court's power to make any order in the first place (s 79(2) of the Family Law Act No 53 of 1975). See Barbayannis, 1984 *Monash University Law Review*, 221 at 221.

³²⁰ [2012] HCA 52.

³²¹ *Stanford v Stanford* [2012] HCA 52, paras 36 – 40.

³²² See *In the Marriage of Ferraro* [1992] FamCA 64, para 13 – 24, 114; *Hickey v Hickey and A-G of the Commonwealth* [2003] FamCA 395, para 39.

³²³ See *Erdem v Ozsoy* [2012] FMCAfam 1323, para 116; *Sebastian v Sebastian (No 5)* [2013] FamCA 191, paras 144, 152 – 155. Wilson and Coggins, *The Blended Family Blues: Obtaining Property Orders Over the Assets of an Intact Relationship in a Blended Family*, 5.

³²⁴ [2012] HCA 52.

³²⁵ *Erdem v Ozsoy* [2012] FMCAfam 1323, para 116; *Watson v Ling* [2013] FamCA 57; *Sebastian v Sebastian (No 5)* [2013] FamCA 191, paras 15; *Martin v Crawley* (2013) FamCA 1032; *Daniels v Daniels* [2015] FCCA 2569, paras 56 – 57.

modified approach should be in the determination of proceedings brought pursuant to section 79 of the Family Law Act No 53 of 1975 (Cth). The researcher is of the opinion that the better approach, as suggested by Young J in *Sebastian v Sebastian*,³²⁷ will be:

1. "Identify, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in their property";³²⁸
2. "Evaluate whether it is just and equitable to pronounce an order ...";³²⁹
3. If the answer in step two is in the affirmative, assess what orders should be made by considering the extent of each party's contributions and other matters listed in section 79(4) and section 75(2) to the extent that they are relevant;³³⁰ and
4. "... finally reflect upon and reconsider, on an overview basis, if the proposed orders are just and equitable.... in their division of property, their structure and particularly in their monetary outcome."³³¹

It has been an opinion expressed in some quarters that, arising from the judgement of the High Court in *Stanford v Stanford*³³² and the cases that have been considered thereafter, there could be a shift in direction in terms of property interest applications under the Family Law Act No 53 of 1975 (Cth).³³³ The view is that with the modified approach in adjusting the property rights of spouses as stated by the High Court and adopted by the Full Courts, spouses will begin to reconsider the utility and possibility of an application for a declaration of property interest as stated in section 78 of the Family Law Act No 53 of 1975 (Cth) which will definitely obviate the need for the establishment of the just and equitable requirement as mandated by section 79 of

³²⁶ Bartfeld, *The High Court Decision in Stanford v Stanford – Lots of Questions - Very Few Answers*, 11 – 19; Stidston, 2013 <http://www.westminsterlaw.com.au/wp-content/uploads/2013/05/Stanford-v-Stanford-A-tale-of-two-enquiries.pdf>, 1 at 7 – 8.

³²⁷ *(No 5)* [2013] FamCA 191.

³²⁸ *Erdem v Ozsoy* [2012] FMCAfam 1323, para 116. See also *Sebastian v Sebastian (No 5)* [2013] FamCA 191, para 152.

³²⁹ *Sebastian v Sebastian (No 5)* [2013] FamCA 191, para 152.

³³⁰ *Sebastian v Sebastian (No 5)* [2013] FamCA 191, para 152.

³³¹ *Sebastian v Sebastian (No 5)* [2013] FamCA 191, paras 153, 154.

³³² [2012] HCA 52.

³³³ Stidston, 2013 <http://www.westminsterlaw.com.au/wp-content/uploads/2013/05/Stanford-v-Stanford-A-tale-of-two-enquiries.pdf>, 1 at 7. Wilson and Coggins, *The Blended Family Blues: Obtaining Property Orders over the Assets of an Intact Relationship in a Blended Family*, 9 predict that there could possibly be an increase in the number of applications commenced under s 78 of the Family Law Act No 53 of 1975 (Cth).

Family Law Act No 53 of 1975 (Cth).³³⁴

4.3.4.1 Financial and Non-Financial Contributions: How Weighted?

The financial and non-financial contributions of each spouse as stated in section 79(4)(a) to (c) of the Family Law Act No 53 of 1975 (Cth) are amongst a number of factors which the court is required to consider after deciding to exercise its discretion. This will include the various contributions of the spouses to the acquisition and development of separate and joint property³³⁵ inclusive of the contributions of the spouses to the welfare of the family³³⁶ and as a homemaker.³³⁷

The recognition of the contributions of a spouse to any improvement made to the property of either or both spouses and to the welfare of the family, as matters to be regarded while adjusting the property interests of spouses on marriage breakdown, have been justified on the ground that marriage customarily entails "... a sharing of property, and indeed a sharing of economic existence... and is intended by the parties to last for their joint lives."³³⁸ It would, thus, be unjust for the law to permit spouses to rely on their strict property rights upon marriage breakdown.³³⁹

In evaluating the contributions of the spouses, it has been held that much weight will be given to the initial contribution brought into the marriage where it is shown to be significant.³⁴⁰ It should be noted that the court must consider other relevant

³³⁴ Wilson and Coggins, *The Blended Family Blues: Obtaining Property Orders over the Assets of an Intact Relationship in a Blended Family*, 9.

³³⁵ See *Mahon v Mahon* [2015] FCCA 510, para 124.

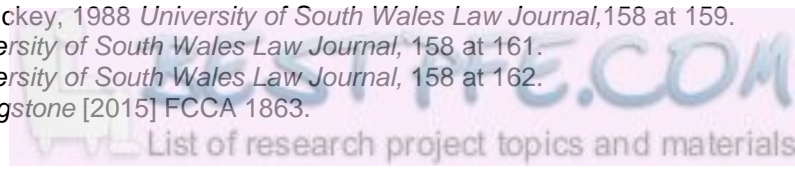
³³⁶ See s 79(4)(c) of the Family Law Act No 53 of 1975 (Cth). The clause "... including any contribution made in the capacity of homemaker or parent ..." was included in the subsection by the Family Law Amendment Act No 72 of 1983 (Cth). A spouse's contribution to the welfare of the family will include both financial and non-financial contribution. It will further include every responsibility which a spouse exercises in order to free the other spouse to make contributions to the wealth of the family. See Barbayannis, 1984 *Monash University Law Review*, 221 at 222; Dickey, 1988 *University of South Wales Law Journal*, 158 at 164. The "theoretical situation" which existed before the 1983 amendment that a spouse's domestic activities at home allowed the other spouse the opportunities of amassing wealth has been statutorily enacted by 79(4)(c) of the Family Law Act No 53 of 1975 (Cth) as amended in 1983. See Lawson, 1994 *University of Tasmania Law Review* 294 at 327.

³³⁷ *Sebastian v Sebastian (No 5)* [2013] FamCA 191, paras 157; *Daniels v Daniels* [2015] FCCA 2569, paras 51, 53. These factors are retrospective in nature. They deal with the previous contributions that spouses had made before marital conflicts arose which necessitated the application for property settlement. See Bailey-Harris, 1985 *University of South Wales Law Journal*, 1 at 14. Barbayannis, 1984 *Monash University Law Review*, 221; Lawson, 1994 *University of Tasmania Law Review* 294 at 304; Dickey, 1988 *University of South Wales Law Journal*, 158 at 159.

³³⁸ Dickey, 1988 *University of South Wales Law Journal*, 158 at 161.

³³⁹ Dickey, 1988 *University of South Wales Law Journal*, 158 at 162.

³⁴⁰ *Livingstone v Livingstone* [2015] FCCA 1863.



contributions made by both spouses.³⁴¹ This will include "... the use made by the parties of that contribution ..."³⁴² In *Pierce v Pierce*,³⁴³ therefore, which related to a ten year marriage, where the husband had bought the matrimonial home with the \$200, 000 which he had brought into the marriage, the spouses' respective contributions were assessed as 70% by the husband and 30% by the wife.

In *Livingstone v Livingstone*,³⁴⁴ the spouses acknowledged that favourable weight should be given to the husband's initial contributions, but they disagreed about the percentage to be attributed in favour of the husband. While the husband claimed for an adjustment from 20% to 25% for his initial contribution, the wife argued that he should receive a 10% adjustment. The court made an adjustment of 15% in favour of the husband on the consideration that the husband's initial contribution acted "... as a springboard and represented a significant portion of the parties' wealth."³⁴⁵

It should, however, be noted that the financial contributions of a spouse (whether made initially or during the subsistence of the marriage) are in no way considered to be of a greater value to the non-financial contribution of the other spouse, especially in long marriages.³⁴⁶ Forgary J held in *Money v Money*:³⁴⁷

"... respective contributions of the parties over a long period of marriage 'offset' the significance which might otherwise be attached to a greater initial contribution by one party"³⁴⁸... ultimately, when it comes to the trial such a contribution is one of a number of factors to be considered. The longer the marriage the more likely it is that there will be latter factors of significance and in the ultimate the exercise is to weigh the original contribution with all other, later, factors and those later factors, whether equal or not, may in the circumstances of the individual case reduce the significance of the original contribution."

A classic example of Forgary J's statement above can be seen in the case of

³⁴¹ *Money v Money* (1994) 17 Fam LR 814 at 816; *Pierce v Pierce* (1998) FamCA 74 at para 28; *Williams v Williams* [2007] FamCA 313, para 37; *Livingstone v Livingstone* [2015] FCCA 1863, para 181.

³⁴² *Pierce v Pierce* (1998) FamCA 74 at para 28.

³⁴³ (1998) FamCA 74.

³⁴⁴ [2015] FCCA 1863.

³⁴⁵ *Livingstone v Livingstone* [2015] FCCA 1863, para 181. In *Danson v Danson* [2015] FamCA 1167, para 140 the court considered the disparity in the initial financial contributions of the spouses to arrive at a ratio of 55:45 in favour of the wife in relation to their total contribution.

³⁴⁶ *Daniels v Daniels* [2015] FCCA 2569, para 71.

³⁴⁷ (1994) 17 Fam LR 814 at 816.

³⁴⁸ Emphasis added.

Daniels v Daniels.³⁴⁹ This was a marriage which had lasted for twenty years. Upon an application to adjust the property rights of the spouses commenced by the wife, the spouses disputed the monetary contributions brought by each of them into the marriage. The husband had alleged that he brought about \$200, 000 into the marriage while the wife argued that the husband had contributed only about \$24, 000. The husband argued that his monetary contribution to the marriage was significant as he worked very hard to make a living for himself and the family. He urged the court to regard the wife’s contribution as minimal because she did nothing to improve her financial status but acknowledged that the wife bore most of the home caring responsibilities. In the bid to assess the contributions of the spouses, the court stated:

“It is now impossible to make any assessment in relation to what might or might not have been the moneys brought into the relationship by one or other of the parties, but I certainly acknowledge that the husband, it would seem, brought more into the relationship but that with the effluxion of time, it is clear that the party’s situation is one where any consideration of an initial contribution has been significantly eroded with the steps that have been taken by each of the parties, during the relationship.”³⁵⁰

The court stated that the husband’s contention that his contribution was more valuable than the wife’s contribution as a homemaker throughout the twenty years of their marriage was unreasonable.³⁵¹ Having considered the peculiar circumstances of this case, it held that notwithstanding:

“... the party’s contributions though entirely different and made either financially or non-financially, were of an equal character and it is appropriate that the starting point in relation to the contributions of the parties should be seen as an equal or 50/50 contribution.”³⁵²

³⁴⁹ [2015] FCCA 2569.

³⁵⁰ *Daniels v Daniels* [2015] FCCA 2569, para 46. Emphasis added. See *Norbis v Norbis* [1986] HCA 17, para 18 where the High Court indicated preference for a “global approach” instead of the “asset by asset approach” in adjusting the property rights of spouses in marriages of long duration. It must, however, be noted that the judges of the High Court were all of the opinion that neither the “global approach” nor the “asset by asset approach” was to be taken “as a definitive starting point”. The facts of each case will ultimately determine the approach to be adopted by the court. See Bates, 1988 *Anglo-American Law Review* 46 at 47 – 49.

³⁵¹ *Daniels v Daniels* [2015] FCCA 2569, paras 71 – 72.

³⁵² *Daniels v Daniels* [2015] FCCA 2569, para 73. Compare this case with the case of *Gadde v Gadde (No 2)* [2015] FamCA 1165, para 33 (a case for an interim property order and spousal maintenance) where the court found that both spouses had brought assets into the marriage and jointly acquired property. In their eight years of marriage, the wife had made non-financial contributions as a homemaker and parent while the husband who worked as a stockbroker earned a substantial salary. Their contributions were described as “complimentary” by the court. The recent decisions of the

The responsibility of a spouse as a homemaker and mother in a long marriage may be equated to the monetary contributions of the other spouse.³⁵³ Dawson J in *Mallet v Mallet*³⁵⁴ has, however, emphasised that this rule is not applicable in all cases. In his words:

“But it does not follow in every case where the husband earns the family income and the wife carries out her responsibilities in the home that the contribution of each to property acquired during cohabitation should be regarded as equal.”³⁵⁵

In *Mahon v Mahon*,³⁵⁶ the court held that “[t]he contribution of ‘stay-at-home’ mothers to the welfare of the family should never be underestimated...”³⁵⁷ Having taken into consideration the fact that the bulk of the duty as a homemaker fell on the wife who took care of their four children including the spouses’ four children born from previous relationships (two each), the court gave considerable weight to the wife’s contribution as a homemaker.³⁵⁸ The researcher will return to the discussion on whether there should be a presumption of equality of contribution on the determination of the property rights of spouses, where one spouse acts as a homemaker in a long marriage and the other spouse devotes his or her time towards the earning of an income and acquiring property.³⁵⁹

4.3.4.2 Consideration of Other Factors (Future Provisions Considerations)

Besides the contribution factor, the court is mandated to give consideration to other factors mentioned in section 79(4) of the Family Law Act No 53 of 1975 (Cth).³⁶⁰ The court must consider the effect which its order would have on the spouses’ earning capacity.³⁶¹ It is also mandated to consider any previous order that has been made

Australian Family Courts are an indication of a change in the way they value financial contributions *vis-a-vis* non-financial contributions. A spouse’s labour at home is at present taken into account during assessment. See Fox, 2003 *Child and Family Law Quarterly*, 1 at 17.

³⁵³ *Daniels v Daniels* [2015] FCCA 2569, para 73. The court has held that in short marriages where it is established by evidence that spouses treated their finances totally separately during the subsistence of the marriage, an order altering their property interests may not be appropriate. See *Hopkins v Hopkins* [2015] FCCA 2625, paras 63 – 71 where the spouses were married for three years and two months and retained their different assets.

³⁵⁴ [1984] HCA 21.

³⁵⁵ *Mallet v Mallet* [1984] HCA 21, para 9, per Dawson J.

³⁵⁶ [2015] FCCA 510.

³⁵⁷ *Mahon v Mahon* [2015] FCCA 510, para 105.

³⁵⁸ *Mahon v Mahon* [2015] FCCA 510, paras 101 – 105.

³⁵⁹ See 6.3.3 below.

³⁶⁰ S 79(4)(d) to (g) of the Family Law Act No 53 of 1975 (Cth).

³⁶¹ S 79(4)(d) of the Family Law Act No 53 of 1975 (Cth).

under the Family Law Act No 53 of 1975 (Cth)³⁶² or the Child Support (Assessment) Act No 124 of 1989 (Cth) with respect to the support obligation of the spouse(s) for any child of the marriage.³⁶³

Of particular importance are the provisions of section 75(2) of the Family Law Act No 53 of 1975 (Cth) to the extent that they are relevant in the determination of the appropriate order to make in the circumstances of individual cases.³⁶⁴ It is stated in *Daniels v Daniels*³⁶⁵ that section 75(2) of the Family Law Act No 53 of 1975 (Cth) makes provisions for the "... future entitlements or expectations ..." of the spouses. Section 79(d) to (f) inclusive of section 75(2) of the Family Law Act No 53 of 1975 (Cth) contains "... the prospective element of the determination of the application for property settlement."³⁶⁶ Here, the court is to take account of the present and future circumstances of the spouses.³⁶⁷

³⁶² S 79(4)(f) of the Family Law Act No 53 of 1975 (Cth).

³⁶³ S 79(4)(g) of the Family Law Act No 53 of 1975 (Cth).

³⁶⁴ S 75(2) of the Family Law Act No 53 of 1975 (Cth) provides: "The matters to be so taken into account are: (a) the age and state of health of each of the parties; and (b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and (c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years; and (d) commitments of each of the parties that are necessary to enable the party to support: (i) himself or herself; and (ii) a child or another person that the party has a duty to maintain; and (e) the responsibilities of either party to support any other person; and (f) subject to subsection (3), the eligibility of either party for a pension, allowance or benefit under: (i) any law of the Commonwealth, of a State or Territory or of another country; or (ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia; and the rate of any such pension, allowance or benefit being paid to either party; and (g) where the parties have separated or divorced, a standard of living that in all the circumstances is reasonable; and (h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income; and (ha) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and (j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party; and (k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; and (l) the need to protect a party who wishes to continue that party's role as a parent; and (m) if either party is cohabiting with another person—the financial circumstances relating to the cohabitation; and (n) the terms of any order made or proposed to be made under section 79 in relation to: (i) the property of the parties; or (ii) vested bankruptcy property in relation to a bankrupt party; and... (na) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage; and (o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and (p) the terms of any financial agreement that is binding on the parties to the marriage..."

³⁶⁵ [2015] FCCA 2569, para 40.

³⁶⁶ *Daniels v Daniels* [2015] FCCA 2569, para 53; Bailey-Harris, 1985 *University of South Wales Law Journal*, 1 at 14; Lawson, 1994 *University of Tasmania Law Review* 294 at 304.

³⁶⁷ Bailey-Harris, 1985 *University of South Wales Law Journal*, 1 at 14; Dickey, 1988 *University of South Wales Law Journal*, 158 at 159.

It is based on these factors *vis-a-vis* the consideration of section 79(2) of the Family Law Act No 53 of 1975 (Cth) that the court decides whether or not to alter the property rights of spouses.³⁶⁸ Where one spouse has “greater needs” and the other “stronger means”, the court is likely to alter their property interests to arrive at a fair result³⁶⁹ so balancing the inequality between the spouses.³⁷⁰ For instance, where, during the subsistence of the marriage, a wife forgoes employment opportunities in order to advance the welfare of the family, and the husband, in return, continues to make provision for her by taking care of her economic needs, should the marriage experience conflict and eventually break down irretrievably, what is “just and equitable” will not be seen to be done if the economic needs of the dependent wife are not taken care of by adjusting some property rights in her favour.³⁷¹ Such an adjustment will be “... justified as a form of compensation to a spouse for the loss of the continuing support that he or she had expected to receive into the future, and in return for which (the) spouse forwent financial gain during the period of cohabitation.”³⁷² Ingleby³⁷³ has stated that the legislative provision is geared towards reducing or removing the resultant inequalities created by the breakdown of the marriage rather than promoting equality on a 50/50 scale.³⁷⁴

It is submitted that, after a determination of the existing property rights of the spouses and an assessment of their individual contributions to the purchase and development of any property, inclusive of the contribution of a spouse to the family welfare and as a home carer, the court arrives at a conclusion on their respective

³⁶⁸ According to the court in *Stanford v Stanford* [2012] HCA 52, para 40: “To conclude that making an order is ‘just and equitable’ *only* because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act.” *Daniels v Daniels* [2015] FCCA 2569, para 51.

³⁶⁹ *Daniels v Daniels* [2015] FCCA 2569, para 51.

³⁷⁰ Graycar, 1995 *Victoria University Wellington Law Review*, 9 at 16.

³⁷¹ See Wade, 1985 *Federal Law Review* 76 at 83; Dickey, 1988 *University of South Wales Law Journal*, 158 at 166.

³⁷² Dickey, 1988 *University of South Wales Law Journal*, 158 at 166 citing Symes, 1985 *Modern Law Review* 44 at 57 – 58. Barbayannis, 1984 *Monash University Law Review*, 221 at 223 has argued that an order reached on this consideration should not be categorised “... as a maintenance order but a property order with maintenance component.” On this proposition, see *Pastrikos v Pastrikos* (1980) FLC 90-897. Although compensation in form of a periodic sum or lump sum could as well serve this purpose rather than adjusting the property rights of spouses as argued by Dickey, 1988 *University of South Wales Law Journal*, 158 at 167, the proper order to make will ultimately depend on the court after a consideration of all the facts of the case before it. The court’s duty under s 79 of the Family Law Act No 53 of 1975 (Cth) is to ensure that its orders are appropriate and meet the just and equitable requirements. See *In the Marriage of Stowe* (1980) Fam LR 757 at 767; Lynch, 1981 *Federal Law Review*, 362 at 363.

³⁷³ 2005 *International Journal of Law, Policy and Family*, 137.

³⁷⁴ Ingleby, 2005 *International Journal of Law, Policy and Family*, 137 at 139.

monetary claims which may or may not be equal depending on the facts of each case.³⁷⁵ In order to arrive at a just conclusion, the court is required to take a further step (if necessary) to adjust the property rights of the spouses by considering the matters listed in section 75(2) of the Family Law Act No 53 of 1975 (Cth).³⁷⁶

The above approach buttresses the argument of the Australian Law Reform Commission (ALRC).³⁷⁷ The ALRC had reported that a regime based on equality of division, although perceived first as propagating the proprietary rights of women, will in the long run "... aggravate the economic inequality that often arises from the differing effects of marriage and childbearing on the spouses primarily to the detriment of custodial parents and women whose earning capacity has been impaired by their marriage."³⁷⁸ It stated:

"All the evidence leads to the conclusion that equal sharing of property at the end of a marriage is not necessarily fair sharing. A just sharing of property should be based upon a practical, rather than a merely formal, view of the equal status of husbands and wives within marriage. ... Thus, a just sharing of property should take into account any disparity arising from the marriage in the standards of living reasonably attainable by the parties after separation."³⁷⁹

In *Danson v Danson*,³⁸⁰ the court, after assessing the total contributions of the spouses in view of section 79(4) of the Family Law Act No 53 of 1975 (Cth), arrived at 55% for the wife and 45% for the husband, but, after a consideration of the factors stated in section 75(2) of the Family Law Act No 53 of 1975 (Cth), the court was inclined to make a further adjustment of 7.5% of the total adjustable property interests in favour of the wife. In making the property settlement order of 62.5% in favour of the wife and 37.5% to the husband, the court justified its order by the judges stating: "I am satisfied, in all the circumstances, particularly the disparity in initial contributions and the likely income disparity in the parties' remaining working lives, that it is appropriate, just and equitable."³⁸¹

³⁷⁵ This assessment is carried out by the court with particular reference to s 79(4)(a) – (c) of the Family Law Act No 53 of 1975 (Cth). See *Danson v Danson* [2015] FamCA 1167, para 140.

³⁷⁶ *Danson v Danson* [2015] FamCA 1167, paras 141.

³⁷⁷ Australian Law Reform Commission *Matrimonial Property Law (Report No 39)*, 1987.

³⁷⁸ Australian Law Reform Commission *Matrimonial Property Law (Report No 39)*, para 273 as cited by Graycar, 1995 *Victoria University Wellington Law Review*, 9 at 17.

³⁷⁹ Australian Law Reform Commission *Matrimonial Property Law (Report No 39)*, para 273 as cited by Graycar, 1995 *Victoria University Wellington Law Review*, 9 at 17.

³⁸⁰ [2015] FamCA 1167, paras 140 – 143.

³⁸¹ *Danson v Danson* [2015] FamCA 1167, para 142.

4.3.4.3 Is there a Starting Point for Adjusting Property Rights?

Before the High Court decision in *Mallet v Mallet*,³⁸² Family Courts in a plethora of cases³⁸³ tried to create a starting point for distribution in cases where the exercise of discretion was considered appropriate. The courts were confronted with the question of whether the contributions of a spouse (mostly the wife) as a homemaker in a long marriage should be given equal weight with the financial contributions made by the husband.³⁸⁴

The courts had expressed the opinion that the contributions of a spouse (mostly the wife) on whom the responsibilities of the family lie as a homemaker and who takes up the task of nurturing the children to adulthood should in no way be different from the financial contributions of the spouse (the husband in most cases), who was afforded the opportunity of amassing wealth by virtue of the wife's devotion to marital and parental duties which otherwise would have been joint.³⁸⁵

With particular reference to property which is jointly owned by the spouses by virtue of their joint contribution over the years, it was held that the division should be based on equality of contribution rather than embarking on an exercise of quantifying the nature and extent of the contributions of spouses.³⁸⁶ In *Wardman v Hudson*,³⁸⁷ therefore, the Family Court stated:

“It appears to us that in relation to a jointly owned property of parties whose marriage has broken down or in respect of a property which has been acquired jointly by such parties as a result of their joint contributions over a significant period of time that at least a *proper starting point is that the property upon dissolution of the marriage and the resolution of the financial issues between them ought to be treated as jointly owned and ought in ordinary circumstances to be divided equally between them.*”³⁸⁸ This we consider is at least a strong prima facie position.”

Stating that the starting point for property alteration between spouses under section 79 of the Family Law Act No 53 of 1975 (Cth) is equality of entitlement in respect of

³⁸² [1984] HCA 21.

³⁸³ See *Wardman v Hudson* (1978) FLC 90-466; *Rolfe v Rolfe* (1979) FLC 90-629.

³⁸⁴ See *Rolfe v Rolfe* (1979) FLC 90-629.

³⁸⁵ See *Rolfe v Rolfe* (1979) FLC 90-629 at 78273; Lawson, 1994 *University of Tasmania Law Review* 294 at 327.

³⁸⁶ *Wardman v Hudson* (1978) FLC 90-466 at 77384.

³⁸⁷ (1978) FLC 90-466 at 77384.

³⁸⁸ Emphasis added.

property acquired during the subsistence of their marriage, Evatt CJ in *Rolfe v Rolfe*³⁸⁹ concluded:

"The purpose of sec. 79(4)(b), in my opinion, is to ensure just and equitable treatment of a wife who has not earned income during the marriage, but who has contributed as a home maker and parent to the property. A husband and father is free to earn income, purchase property and pay off the mortgage so long as his wife assumes the responsibility for the home and the children. Because of that responsibility she may earn no income or have only small earnings, but provided she makes her contribution to the home and to the family the Act clearly intends that her contribution should be recognised not in a token way but in a substantial way. While the parties reside together, the one earning and the other fulfilling responsibilities in the home, there is no reason to attach greater value to the contribution of one than to that of the other. This is the way they arrange their affairs and the contribution of each should be given equal value."

In 1984, in the case of *Mallet v Mallet*,³⁹⁰ the High Court held to the contrary that there was no statutory authority for judicially creating a starting point for the distribution of property even where the marriage had lasted for a very long time.³⁹¹ Appraising Evatt CJ's opinion on the purpose of section 79(4)(b) of the Family Law Act No 53 of 1975 (Cth), Wilson J clarified the place of "equality" in the distribution of property between spouses under the Act.³⁹² He stated:³⁹³

"With all respect, I agree with her Honour's exposition of the purpose of the paragraph subject to one reservation. The Act requires that the contribution of a wife as a home maker and parent be seen as an indirect contribution to the acquisition, conservation or improvement of the property of the parties regardless of where the legal ownership resides. The contribution must be assessed, not in any merely token way, but in terms of its true worth to the building up of the assets. However, equality will be the measure, other things being equal, only if the quality of the respective contributions of husband and wife, each judged by reference to their own sphere, are equal. The quality of the contribution made by a wife as home maker or parent may vary enormously, from the inadequate to the exceptionally good. She may be an admirable housewife in every way or she may fulfil little more than the minimum requirements. Similarly, the contribution of the breadwinner may vary enormously and deserves to be evaluated in comparison with that of the other party. It follows that it cannot be said of every case where the parties reside together that equal value must be attributed to the contribution

³⁸⁹ (1979) FLC 90-629 at 78,273.

³⁹⁰ (1984) FLC 91 – 507.

³⁹¹ Barbayannis, 1984 *Monash University Law Review*, 221 at 226; Bailey-Harris, 1985 *University of South Wales Law Journal*, 1 at 2; Lawson, 1994 *University of Tasmania Law Review* 294 at 295, 327.

³⁹² *Mallet v Mallet* [1984] HCA 21, paras 13 – 15, per Wilson J.

³⁹³ *Mallet v Mallet* [1984] HCA 21, para 15, per Wilson J.

of each. That will be appropriate only to the extent that the respective contributions of the parties are each made to an equivalent degree. What the Act requires is that in considering an order that is just and equitable the court shall 'take into account' any contribution made by a party in the capacity of homemaker or parent. It is a wide discretion which requires the court to assess the value of that contribution in terms of what is just and equitable in all the circumstances of a particular case. There can be no fixed rule of general application."

Arising from the foregoing, the High Court has emphasised that the discretion to redistribute property which is hinged on an evaluation of the various contributions of the spouses to the property and family welfare together with their needs and means in the nearest future remains unfettered.³⁹⁴ It rejected any notion by the courts to create "... a starting point of half-shares ..." ³⁹⁵ or a benchmark of equality in the alteration of the property interests of spouses.³⁹⁶

*Mallet v Mallet*³⁹⁷ was a marriage which had lasted for twenty-nine years before it was dissolved. The spouses had initially during their marriage encountered financial difficulties. They were, however, able to overcome them in 1974 owing to the husband's hard work and the wife's assistance. Between 1974 and 1978 when they separated, their financial state had improved. Their marriage was dissolved in 1979. Both spouses had joint and individual assets and maintained a very high standard of living. The marriage produced three adult children who, at the time of the proceedings, were already independent adults. It was on record that the wife had played a major role in caring for the children while they were growing and that she had acted as a homemaker.

On an application brought under section 79 of the Family Law Act No 53 of 1975 (Cth) by the divorced wife seeking for an alteration of proprietary interests in the property which both spouses owned either jointly or individually, the court of first instance made an order which varied the property rights of the spouses. On appeal to the Full Court, the wife challenged the cash award of \$260,000 made to her by the court of first instance on the basis that the court had departed from the principle: "Equality is equity". In allowing the appeal, the Full Court increased the amount of the award from \$260,000 to \$335,000. It stated that the principle "equality is equity"

³⁹⁴ *Mallet v Mallet* [1984] HCA 21, para 15, per Wilson J; Bailey-Harris, 1985 *University of South Wales Law Journal*, 1 at 2.

³⁹⁵ Bailey-Harris, 1985 *University of South Wales Law Journal*, 1 at 2.

³⁹⁶ *Mallet v Mallet* [1984] HCA 21, para 4.

³⁹⁷ [1984] HCA 21.

is not existent in family law but that cases refer to it only as a convenient starting point in marriages of long duration.³⁹⁸ Rejecting the adoption of the concept of equality by the Full Court, Gibbs J stated:³⁹⁹

“... Parliament has not provided, expressly or by implication, that the contribution of one party as a homemaker or parent and the financial contribution made by the other party are deemed to be equal, or that there should, on divorce, either generally, or in certain circumstances, be an equal division of property, or that equality of division should be the normal or proper starting point for the exercise of the court’s discretion. Even to say that in some circumstances equality should be the normal starting point is to require the courts to act on a presumption which is unauthorised by the legislation. The respective values of the contributions made by the parties must depend entirely on the facts of the case and the nature of the final order made by the court must result from a proper exercise of the wide discretionary power whose nature... is unfettered by the application of supposed rules for which the Family Law Act provides no warrant.”

Masson J stated that the creation of a starting point of equality in the alteration of the proprietary rights of spouses is flawed in two respects. Firstly, the principle has been elevated by the courts “... to the status of a legal presumption ...”⁴⁰⁰ Secondly, the principle arbitrarily equates the financial contribution of a spouse to the non-financial contribution of the other spouse who primarily functions as a homemaker thereby obviating the need to assess the various contributions of the spouses as directed by the Family Law Act No 53 of 1975 (Cth).⁴⁰¹ In his words:⁴⁰²

“This exposition of the proposition that equality is a convenient starting point proceeds upon a misconception of s.79. The section contemplates that an order will not be made unless the court is satisfied that it is just and equitable to make the order (s.79(2)), after taking into account the factors mentioned in (a) to (e) of s.79(4). The requirement that the court ‘shall take into account’ these factors imposes a duty on the court to evaluate them. Thus, the court must in a given case evaluate the respective contributions of husband and wife under pars.(a) and (b) of sub-s.(4), difficult though that may be in some cases. In undertaking this task it is open to the court to conclude on the materials before it that the indirect contribution of one party as homemaker or parent is equal to the financial contributions made to the acquisition of the matrimonial home on the footing that that party’s efforts as homemaker and parent have enabled the other to earn an income by means of which the home was acquired and financed during the marriage. To sustain this

³⁹⁸ *Mallet v Mallet* [1984] HCA 21, para 10, per Wilson J.

³⁹⁹ *Mallet v Mallet* [1984] HCA 21, para 4.

⁴⁰⁰ *Mallet v Mallet* [1984] HCA 21, para 20.

⁴⁰¹ *Mallet v Mallet* [1984] HCA 21, para 20.

⁴⁰² *Mallet v Mallet* [1984] HCA 21, para 18.



conclusion the materials before the Court will need to show an equality of contribution - that the efforts of the wife in her role were the equal of the husband in his.”

Wade⁴⁰³ has argued that using the presumption of equality as convenient starting point (in a marriage of long duration) in adjusting the property rights of spouses has the advantage of avoiding the unfettered and unpredictable discretion of judges. According to him, it is a rule of convenience which will, to an extent, prevent the court from the voyage of retrospectively considering what the spouses did in the past as occasioned by the statutory guidelines.⁴⁰⁴

According to Lawson,⁴⁰⁵ a spouse’s homemaking function and parental role have not been equated by the courts to the business assets acquired by the other spouse. At best, the homemaker’s contributions are given not a token but a substantial recognition during evaluation.⁴⁰⁶ Noting the possibility of an equal division of property upon marriage breakdown, Masson J expressed the view that after an evaluation of the direct financial contributions of one spouse and the indirect contributions of the other spouse in her capacity as a homemaker:

“... a conclusion in favour of equality of contribution will be more readily reached where the property in issue is the matrimonial home or superannuation benefits or pension entitlements and the marriage is of long standing. It will be otherwise when the property in issue consists of assets acquired by one party whose ability and energy has enabled the establishment or conduct of an extensive business enterprise to which the other party has made no financial contribution and where that other party’s role does not extend beyond that of homemaker and parent.”⁴⁰⁷

Discussing the disadvantages experienced by homemakers on the breakdown of marriage, Graycar⁴⁰⁸ argues that a woman’s work as a parent and homemaker should not be undervalued in relation to a man’s financial contribution to the family.⁴⁰⁹ According to her, the ascription of the term “substantial weight” rather than

⁴⁰³ 1985 *Federal Law Review*, 76 at 82.

⁴⁰⁴ Wade, 1985 *Federal Law Review*, 76 at 82.

⁴⁰⁵ 1994 *University of Tasmania Law Review* 294 at 326.

⁴⁰⁶ *Mallet v Mallet* [1984] HCA 21, para 4; Lawson, 1994 *University of Tasmania Law Review* 294 at 329.

⁴⁰⁷ *Mallet v Mallet* [1984] HCA 21, para 19.

⁴⁰⁸ 1995 *Victoria University Wellington Law Review*, 9 at 12 and 13.

⁴⁰⁹ *In the Marriage of Ferraro* [1992] FamCA 64, para 200 the Full Court stated: “... an assessment of the quality of a homemaker contribution to the family is vulnerable to subjective value judgments as to what constitutes a competent homemaker and parent and cannot be readily equated to the value of assets acquired. This leads to a tendency to undervalue the homemaker role.”

“equal weight” to a woman’s contributions as a homemaker justifies the conclusion that the woman’s contributions are valued less than the contribution of the man who had acquired substantial assets by virtue of his skill and expertise in business over the years⁴¹⁰ (and undeniably also, by the wife’s input and assistance in the family home).⁴¹¹

In 1992, it was recommended by the Joint Select Committee⁴¹² that the starting point for the alteration of proprietary rights under section 79 of the Family Law Act No 53 of 1975 (Cth) should be based on “equality of sharing”, which should only be deviated from by an exercise of the court’s discretion in exceptional circumstances. The “equal sharing” principle is yet to be legislated upon.

It is clear that the discussions above arose from the decision of the court in *Mallet v Mallet*.⁴¹³ The decision in *Mallet’s* case did not undermine the importance of the enormous contributions which a homemaker could make to the acquisition of assets in the family, but rather it simply emphasised the point that the creation of an “equality principle” as a starting point for the alteration of property rights is not justified statutorily.⁴¹⁴

It must be noted that, on the prevailing authority of *Stanford v Stanford*⁴¹⁵ and the

⁴¹⁰ See *In the Marriage of Ferraro* [1992] FamCA 64, paras 201, 203, 217, 245, 261 and 270 where the husband’s expertise in business which led to the acquisition of substantial assets was held to be a contribution of a special kind which makes it “... inappropriate to assume equality of contribution towards the acquisition, conservation or improvement of property during the subsistence of the marriage.” – para 213. In this case, it was revealed by evidence that the wife contributed significantly to the family welfare and played a full functional role as a parent and homemaker without any assistance from the husband, the court nonetheless did not equate it to the husband’s financial contributions. The husband was awarded 62.5% while the wife was awarded 37.2% for her outstanding contribution as a homemaker. See Graycar, 1995 *Victoria University Wellington Law Review*, 9 at 14. Guest, 2005 *International Journal of Law Policy and Family*, 148 at 153 – 156, 161 – 162 has argued that the doctrine of special contribution is not gender biased but a just doctrine upon which the court gives recognition to the exceptional skills and efforts of a spouse which led to the acquisition of capital assets in the family. According to the author (at 161 – 162), the doctrine of special contribution “... validates recognition of an individual’s right to the value of his or her innate skill and intelligence. Such an argument is open as a contribution issue within the framework of s 79 of the Family Law Act No 53 of 1975 (Cth). It is a material consideration for assessment. It is not a point scoring exercise. It becomes a fact in issue that should be properly considered and weighed alongside the homemaker-parent contribution, taking into account that the contribution of the latter afforded the other party the opportunity to do so. It is both ‘fair’ and ‘just and equitable’ for the court to properly consider such a contribution.”

⁴¹¹ Graycar, 1995 *Victoria University wellington Law Review*, 9 at 13.

⁴¹² “Certain Aspects of the Operation and Interpretation of the Family Law Act” 1992 Report, 233 – 234 referred to by Lawson, 1994 *University of Tasmania Law Review* 294 at 298.

⁴¹³ [1984] HCA 21.

⁴¹⁴ Lawson, 1994 *University of Tasmania Law Review* 294 at 327.

⁴¹⁵ [2012] HCA 52,

cases that followed subsequently,⁴¹⁶ the decision to alter the proprietary rights of spouses on marriage breakdown must be made based on statutory and established legal principles⁴¹⁷ which would ultimately be based on the facts of each case. More so, the contribution of a spouse to the family's welfare, and especially as a homemaker, is at present given considerable weight in the exercise of judicial discretion.⁴¹⁸ As it currently stands under the Australian matrimonial property system, it is not permitted to commence an enquiry for an alteration of proprietary interests on the basis of the presumption of equality.⁴¹⁹ Every case must be determined on the basis of its peculiar facts with particular reference to the provisions of section 79 of the Family Law Act No 53 of 1975 (Cth).⁴²⁰

4.3.4.4 The Connection between Property Orders and Maintenance Orders under the Family Law Act No 53 of 1975 (Cth)

It is noted that, under the Family Law Act No 53 of 1975 (Cth), a court is empowered to make a maintenance order by ordering a spouse to make a transfer or settlement of property to the spouse in whose favour an order for maintenance lies.⁴²¹ The property which is subject to this kind of order must be specifically identified. Section 80(1)(ba) of the Family Law Act No 53 of 1975 (Cth) provides that the court may "... order that a specified transfer or settlement of property be made by way of maintenance for a party to a marriage."⁴²²

It is mandatory for the court to specify that the property order being made is in the nature of a maintenance order for a spouse under section 77A of the Family Law Act

⁴¹⁶ *Bevan v Bevan* [2013] FamCAFC 116; *Mahon v Mahon* [2015] FCCA 510.

⁴¹⁷ *Stanford v Stanford* [2012] HCA 52, para 37

⁴¹⁸ *Mahon v Mahon* [2015] FCCA 510 para 105. Barbayannis, 1984 *Monash University Law Review*, 221 at 227 had expressed the view that at least within the Australian context, where most spouses pool their resources together and own property jointly, a spouse's role as a homemaker is not likely to be diminished in view of the fact "... that many decisions will still result in an equal division of property as between spouses." The researcher submits that, in the light of recent cases, a wife's contributions as a parent and homemaker continue to receive favourable consideration and attract an adjustable percentage of the total net value of the property in her favour after a determination of what her legal and equitable rights are in the property to be adjusted. See *Daniels v Daniels* [2015] FCCA 2569, para 73; *Danson v Danson* [2015] FamCA 1167, para 142; *Mahon v Mahon* [2015] FCCA 510, paras 105, 210.

⁴¹⁹ *Mallet v Mallet* [1984] HCA 21; Barbayannis, 1984 *Monash University Law Review*, 221 at 226.

⁴²⁰ Barbayannis, 1984 *Monash University Law Review*, 221 at 226.

⁴²¹ See s 80(1)(ba) of the Family Law Act No 53 of 1975 (Cth).

⁴²² See s 66P(1)(c) of the Family Law Act No 53 of 1975 (Cth) in respect of a maintenance order for a child. See also Dickey, *Family Law*, 349.

No 53 of 1975 (Cth).⁴²³ The court must also specify "... the value of the portion of the property, attributable to the provision of maintenance for the child or each child, as the case may be."⁴²⁴

4.3.5 Variation of Antenuptial or Postnuptial Settlement under the Family Law Act No 53 of 1975 (Cth)

The court's power to vary antenuptial or postnuptial settlements was retained under the Family Law Act No 53 of 1975 (Cth). Section 85A of the Family Law Act No 53 of 1975 (Cth) provides thus:

"(1) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage.
(2) In considering what order (if any) should be made under subsection (1), the court shall take into account the matters referred to in subsection 79(4) so far as they are relevant.
(3) A court cannot make an order under this section in respect of matters that are included in a financial agreement."

The power of the court under this section is discretionary by nature. The use of the word "may" in section 85A(1) of the Family Law Act No 53 of 1975 (Cth) underscores this point. The court must also arrive at the conclusion that the order proposed to be made (if any) meets the just and equitable requirement in the peculiar circumstances of each case.⁴²⁵

Reference is made to section 79(4) of the Family Law Act No 53 of 1975 (Cth) which spells out the factors to be considered when adjusting the property rights of spouses. The court is obliged to consider any relevant matter(s) in section 79(4) of the Family Law Act No 53 of 1975 (Cth) when making an order for the variation of antenuptial or postnuptial settlements. Hence, it is submitted that an order made under section 85A of the Family Law Act No 53 of 1975 (Cth) is directed towards dealing with the economic situation of the spouses after the breakdown of marriage.⁴²⁶

⁴²³ S 77A(1)(c) of the Family Law Act No 53 of 1975 (Cth). See s 66R(1)(c) of the Family Law Act No 53 of 1975 (Cth) in respect of a similar order for the maintenance of a child.

⁴²⁴ S 77A(1)(d) of the Family Law Act No 53 of 1975 (Cth). See also s 66R(1)(d)(i) and (ii) of the Family Law Act No 53 of 1975 (Cth).

⁴²⁵ See s 85A(1) of the Family Law Act No 53 of 1975 (Cth).

⁴²⁶ See *Lansell v Lansell* (1964) 110 CLR 353 at 362 where the court explained the rationale behind the order for a variation of antenuptial and postnuptial settlement under s 86(2) of the Matrimonial

For the court to exercise its discretion, it must satisfy itself that there is a “settlement” and that the settlement is nuptial in nature.⁴²⁷ “Settlement” under this head “... means any disposition which makes future or continuing provision for either or both spouses or for their children.”⁴²⁸ Where a third party makes a gift of a house to a couple, to be used as their matrimonial home, such property will, thus, constitute a nuptial settlement because it makes a continuing provision for the needs of the spouses at present and in the nearest future.⁴²⁹

The court is precluded from exercising its discretion where matters relating to antenuptial and postnuptial settlements have been covered in a financial agreement concluded between the spouses in terms of the provisions of the Family Law Act No 53 of 1975 (Cth).⁴³⁰

4.3.6 Injunctions on Matrimonial Property

The court is vested with the discretionary power to grant injunctions at the instance of an application by a spouse.⁴³¹ The court’s orders include: the personal protection of a spouse;⁴³² a restraining order against a spouse from entering the matrimonial home or its premises;⁴³³ an injunction in respect of the disposition of the matrimonial property⁴³⁴ or to the use and occupation of such property.⁴³⁵ Of importance to this discussion are paragraphs (b), (e) and (f) of section 114(1) of the Family Law Act No 53 of 1975 (Cth). They read:

- “(1) In proceedings of the kind referred to in paragraph (e) of the definition of *matrimonial cause* in subsection 4(1), the court may make such order or grant such injunction as it considers proper with respect to the matter to which the proceedings relate, including:**
- ...
- (b) an injunction restraining a party to the marriage from entering or remaining in the matrimonial**

Causes Act No 104 of 1959 (Cth) which is akin to the provisions of s 85A of the Family Law Act No 53 of 1975 (Cth).

⁴²⁷ CCH Australia Limited, *Australia Family Law Guide*, 207.

⁴²⁸ CCH Australia Limited, *Australia Family Law Guide*, 207.

⁴²⁹ *Dewar v Dewar* (1960) 106 CLR 170 at 174 – 175; CCH Australia Limited, *Australia Family Law Guide*, 208.

⁴³⁰ See s 85A(3) of the Family Law Act No 53 of 1975 (Cth).

⁴³¹ S 114 of the Family Law Act No 53 of 1975 (Cth).

⁴³² S 114(1)(a) of the Family Law Act No 53 of 1975 (Cth).

⁴³³ S 114(1)(b) of the Family Law Act No 53 of 1975 (Cth).

⁴³⁴ S 114(1)(e) of the Family Law Act No 53 of 1975 (Cth). See *R v Dovey; Ex parte Ross* (1979) 141 CLR 526.

⁴³⁵ S 114(1)(f) of the Family Law Act No 53 of 1975 (Cth).

home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or the premises in which the other party to the marriage resides are, situated;

- ...
(e) an injunction in relation to the property of a party to the marriage; or
(f) an injunction relating to the use or occupancy of the matrimonial home.”

The application for injunction under this section must be between the spouses and it must emerge from their matrimonial relationship.⁴³⁶ An application for injunction is not, therefore, required to be ancillary to any other proceedings under the Act.⁴³⁷ It can be commenced independently of any principal relief under the Act.

In making any of the above orders, the court is required to make an order which it considers proper.⁴³⁸ The court could be guided by factors such as: the financial status of the spouses and their respective needs; the needs of the spouses' children; the need to protect the interests of a spouse in the matrimonial home; to prevent any likely hardship which may be occasioned to either of the spouses or their children;⁴³⁹ or where necessary to protect a spouse from physical or emotional harm arising from the conduct of the other spouse.⁴⁴⁰ The court must consider the evidence before it and put the evidence on a proper scale *vis-a-vis* the needs of the children or those of either spouse before granting or refusing an order for injunction in relation to a matrimonial home.⁴⁴¹ The court's discretion must, thus, be properly exercised in this regard.⁴⁴²

4.3.7 Financial Agreements

Financial agreements are provided for by Part VIIIA of the Family Law Act No 53 of 1975 (Cth). This makes provision for financial agreement before marriage,⁴⁴³ during

⁴³⁶ See the definition of “matrimonial cause” under paragraph (e) of s 4(1) of the Family Law Act No 53 of 1975 (Cth).

⁴³⁷ Parkinson, *Australian Family Law in Context*, 533.

⁴³⁸ S 114(1) of the Family Law Act No 53 of 1975 (Cth); *In the Marriage of Davis* [1976] FLC 90-062 at 75309.

⁴³⁹ *In the Marriage of Davis* [1976] FLC 90-062 at 75309.

⁴⁴⁰ Parkinson, *Australian Family Law in Context*, 534.

⁴⁴¹ *In the Marriage of Davis* [1976] FLC 90-062 at 75309.

⁴⁴² See *In the Marriage of Fedele* [1986] FamCA 14, paras 26 – 27, 31; *Dees v Dees* [2010] FMCAfam 682.

⁴⁴³ S 90B of the Family Law Act 1975 (Cth).

marriage,⁴⁴⁴ and after a divorce order has been made by a court.⁴⁴⁵ It was originally introduced (by way of an addition) to the Family Law Act No 53 of 1975 (Cth) by the Family Law Amendment Act No 143 of 2000.⁴⁴⁶ Since 2003, several provisions relating to financial agreements have been amended.⁴⁴⁷

Before 2000, financial agreements concluded by spouses were regarded by the courts as unenforceable,⁴⁴⁸ as such agreements could not extinguish the jurisdiction of the courts in proceedings for property settlement under section 79 of the Family Law Act No 53 of 1975 (Cth).⁴⁴⁹ At best, the courts take such agreements into consideration when making a property adjustment order (if any) under section 79 of the Family Law Act No 53 of 1975 (Cth).⁴⁵⁰ Financial agreements were not enforceable *per se*.⁴⁵¹

Section 4(1) of the Family Law Act No 53 of 1975 (Cth) defines a financial agreement as "... an agreement that is a financial agreement under section 90B, 90C or 90D, but does not include an ante-nuptial or post-nuptial settlement to which section 85A applies."

It is noted that section 71A(1) limits the jurisdiction of the courts in property settlement proceedings⁴⁵² to entertain certain matters which have been covered by binding financial agreements. Section 71A(1) provides:

"This Part does not apply to:

⁴⁴⁴ S 90C of the Family Law Act 1975 (Cth).

⁴⁴⁵ S 90D of the Family Law Act 1975 (Cth). See Keyes, 2011 *Australian Journal of Family Law*, 167 at 168.

⁴⁴⁶ Keyes, 2011 *Australian Journal of Family Law*, 167- 170.

⁴⁴⁷ In 2005 and 2008, ss 90B and 90D of the Family Law Act 1975 (Cth) were amended by the Family Law Acts Amendment No 98 of 2005 and No 115 of 2008. In 2003, 2005 and 2008, s 90C of the Family Law Act 1975 (Cth) was amended by the Family Law Amendment Act No 138 of 2003; No 98 of 2005 and No 115 of 2008 while s 90G which specifies when financial agreements are binding was amended in 2003, 2008 and 2009 by the Family Law Amendment Act No 138 of 2003; No 115 of 2008 and the Federal Justice System Amendment (Efficiency Measures) Act No 1 of 2009; No 122 of 2009. It should be noted that the sections which shall be referred to in this discussion incorporate all the amended portions of the Family Law Act 1975 (Cth).

⁴⁴⁸ Keyes, 2011 *Australian Journal of Family Law*, 167 at 168.

⁴⁴⁹ See Keyes and Burns, 2002 *Melbourne University Law Review*, 577 at 586.

⁴⁵⁰ *In the Marriage of Hannema* (1981) 54 FLR 79 at 87.

⁴⁵¹ *In the Marriage of Hannema* (1981) 54 FLR 79 at 87. Financial agreements were anathemised amongst Australians, but in 2000 there was a legislative provision challenging such an aversion. See Herd, 2002 *Australian Law Reform Commission Reform Journal*, 23.

⁴⁵² Part VIII of the Family Law Act No 53 of 1975 (Cth) which makes provisions for property matters, spousal maintenance and maintenance agreements does not apply to certain matters covered by binding financial agreements.

- (a) financial matters⁴⁵³ to which a financial agreement that is binding on the parties to the agreement applies; or
- (b) financial resources to which a financial agreement that is binding on the parties to the agreement applies.”

A financial agreement is capable of ousting the court’s jurisdiction if binding.⁴⁵⁴ The court has no supervisory jurisdiction over such agreements, and such an agreement precludes the court from determining the property interests or adjustment.⁴⁵⁵ It was held by the High Court in *Stanford v Stanford*:⁴⁵⁶

“If the parties have made a financial agreement about the property of one or both of the parties that is binding under Pt VIIIA of the Act, then, subject to that Part, a court cannot make a property settlement order under s 79.”

The court’s jurisdiction is, however, not ousted in proceedings under paragraph (caa)⁴⁵⁷ or (cb)⁴⁵⁸ of the definition of matrimonial cause in section 4(1) of the Family Law Act No 53 of 1975 (Cth).⁴⁵⁹ The court’s jurisdiction cannot be limited or excluded by a financial agreement in respect of the maintenance of a spouse⁴⁶⁰ if the court is of the opinion:

“... that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit.”⁴⁶¹

⁴⁵³ S 4(1) of the Family Law Act No 53 of 1975 (Cth) defines financial matters as matters concerning spousal and child maintenance and the property of either or both spouses.

⁴⁵⁴ See *Stanford v Stanford* [2012] HCA 52, para 41; *Bevan v Bevan* [2013] FamCAFC 116, paras 47, 107 – 108 with reference to para 50 His Honour’s (the court of first instance) judgement that the court’s jurisdiction can be ousted by a properly documented financial agreement; *Piper v Mueller* [2015] FamCAFC 241, para 93; *Polik v Polik* [2015] FamCA 299, para 5. See also s 90G of the Family Law Act 1975 (Cth) on when financial agreements are binding.

⁴⁵⁵ *Piper v Mueller* [2015] FamCAFC 241, para 93.

⁴⁵⁶ [2012] HCA 52, para 41.

⁴⁵⁷ Paragraph (caa) refers to “... proceedings between: (i) a party to a marriage; and (ii) the bankruptcy trustee of a bankrupt party to the marriage; with respect to the maintenance of the first-mentioned party.”

⁴⁵⁸ Paragraph (cb) refers to “... proceedings between: (i) a party to a marriage; and (ii) the bankruptcy trustee of a bankrupt party to the marriage; with respect to any vested bankruptcy property in relation to the bankrupt party, being proceedings: (iii) arising out of the marital relationship; or (iv) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between the parties to the marriage; or (v) in relation to the divorce of the parties to the marriage, the annulment of the marriage or the legal separation of the parties to the marriage, being a divorce, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that divorce, annulment or legal separation is recognised as valid in Australia under section 104.”

⁴⁵⁹ S 71A(2) of the Family Law Act No 53 of 1975 (Cth).

⁴⁶⁰ S 90F(1) of the Family Law Act No 53 of 1975 (Cth).

⁴⁶¹ S 90F(1A) of the Family Law Act No 53 of 1975 (Cth).

4.3.7.1 Types of Financial Agreements

There are three types of financial agreements which can be concluded under Part VIIIA of the Family Law Act No 53 of 1975 (Cth). They are premarital financial agreements, marital financial agreements and financial agreements after a divorce order.

4.3.7.1.1 Premarital Financial Agreements

Section 90B of the Family Law Act No 53 of 1975 (Cth) makes provisions for financial agreements between “intending spouses”.⁴⁶² A financial agreement made pursuant to this section by persons “... who are contemplating entering into a marriage with each other ...”⁴⁶³ covers the financial resources and property of either or both parties to the agreement together with their maintenance entitlements during marriage and or in the probable event of their marriage breakdown.⁴⁶⁴

4.3.7.1.2 Marital Financial Agreements

Section 90C of the Family Law Act No 53 of 1975 (Cth) deals with financial agreements during marriage. Where parties are already married, they can conclude a financial agreement⁴⁶⁵ which deals with: their property rights; their financial resources; and their maintenance entitlements during the subsistence of the marriage and upon its breakdown.⁴⁶⁶ It should be noted that a financial agreement made in view of section 90C of the Family Law Act No 53 of 1975 (Cth) “... may be made before or after the marriage has broken down.”⁴⁶⁷

4.3.7.1.3 Financial Agreements after Divorce

Section 90D of the Family Law Act No 53 of 1975 (Cth) specifically makes provisions for financial agreements between former spouses.⁴⁶⁸ Such an agreement is concluded after a divorce order has been made whether or not the order has

⁴⁶² Bates, 1988 *Anglo-American Law Review*, 46 at 58

⁴⁶³ S 90B(1) of the Family Law Act No 53 of 1975 (Cth).

⁴⁶⁴ S 90B(2) of the Family Law Act No 53 of 1975 (Cth).

⁴⁶⁵ S 90C(1) of the Family Law Act No 53 of 1975 (Cth).

⁴⁶⁶ S 90C(2) of the Family Law Act No 53 of 1975 (Cth).

⁴⁶⁷ S 90C(2A) of the Family Law Act No 53 of 1975 (Cth). See *Polik v Polik* [2015] FamCA 299, para 4.

⁴⁶⁸ S 90D(1) of the Family Law Act No 53 of 1975 (Cth).

become absolute.⁴⁶⁹ The agreement relates to the division or distribution of the property or financial resources which were acquired by either or both former spouses during their former marriage.⁴⁷⁰ It also deals with the maintenance of either of the former spouses.⁴⁷¹

4.3.7.2 Binding Financial Agreements

It is noted that a binding financial agreement, which deals with the distribution of the property or financial resources of the parties, takes effect only: after a separation declaration is made;⁴⁷² the spouses are divorced;⁴⁷³ or either or both of the spouses die.⁴⁷⁴ A separation declaration⁴⁷⁵ is a declaration in writing which is signed by at least one of the spouses to a financial agreement stating that both "... spouse parties have separated and are living separately and apart at the ..." ⁴⁷⁶ time when the declaration was signed⁴⁷⁷ and in the opinion of the declarants "... there is no reasonable likelihood of cohabitation being resumed."⁴⁷⁸

A provision in a financial agreement which deals with the maintenance of a spouse or a child of the marriage is void to the extent that it fails to specify the beneficiary and "... the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party or of the child or each child, as the case may be."⁴⁷⁹

Section 90G of the Family Law Act No 53 of 1975 (Cth) specifies the condition for a binding financial agreement. Subsection (1) of section 90G of the Family Law Act No

⁴⁶⁹ S 90D(1) of the Family Law Act No 53 of 1975 (Cth).

⁴⁷⁰ S 90D(2)(a) of the Family Law Act No 53 of 1975 (Cth).

⁴⁷¹ S 90D(2)(b) of the Family Law Act No 53 of 1975 (Cth).

⁴⁷² S 90DA(1) of the Family Law Act No 53 of 1975 (Cth). A financial agreement will, however be operative in relation to other matters covered by the agreement except to the extent that "... it provides for a third party to contribute to the maintenance of a spouse party during the marriage ..." or "... for matters covered by paragraph 90B(3)(b) or 90C(3)(b) ..." of the Act. See s 90DB(1) and (2) of the Family Law Act No 53 of 1975 (Cth)). See also the note immediately under s 90DA(1) of the Family Law Act No 53 of 1975 (Cth).

⁴⁷³ S 90DA(1A)(a) of the Family Law Act No 53 of 1975 (Cth).

⁴⁷⁴ S 90DA(1A)(b) of the Family Law Act No 53 of 1975 (Cth).

⁴⁷⁵ See s 90DA(2), (3) and (4) of the Family Law Act No 53 of 1975 (Cth).

⁴⁷⁶ S 90DA(4)(a) of the Family Law Act No 53 of 1975 (Cth). Spouses are said to be separated even if the cohabitation ceased by the action or conduct of a spouse. The court can find that there has been separation even where the spouses are living in the same residence or either of the spouses has rendered some household services to the other spouse. See s 49 of the Family Law Act No 53 of 1975 (Cth).

⁴⁷⁷ See S 90DA(5) of the Family Law Act No 53 of 1975 (Cth) for the meaning of "declaration time".

⁴⁷⁸ S 90DA(4)(b) of the Family Law Act No 53 of 1975 (Cth).

⁴⁷⁹ S 90E of the Family Law Act No 53 of 1975 (Cth).

53 of 1975 (Cth) provides:

“Subject to subsection (1A), a financial agreement is binding on the parties to the agreement if, and only if:

- (a) the agreement is signed by all parties; and**
- (b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and**
- (c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and**
- (ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and**
- (d) the agreement has not been terminated and has not been set aside by a court.”**

It is not necessary that all the conditions in section 90G(1)(b), (c) and (ca) of the Family Law Act No 53 of 1975 (Cth) must be present for a financial agreement to be binding.⁴⁸⁰ The court may still hold that a financial agreement which has been signed by all parties and has not been terminated⁴⁸¹ is binding⁴⁸² where one or more of the conditions stated in 90G(1)(b), (c) and (ca) have not been met.⁴⁸³ In doing this, the court must be satisfied that the requirements of justice and equity will not be met if it holds that the financial agreement is not binding.⁴⁸⁴

The death of one of the spouses to a financial agreement does not stop the operation of a binding financial agreement. The agreement continues to operate “... in favour of, and is binding on, the legal representative of ...” the deceased spouse.⁴⁸⁵

4.3.7.3 Termination of Financial Agreements and Court’s Power to Set Aside

Financial agreements can, however, be terminated by parties to the agreement

⁴⁸⁰ See s 90G(1A) of the Family Law Act No 53 of 1975 (Cth).

⁴⁸¹ S 90G(1A)(e) of the Family Law Act No 53 of 1975 (Cth).

⁴⁸² See s 90G(1A)(d) and (1B) of the Family Law Act No 53 of 1975 (Cth).

⁴⁸³ S 90G(1A)(a) and (b) of the Family Law Act No 53 of 1975 (Cth).

⁴⁸⁴ s 90G(1A)(c) of the Family Law Act No 53 of 1975 (Cth).

⁴⁸⁵ S 90H of the Family Law Act No 53 of 1975 (Cth). See *Polik v Polik* [2015] FamCA 299.

either "... by including a provision to that effect in another financial agreement ..." ⁴⁸⁶ or by concluding a termination agreement for that purpose. ⁴⁸⁷ If the termination agreement is in compliance with the provisions of section 90J(2) ⁴⁸⁸ of the Family Law Act No 53 of 1975 (Cth) which is subject to section 90J(2A) ⁴⁸⁹ of the Family Law Act No 53 of 1975 (Cth), it will be binding on the parties.

A financial agreement or a termination agreement may be set aside on the following grounds, amongst others, "... if the court is satisfied that ...":

- (a) it was procured by fraud or there was lack of a material or relevant disclosure by a party; ⁴⁹⁰
- (b) it was concluded for the purpose of defeating a creditor(s)'s claim against a party; ⁴⁹¹
- (c) the interests of a party's creditor(s) were not given any consideration or such interests were recklessly disregarded; ⁴⁹²
- (d) "the agreement is void, voidable or unenforceable"; ⁴⁹³
- (e) in view of the present circumstances, it will be impracticable to enforce the agreement or any part of it; ⁴⁹⁴
- (f) a spouse will suffer injustice and hardship if the agreement is not set aside as a result of a major change in the circumstances and position of the spouses in

⁴⁸⁶ 90J(1)(a) of the Family Law Act No 53 of 1975 (Cth).

⁴⁸⁷ 90J(1)(b) of the Family Law Act No 53 of 1975 (Cth).

⁴⁸⁸ S 90J(2) of the Family Law Act No 53 of 1975 (Cth) provides: "Subject to subsection (2A), a termination agreement is binding on the parties if, and only if: (a) the agreement is signed by all parties to the agreement; and (b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and (c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and (ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and (d) the agreement has not been set aside by a court."

⁴⁸⁹ S 90J(2A) of the Family Law Act No 53 of 1975 (Cth) provides: "A termination agreement is binding on the parties if: (a) the agreement is signed by all parties to the agreement; and (b) one or more of paragraphs (2)(b), (c) and (ca) are not satisfied in relation to the agreement; and (c) a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made); and (d) the court makes an order under subsection (2B) declaring that the agreement is binding on the parties to the agreement; and (e) the agreement has not been set aside by a court."

⁴⁹⁰ S 90K(1)(a) of the Family Law Act No 53 of 1975 (Cth).

⁴⁹¹ S 90K(1)(aa)(i) of the Family Law Act No 53 of 1975 (Cth).

⁴⁹² S 90K(1)(aa)(ii) of the Family Law Act No 53 of 1975 (Cth).

⁴⁹³ S 90K(1)(b) of the Family Law Act No 53 of 1975 (Cth).

⁴⁹⁴ S 90K(1)(c) of the Family Law Act No 53 of 1975 (Cth).

relation to the content of the agreement;⁴⁹⁵ and
(g) a party engaged in an unconscionable conduct in the process of concluding the financial agreement.⁴⁹⁶

The court is empowered to set aside a financial agreement where it considers it just to do so in order to preserve or adjust the property rights of spouses or the rights of any other interested person.⁴⁹⁷ Where a party dies after the proceedings to set aside a financial agreement have been finalised, any order made by the court "... may be enforced on behalf of, or against, as the case may be, the estate of the deceased party."⁴⁹⁸

Should a party die before proceedings are completed, the legal representative of the deceased party may continue such proceedings.⁴⁹⁹ "If the court is of the opinion that it would have exercised its powers ..." to set aside a financial agreement had the deceased party being alive,⁵⁰⁰ and it is still necessary to make such order in the present circumstances, the court will proceed to set it aside under section 90K(1) and (3) of the Family Law Act No 53 of 1975 (Cth).⁵⁰¹

The court is, however, precluded from setting aside or terminating a financial agreement where it will amount to "... the acquisition of property from a person ..." on terms which are considered unjust.⁵⁰² It is submitted that the only justification for exercising the power granted by section 90K of the Family Law Act No 53 of 1975 (Cth) is that it is exercised on a just basis with particular reference to the peculiar circumstances of the case before the court.

Ordinary "... principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts ..." and the remedies available to parties under contract generally, apply equally to financial agreements, their enforceability, and termination agreements.⁵⁰³

⁴⁹⁵ S 90K(1)(d) of the Family Law Act No 53 of 1975 (Cth).

⁴⁹⁶ S 90K(1)(e) of the Family Law Act No 53 of 1975 (Cth).

⁴⁹⁷ S 90K(3) of the Family Law Act No 53 of 1975 (Cth).

⁴⁹⁸ S 90K(4) and (5)(c) of the Family Law Act No 53 of 1975 (Cth).

⁴⁹⁹ S 90K(5)(a) of the Family Law Act No 53 of 1975 (Cth).

⁵⁰⁰ S 90K(5)(b)(i) of the Family Law Act No 53 of 1975 (Cth).

⁵⁰¹ S 90K(5)(b)(ii) of the Family Law Act No 53 of 1975 (Cth).

⁵⁰² S 90K(6) of the Family Law Act No 53 of 1975 (Cth).

⁵⁰³ See s 90KA(a) to (c) of the Family Law Act No 53 of 1975 (Cth). See *Polik v Polik* [2015] FamCA 299, para 25 where it was held that "...questions as to the enforceability and effectiveness of a

Spouses who conclude financial agreements may contract out of the statutory requirements for financial provisions and property settlement orders.⁵⁰⁴ They may agree on how their property and financial resources, acquired before and/or after the marriage, should be distributed or divided and the maintenance of each of the spouses.⁵⁰⁵ Spouses can agree that they should retain the ownership of their individual property and financial resources without dividing the same on the breakdown of marriage.⁵⁰⁶ By this arrangement, spouses can preserve specific business assets.⁵⁰⁷

The recognition of financial agreements in the Australian jurisdiction has been criticised on the ground that it will further aggravate the financial and economic disadvantage encountered by women on the breakdown of marriage.⁵⁰⁸ This point is well conceived as it has been admitted that the statutory provisions on financial agreements have failed "... sufficiently [to] take into account the circumstances in which such agreements are likely to be reached and to be enforced ..."⁵⁰⁹ and the challenges which women encounter when they use contract to protect their property interests.⁵¹⁰ It has been argued that contract is not necessarily an appropriate tool for resolving matrimonial property disputes between spouses.⁵¹¹ Keyes and Burns,⁵¹² however, hold a contrary view with particular reference to the latter argument.

It is noted that, in 2015, a Bill⁵¹³ was proposed to amend relevant sections of the binding financial agreements provisions in the Family Law Act No 53 of 1975 (Cth). The primary objectives of the Bill are to expunge the existing uncertainties

financial agreement are to be determined by the Court according to the principles of law and equity that are applicable in determining the enforceability and effect of contracts, with this Court having the same powers and being able to grant the same remedies as the High Court in connection with contracts in its original jurisdiction."

⁵⁰⁴ *Piper v Mueller* [2015] FamCAFC 241, para 8, particularly paragraph L of the recital to the 2009 August agreement concluded by the parties.

⁵⁰⁵ *Piper v Mueller* [2015] FamCAFC 241, para 8.

⁵⁰⁶ S 90F(2) of the Family Law Act No 53 of 1975 (Cth).

⁵⁰⁷ Keyes and Burns, 2002 *Melbourne University Law Review*, 577 at 587.

⁵⁰⁸ Ferlberg and Smyth, 2000 *Australian Journal of Family Law*, 80 at 89 – 93; Keyes and Burns, 2002 *Melbourne University Law Review*, 577 at 587.

⁵⁰⁹ Keyes and Burns, 2002 *Melbourne University Law Review*, 577 at 587.

⁵¹⁰ Keyes and Burns, 2002 *Melbourne University Law Review*, 577 at 587.

⁵¹¹ Ferlberg and Smyth, 2000 *Australian Journal of Family Law*, 80 at 96.

⁵¹² 2002 *Melbourne University Law Review*, 577 at 587. See also Neave, 1995 *Public and Private Feminist Legal Debates*, 144 at 155.

⁵¹³ Family Law Amendment (Financial Agreements and Other Measures) Bill 2015.

surrounding the conclusion, interpretation and enforcement of binding financial agreements and introduce statements of principles in relevant parts of the Act.⁵¹⁴ For instance, clause 90AM of the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 states, in explicit terms, that the object of Part VIIIA of the Family Law Act No 53 of 1975 (Cth) is to oust the court's jurisdiction to make orders regarding matters covered by binding financial agreements.⁵¹⁵

The 2015 Bill emphasises that intending spouses, spouses or former spouses should have the autonomy of determining how to deal with their financial resources or property together with the maintenance entitlement of either spouse during and upon the breakdown of their marriage without involving the court.⁵¹⁶ Financial agreements are certain to be binding and enforceable if concluded in good faith except when terminated by another agreement or set aside by the court in exceptional circumstances.⁵¹⁷

4.4 Conclusion

“The discretion to adjust property rights under section 79 of the Family Law Act No 53 of 1975 (Cth) [and under its predecessor section 86 of the Matrimonial Causes Act No 104 of 1959 (Cth)] emerged in relation to the unfair and unchanging rules of law and equity.”⁵¹⁸ The power of the Australian court to alter the proprietary rights of spouses is peculiar. The Australian courts do not alter the proprietary rights of spouses unless the just and equitable requirement is satisfied whether or not there has been a breakdown of marriage. Nigeria is one country that is expected to develop its law in line with the Commonwealth nations or create its own distinct matrimonial property regime (as local circumstances would permit) as is being done by Australia and other Commonwealth countries.⁵¹⁹

⁵¹⁴ See 2015 Consultation Paper: “Binding Financial Agreement Amendments Family Law Act 1975”, 1.

⁵¹⁵ See cl 90AM(1) of the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015.

⁵¹⁶ Cl 90AM(2)(a) of the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015.

⁵¹⁷ Cl 90AM(2)(b) of the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015.

⁵¹⁸ Wade, 1985 *Federal Law Review*, 76 at 86.

⁵¹⁹ New Zealand is a classic example of a Commonwealth country which abandoned the English system of separation of property regime to adopt a modified community of property system in 1977 upon the commencement of its Matrimonial Property Act No 166 of 1976.

The interpretation given to section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth) by Australian courts is widely at variance with the stance taken by Nigerian courts in respect of section 72(1) of the Matrimonial Causes Act No 18 of 1970⁵²⁰. While Australian courts held the view that they can, pursuant to section 86(1) of Matrimonial Causes Act No 104 of 1959 (Cth), transfer the property of one spouse to the other spouse, Nigerian courts declined or shied away from adopting a similar approach. It is suggested that Nigerian courts can reconsider their approach to section 72(1) of the Matrimonial Causes Act No 18 of 1970⁵²¹ when dealing with the property rights of spouses.

Nigeria can also learn from the judicial activism displayed by Australian courts in respect of section 86(1) of Matrimonial Causes Act No 104 of 1959 (Cth), which led to a reform of the law which today gives substantial weight to the contribution of the homemaker in an application for the alteration of property interest.

Compared to Nigerian law, Australian law has moved on. It has gone beyond the strict separation of property regime where ordinary rules of law and equity determine the property rights of spouses to a regime which affords the court the opportunity to alter the property rights of spouses, only when it is necessary to do so, in order to meet the justice of individual cases. Nigerian law can also develop in this direction by adopting a similar "... equitable property distribution scheme ..."⁵²²

Today, in Australia, binding financial agreements have a place in the field of matrimonial property law, although condemned by Australians before 2000, after which there was a change in societal thinking. A statutory codification of financial agreements, which states the requirements for their recognition and enforceability, could also be adapted by Nigeria.

⁵²⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

⁵²¹ Cap M7 Laws of the Federation of Nigeria, 2004.

⁵²² Wade, 1988-1989 *Family Law Quarterly*, 41 at 50.

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5.1 INTRODUCTION

This chapter aims to provide a succinct examination of the current matrimonial property systems in South Africa as they relate to civil marriages.¹ The Divorce Act 70 of 1979 and the Matrimonial Property Act 88 of 1984 will constitute the two principal Acts which will be analysed in this chapter.

The provisions of the Matrimonial Property Act 88 of 1984, particularly as they relate to the community of property system,² the accrual system,³ the court's power to make an order for the division of the accrual⁴ or joint estate⁵ of the spouses during the subsistence of the marriage, and to order a change of the matrimonial property system of the spouses⁶ will be instructive.

Unlike the situation in Australia⁷ and in England⁸ where the distribution of property upon the breakdown of marriage is subject to judicial discretion, except in Australia where spouses conclude a financial agreement which could possibly oust the jurisdiction of court,⁹ South Africa has a distinct matrimonial property arrangement, with restrained judicial discretion, upon divorce, based on the matrimonial property system which the spouses opt for at the time of their marriage.¹⁰

South African law presents a structured matrimonial property arrangement which allows intending spouses the opportunity to indicate their preference for a particular matrimonial property regime¹¹ that will regulate their property relationship while their marriage subsists and upon its breakdown either by divorce or death. In the words of Carnelley and Bhamjee,¹² the opportunity to make a choice from different matrimonial property systems recognised by law is "... the most important protective

¹ It is noted that the matrimonial property systems in South Africa also apply to civil unions under the Civil Union Act 17 of 2006. S 13(1) of the Act provides: "The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union." Within the context of this study, however, the scope is restricted to a monogamous marriage between a man and a woman. See 1.5 above.

² See chapter III of the Matrimonial Property Act 88 of 1984.

³ See chapter I of the Matrimonial Property Act 88 of 1984.

⁴ S 8 of the Matrimonial Property Act 88 of 1984.

⁵ By s 1 of the Matrimonial Property Act 88 of 1984, "joint estate means the joint estate of a husband and a wife in community of property." See s 20 of the Matrimonial Property Act 88 of 1984.

⁶ See s 21 of the Matrimonial Property Act 88 of 1984.

⁷ See 4.3.3 above.

⁸ See 3.5.2 above.

⁹ See 4.3.7 above.

¹⁰ See 5.5.3 below.

¹¹ Bonthuys, 2014 *SALJ*, 439.

¹² 2012 *Obiter*, 482 at 484.

measure available to any spouse.” The point is that the South African matrimonial property law gives “... prospective spouses some degree of freedom with regard to their choice of the matrimonial property system applicable to their marriage.”¹³

There were two (2) major types of matrimonial property systems in South Africa before the Matrimonial Property Act 88 of 1984 was enacted.¹⁴ They were marriage in universal community of property with the husband’s marital power¹⁵ and marriage out of community of property (that is complete separation of property).¹⁶ With the commencement of the Matrimonial Property Act 88 of 1984, which abolished the husband’s marital power by virtue of section 11(1) of the Act¹⁷ and introduced the accrual system¹⁸ as a soothing modification to the out of community of property system, however, there currently exist three major matrimonial property systems which intending spouses must choose from according to their peculiar circumstances. They include: the universal community of property; complete separation of property; and the accrual system.¹⁹

While the above matrimonial property systems have their merits and demerits,²⁰ the matrimonial property law in South Africa has permitted only a limited exercise of judicial discretion in certain types of marriages.²¹ The lack of judicial flexibility and discretion in the awarding of patrimonial benefits (division of assets) upon divorce has occupied the minds of scholars in recent debates. The need for a more extensive judicial discretion has, thus, been advanced.²²

It is against the backdrop of the foregoing that it becomes necessary to embark on

¹³ Skelton and Carnelley eds., *Family Law in South Africa*, 72.

¹⁴ Heaton and Kruger, *South African Family Law*, 61.

¹⁵ Heaton and Kruger, *South African Family Law*, 61. Marital power under common law enables the husband to exercise his power by virtue of marriage over his wife’s property. Under this doctrine, the wife lacks the capacity to contract or litigate.

¹⁶ Heaton and Kruger, *South African Family Law*, 61. According to Skelton and Carnelley eds., *Family Law in South Africa*, 72, spouses who choose to marry out of community of property must exercise their choice in a prescribed manner through the instrument of an antenuptial contract.

¹⁷ Pursuant to s 12 of the Matrimonial Property Act 88 of 1984 a wife has the capacity to contract and litigate over her property.

¹⁸ See ss 2 – 10 of the Matrimonial Property Act 88 of 1984. The accrual system has been in operation for over thirty years in South Africa. De Jong, 2011 *THRHR*, 472 – 481 discussed the operation and principles of the accrual system and how parties can determine the accrual claims.

¹⁹ Heaton and Kruger, *South African Family Law*, 102; De Jong, 2012 *Stellenbosch Law Review*, 225 at 227 – 240.

²⁰ See Visser and Potgieler, *Introduction to Family Law*, 87 – 88.

²¹ See s 7(3) – (6) of the Divorce Act 70 of 1979.

²² See Sinclair and Heaton, *The Law of Marriage*, 139 – 158; Bix, 2002 – 2003 *Family Law Quarterly*, 255 – 271; Heaton and Kruger, *South African Family Law*, 141 – 143.

an overview of modern South African matrimonial property law as it relates to spouses in civil marriages. It is believed that with South Africa in focus, Nigeria will glean inspiration from South Africa's matrimonial property systems in order to advance the property rights of spouses in civil marriages in Nigeria more effectively.

5.2 MATRIMONIAL PROPERTY SYSTEMS

5.2.1 Universal Community of Property

This is the default matrimonial property system in South Africa, and it is applicable to all civil marriages in which the intending spouses did not conclude an antenuptial contract.²³ The universal community of property, which can also be referred to "... as a universal economic partnership of the spouses...",²⁴ comes into existence by operation of law upon the conclusion of marriage.²⁵ This is a general rule²⁶ which can be deviated from only and when parties to a civil marriage conclude a marriage contract out of community of property which must be registered to be enforceable against third parties.²⁷ Where spouses intend a different matrimonial property system to govern their property rights, therefore, they must do so by concluding an antenuptial contract.²⁸

One of the reasons advanced for entering into antenuptial contracts by prospective spouses is to enable parties to deviate from the consequences of marriage in universal community of property by allowing them to exclude assets from the joint estate or exclude one spouse's liability for the other's debts.²⁹

In the universal community of property system, spouses are regarded as "... co-owners in undivided and indivisible half-shares of all the assets and liabilities they have at the time of their marriage as well as the assets and liabilities they acquire

²³ See Monareng, *A Simple Guide to South African Family Law*, 13, Van Schalkwyk, *General Principles of the Family Law*, 241.

²⁴ See Robinson, 2007 *PER*, 1 at 3

²⁵ See *Brummund v Brummund's Estate* 1993 (2) SA 494 (Nm) at 498; Robinson, 2007 *PER*, 1 at 3.

²⁶ There is, however, "... a rebuttable presumption that all marriages are concluded in community of property." See *Edelstein v Edelstein NO and Others* 1952 (3) SA 1 (A) at 10; Skelton and Carnelley eds, *Family Law in South Africa*, 80; Robinson, *et al*, *Introduction to South African Family Law*, 166.

²⁷ See *Ex parte Spinazze and Another NNO* 1985 (3) SA 650 (A) at 658.

²⁸ See 5.3 below.

²⁹ Heaton and Kruger, *South African Family Law*, 83.

during the marriage.”³⁰ Upon the dissolution of the marriage, spouses have the right to an equal division of the balance of the joint estate after all their liabilities have been settled from it.³¹ It is noted that the joint estate of the spouses remains undivided and indivisible during the subsistence of the marriage except where a court orders that the joint estate be divided under section 20 of the Matrimonial Property Act 88 of 1984.³²

Both spouses in the universal community of property system exercise equal powers in respect of the management and disposal of assets which comprise the joint estate.³³ The joint estate may exclude certain assets such as gifts or a bequest with an exclusion clause and non-patrimonial damages.³⁴ Assets which are excluded from the joint estate of the spouses make up their separate estate(s).³⁵ It is, thus, possible for spouses married in community of property to own separate property.³⁶ A separate property is the property of either spouse which is not included in the joint estate.³⁷

Damages (except damages pertaining to patrimonial loss) recovered by a spouse for any delict committed against him or her constitute the separate property of that spouse. They do not fall into the joint estate.³⁸ Where a spouse has incurred liability for any delict committed by him or her, inclusive of damages for non-patrimonial loss, the damages awarded in respect of such an act are recoverable from the separate property of the spouse.³⁹ Should the spouse have no separate property, the

³⁰ See *Ex parte Menzies et Uxor* 1993 3 SA 799 (C) at 811; *Gugu and Another v Zongwana and Others* [2014] 1 All SA 203 (ECM) at 210. See also Heaton and Kruger, *South African Family Law*, 62. According to Van Schalkwyk, *General Principles of the Family Law*, 215, assets refer to “... corporeal things and rights or claims with a positive monetary value.” See also Heaton and Kruger, *South African Family Law*, 63. This also includes the pension interests of a spouse. See s 7(7) of the Divorce Act 70 of 1979 which states that the pension interests of spouses shall form part of their assets when considering the patrimonial benefits which accrue to the spouses. Spouses’ liabilities will include the debts which each spouse had incurred before and during their marriage. See Lowndes, *The Need for a Flexible and Discretionary System of Marital Property Distribution in South African Law of Divorce*, 9.

³¹ See *Leeb and Another v Leeb and Another* [1999] 2 All SA 588 (N) at 597. See also Heaton and Kruger, *South African Family Law*, 62.

³² See *Leeb and Another v Leeb and Another* [1999] 2 All SA 588 (N) at 597. See also 5.2.1 below.

³³ See s 14 of the Matrimonial Property Act 88 of 1984.

³⁴ In respect of non-patrimonial damages, see s 18(a) of the Matrimonial Property Act 88 of 1984.

³⁵ See Heaton and Kruger, *South African Family Law*, 64 – 67 for a list of assets which can be regarded as the separate property of the spouses in a community of property system.

³⁶ Heaton and Kruger, *South African Family Law*, 64.

³⁷ See s 1 of the Matrimonial Property Act 88 of 1984.

³⁸ See s 18(a) of the Matrimonial Property Act 88 of 1984.

³⁹ See s 19 of the Matrimonial Property Act 88 of 1984.

damages will be recoverable from the joint estate,⁴⁰ and any loss suffered by the other spouse in this regard will be taken into consideration in the distribution of their property interests upon the division of the joint estate.⁴¹

Van Schalkwyk⁴² noted that there is a possibility for a statutory adjustment of property rights upon the dissolution of the joint estate by spouses who are married in universal community of property, for example, where a spouse suffers loss on account of a transaction between the other spouse and a third party without first obtaining the consent of the first spouse.⁴³

Although an order for the division of the joint estate is made by the court in a divorce proceeding,⁴⁴ a spouse married in community of property, may under the provisions of section 20 of the Matrimonial Property Act 88 of 1984, apply to the court for an order to divide the joint estate during the subsistence of the marriage.⁴⁵ Section 20(1) of the Matrimonial Property Act 88 of 1984 provides:

“A court may on the application of a spouse, if it is satisfied that the interest of that spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the joint estate in equal shares or on such other basis as the court may deem just.”⁴⁶

It is submitted that, in the above instance, the court is vested with the judicial discretion to deal with the joint estate of the spouses as it deems just and equitable.⁴⁷

In furtherance of the court’s power under section 20(1) of the Matrimonial Property

⁴⁰ See s 19 of the Matrimonial Property Act 88 of 1984.

⁴¹ See s 19 of the Matrimonial Property Act 88 of 1984.

⁴² *General Principles of the Family Law*, 233.

⁴³ S 15(9)(b) of the Matrimonial Property Act 88 of 1984.

⁴⁴ The High Court/Divorce Court is conferred with jurisdiction in divorce matters. Appeals from the High Court lie with the Supreme Court of Appeal, which “... is the highest court of appeal except in constitutional matters ...” where such matters are decided by the Constitutional Court. “The Constitutional Court is the highest court in all constitutional matters.” See ss 166 – 169 of the Constitution of the Republic of South Africa, 1996.

⁴⁵ *Leeb and Another v Leeb and Another* [1999] 2 All SA 588 (N) at 597.

⁴⁶ See s 8(1) of the Matrimonial Property Act 88 of 1984 for a similar power of the court in respect of the accrual system. See also 263 below.

⁴⁷ Although the community of property system advances the equal sharing of the joint estate of the spouses on the basis that “equality is equity”, the court is called upon to exercise its discretion in an equitable fashion. Bearing in mind that equity in some circumstances may not be a 50:50 division formula of the joint estate of the spouses, the court could arguably deem it fit that the equity of the case deserves a completely different *ratio*.

Act 88 of 1984, it may make an order to the effect that the community of property system be replaced by a different matrimonial property system as it deems just.⁴⁸ This change in the property system of the spouses is a court-ordered change. It is different from the change contemplated by section 21 of the Matrimonial Property Act 88 of 1984 which is made upon the application of both spouses.⁴⁹

One of the advantages of the community of property system is the incorporation of the partnership element of marriage. Marriage is seen as an equal partnership, which gives equal weight to both the financial and non-financial contributions of spouses to the joint estate. Marriage in community of property also serves as a protective measure to a financially weaker spouse who is entitled to share in the other spouse's financial prosperity upon divorce.⁵⁰ The administration of the joint estate can, however, be onerous, and the capacity of a spouse to act in some situations is limited by the statutory requirement of consent by the other spouse.⁵¹

5.2.2 Out of Community of Property System

As stated earlier, when spouses intend their civil marriage to be governed by a different matrimonial property system other than the community of property regime, they must conclude an antenuptial contract.⁵² By so doing, spouses opt for the out of community of property system.⁵³ This kind of marriage has three variations,⁵⁴ namely (1) Marriage out of community of property with the inclusion of profit and loss; (2) marriage out of community of property and community of profit and loss without the accrual which is also known as the complete separation of property; and (3) the accrual system.⁵⁵

⁴⁸ See s 20(2) of the Matrimonial Property Act 88 of 1984. See also s 8(2) of the Matrimonial Property Act 88 of 1984 in respect of the accrual system; 263 below.

⁴⁹ The alteration of matrimonial property system is discussed at 5.4 below.

⁵⁰ See Robinson, *et al.*, *Introduction to South African Family Law*, 157.

⁵¹ See s 15 of the Matrimonial Property Act 88 of 1984.

⁵² See Van Schalkwyk, *General Principles of the Family Law*, 241.

⁵³ See Van Schalkwyk, *General Principles of the Family Law*, 241.

⁵⁴ See Heaton and Kruger, *South African Family Law*, 90 – 91; Van Schalkwyk, *General Principles of the Family Law*, 241 – 242.

⁵⁵ See s 2 of the Matrimonial Property Act 88 of 1984. See also Heaton and Kruger, *South African Family Law*, 91 – 103. The accrual system only applies to marriages concluded out of community of property. See Van Niekerk, *A Practical Guide to Patrimonial Litigation in Divorce Actions*, 2.

5.2.2.1 Marriage out of Community of Property with inclusion of Profit and Loss

This property system recognises the creation of three different estates which includes each spouse's separate estate and a third estate known as the common or joint estate of the spouses.⁵⁶ Under this system, there is a complete separation of property while the marriage subsists as each spouse is allowed to retain his or her separate assets.⁵⁷ All pre-marital assets and debts constitute the separate estate of the spouses which each spouse owns, administers and is individually liable for.⁵⁸ "All the profits⁵⁹ and losses⁶⁰ acquired after conclusion of the marriage fall in a joint estate, of which the spouses are bound co-owners in indivisible and undivided half shares."⁶¹ The liability of this estate for debts is also joint. With respect to the joint estate, both spouses have concurrent administration.⁶²

While Heaton and Kruger⁶³ observed that it is not common for spouses in civil marriages to opt for marriage out of community of property with inclusion of profit and loss.⁶⁴

5.2.2.2 Marriage with Complete Separation of Property

As the name indicates, there is an absolute separation of the assets and liabilities of the spouses before and during marriage.⁶⁵ Each spouse has complete control of his or her individual (separate) assets and bears his or her liabilities separately except for household necessities.⁶⁶ Spouses married under this property system after the commencement of the Matrimonial Property Act 88 of 1984 are entitled to their

⁵⁶ See Visser and Potgieler, *Introduction to Family Law*, 86.

⁵⁷ See Heaton and Kruger, *South African Family Law*, 91.

⁵⁸ See Van Schalkwyk, *General Principles of the Family Law*, 242.

⁵⁹ Profits will include the spouses' salaries after marriage but exclude any gain or value derived from an excluded asset. See Van Schalkwyk, *General Principles of the Family Law*, 242 – 243.

⁶⁰ Losses will include all debts which accrue from the joint estate of the spouses but exclude debts incurred from their separate estate. See Van Schalkwyk, *General Principles of the Family Law*, 243.

⁶¹ Van Schalkwyk, *General Principles of the Family Law*, 242. See also Heaton and Kruger, *South African Family Law*, 91.

⁶² Van Schalkwyk, *General Principles of the Family Law*, 225.

⁶³ *South African Family Law*, 91.

⁶⁴ See also Du Toit, 2015 *Journal of Civil Law Studies*, 655 at 661.

⁶⁵ See Robinson, *et al.*, *Introduction to South African Family Law*, 158.

⁶⁶ See Van Schalkwyk, *General Principles of the Family Law*, 243. By s 23(2) of the Matrimonial Property Act 88 of 1984, spouses married out of community of property are required to contribute to necessities for the joint household in the proportion of their financial means; and they "... are jointly and severally liable to third parties for all debts incurred by either of them in respect of necessities for the joint household." – s 23(5) of the Matrimonial Property Act 88 of 1984.

individual pension interests and the pension interests are excluded from the operation of section 7(3) of the Divorce Act 70 of 1979.⁶⁷

It is noted that this matrimonial property system does not exclude the possibility of joint ownership of property between the spouses.⁶⁸ With regards to property which is jointly owned by the spouses, ordinary property law rules determine the extent of each spouse's interest in the property.

For spouses to be married in complete separation of property, the law requires that they must have expressly excluded the operation of the accrual system and the community of profit and loss in their antenuptial contract as stated in section 2 of the Matrimonial Property Act 88 of 1984. The spouses are free to conclude contracts with each other and institute legal actions in respect of such contracts.⁶⁹

It is observed that the complete separation of property system does not afford any protection to the spouse who expends most or all of his or her time acting as a homemaker while foregoing his or her earning capacity if married after the commencement of the Matrimonial Property Act 88 of 1984.⁷⁰ Heaton and Kruger,⁷¹ therefore, argue that the system is very prejudicial to the spouse who is less financially buoyant; it was for this very reason that the accrual system was introduced by the legislature to remedy the situation.⁷²

5.2.2.3 Accrual System

As a result of the hardship⁷³ created by the complete separation of property system which prevented spouses from sharing assets acquired by their joint efforts during the subsistence of their marriage,⁷⁴ the South African Law Commission in 1982, amongst other reasons, advocated the introduction of the accrual system.⁷⁵ Hence, the Matrimonial Property Act 88 of 1984 brought the accrual system into operation.⁷⁶

⁶⁷ See s 7(7)(c) of the Divorce Act 70 of 1979.

⁶⁸ Van Schalkwyk, *General Principles of the Family Law*, 243.

⁶⁹ See Van Schalkwyk, *General Principles of the Family Law*, 243.

⁷⁰ See Visser and Potgieler, *Introduction to Family Law*, 88; Carnelley and Bhamjee, 2012 *Obiter* 482 at 486.

⁷¹ *South African Family Law*, 91.

⁷² See also Barratt, 2013 *SALJ*, 688 at 689 – 670.

⁷³ Sinclair, 1983 *Acta Juridica*, 75 at 78.

⁷⁴ See Van Wyk, 1983 *Acta Juridica*, 53 at 62, Du Toit, 2015 *Journal of Civil Law Studies*, 655 at 660.

⁷⁵ Heaton and Kruger, *South African Family Law*, 91.

⁷⁶ See Chapter 1 of the Matrimonial Property Act 88 of 1984.

This provided an avenue for the financial independence of spouses during the subsistence of their marriage but, at dissolution, entitled them to half a share in the accrual of their respective estates.⁷⁷ By this system, marriage is regarded as a kind of a joint venture or a partnership which recognises the existence of joint interests in the accrual of the spouses' estates upon the dissolution of their marriage.⁷⁸

Upon the commencement of the Matrimonial Property Act 88 of 1984, the accrual system applies to marriages out of community of property system in terms of an antenuptial contract where such a contract does not expressly exclude its application.⁷⁹ By this system, upon "... the dissolution of a marriage ... the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse ... acquires a claim against the other spouse ... for an amount equal to half of the difference between the accrual of the respective estates of the spouses."⁸⁰ It is, however, interesting to note that this right "... is a patrimonial benefit which may on divorce be declared forfeit, either wholly or in part."⁸¹

By section 4(1)(a) of the Matrimonial Property Act 88 of 1984, "[t]he accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage." Section 4(1)(b) provides:

"In the determination of the accrual of the estate of a spouse –

- (i) any amount which accrued to that estate by way of damages, other than damages for patrimonial loss, is left out of account;**
- (ii) an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as any other asset which he acquired by virtue of his possession or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage;**
- (iii) the net value of that estate at the commencement of his marriage is calculated with due allowance for any difference**

⁷⁷ Lowndes, *The Need for a Flexible and Discretionary System of Marital Property Distribution in South African Law of Divorce*, 10; Du Toit, 2015 *Journal of Civil Law Studies*, 655 at 661.

⁷⁸ See Sinclair, 1983 *International and Comparative Law Quarterly*, 785 at 797 – 798; De Jong, 2011 *THRHR* 472 at 474.

⁷⁹ In such cases, the accrual system applies by default or automatically. See s 2 of the Matrimonial Property Act 88 of 1984. See also Robinson, *et al.*, *Introduction to South African Family Law*, 157.

⁸⁰ See s 3(1) of the Matrimonial Property Act 88 of 1984; Du Toit, 2015 *Journal of Civil Law Studies*, 655 at 661.

⁸¹ See s 9 of the Matrimonial Property Act 88 of 1984.

which may exist in the value of money at the commencement and dissolution of his marriage, and for that purpose the weighted average of the consumer price index as published from time to time in the *Gazette* serves as *prima facie* proof of any change in the value of money.”⁸²

In the computation of the accrual of a spouse's estate, unless the spouses' antenuptial contract indicates to the contrary or a testator or donor stipulates otherwise, inheritances, legacies or donations which a spouse received while he or she was still married together with any asset which was acquired by him or her as a result of his or her possession or former possession of the property are excluded.⁸³ In addition, a donation from one spouse to the other, except a donation *mortis causa*, is not considered as part of the property of either spouse in the computation of the accrual of their respective estates.⁸⁴

It is of the essence that the net commencement value of the spouses' estate be declared in the antenuptial contract during the commencement of their marriage. This is to ensure certainty in the ascertainment of the accrual of the spouses' estate.⁸⁵ Where a spouse fails to make a declaration in his/her antenuptial contract, the spouse is required to declare the net value of his or her estate before his or her marriage or within six months after the celebration of such marriage in a statement which is required to be signed by the other spouse and attested to by a notary.⁸⁶ The antenuptial contract or a certified copy of the signed statement constitutes a *prima facie* proof of the net value of the estate of the spouses.⁸⁷

Section 6(4) of the Matrimonial Property Act 88 of 1984 states that, where the liabilities of a spouse exceeds his or her assets at the commencement of the marriage or in a case where a spouse fails to declare the value of his or her estate as required by section 6(1) of the Matrimonial Property Act 88 of 1984 and the contrary is not proved, the net value of the spouse's estate will be deemed to be nil

⁸² With particular reference to the accrual of the estate of a deceased spouse, the Act provides that it will be determined first before any effect is given to the deceased spouse's "... testamentary disposition, donation *mortis causa* or succession in terms of the law of intestate succession." See s 4(2) of the Matrimonial Property Act 88 of 1984.

⁸³ See s 5(1) of the Matrimonial Property Act 88 of 1984.

⁸⁴ See s 5(2) of the Matrimonial Property Act 88 of 1984.

⁸⁵ Skelton and Carnelley ed. Family Law in South Africa, 111.

⁸⁶ See s 6(1) of the Matrimonial Property Act 88 of 1984.

⁸⁷ See s 6(3) of the Matrimonial Property Act 88 of 1984.

at the commencement of his or her marriage.⁸⁸

In *Olivier v Olivier*,⁸⁹ where the parties had declared the net values of their assets to be nil in their antenuptial contract, the defendant's/husband's argument to adduce evidence under section 6(3) of the Matrimonial Property Act 88 of 1984 was rejected on the grounds that section 6(3) of the Matrimonial Property Act 88 of 1984 on which the defendant/husband sought to rely was not applicable because it referred only to cases where the parties had failed to declare the net values of their estates. Where the parties had expressly declared the net values of their estates to be nil in their antenuptial contract, it would not be acceptable for a party to adduce evidence contrary to the express content of the document.⁹⁰ In the absence of a claim for rectification, the declaration in the antenuptial contract will be upheld.⁹¹

In *Thomas v Thomas*,⁹² however, the court took a contrary position. It was of the view that the declared net values of the estates of spouses in an antenuptial contract or a statement is not a clear proof but only serves as a *prima facie* proof as stated in section 6(3) of the Matrimonial Property Act 88 of 1984.⁹³ Parties are not precluded from proving the actual net values of their estate at the time of the marriage where the declared net values do not represent their true values.⁹⁴

Furthermore, a spouse is obliged by law to provide a full disclosure of the particulars of the values of his or her estate within a reasonable time when required by the other spouse to determine the accrual of their respective estates.⁹⁵

It is pertinent to note that the legal right to participate in the division of the accrual of a spouse's estate can arise only at the dissolution of marriage⁹⁶ except in cases where a spouse has made a successful application to the court on the basis that his or her "... right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being prejudiced or will probably be seriously

⁸⁸ See *Olivier v Olivier* 1998 (1) SA 550 (D) at 554 and 555.

⁸⁹ 1998 (1) SA 550 (D) at 554.

⁹⁰ *Olivier v Olivier* 1998 (1) SA 550 (D) at 555 – 556.

⁹¹ *Olivier v Olivier* 1998 (1) SA 550 (D) at 555 – 556.

⁹² [1999] 3 All SA 192 (NC).

⁹³ *Thomas v Thomas* [1999] 3 All SA 192 (NC) at 200 – 201.

⁹⁴ *Thomas v Thomas* [1999] 3 All SA 192 (NC) at 200 – 201.

⁹⁵ See s 7 of the Matrimonial Property Act 88 of 1984.

⁹⁶ See s 3(2) of the Matrimonial Property Act 88 of 1984. See also *Reeder v Softline Ltd and Another* 2001 (2) SA 844 (W) at 849; *MB v NB* 2010 (3) SA 220 at 232; De Jong, 2011 *THRHR* 472 at 474.

prejudiced by the conduct of the other spouse ...”⁹⁷ Where the court is satisfied that it is in the interests of justice to allow the application *stante matrimonio* without prejudice to other persons, it will order an immediate division of the accrual of the estate of the spouses in accordance with the provisions of Chapter I of the Matrimonial Property Act 88 of 1984 or on such other basis as it deems just.⁹⁸ Should the court exercise its powers under section 8(1) of the Matrimonial Property Act 88 of 1984, it may make an order for the replacement of the accrual system with a complete separation of property system.⁹⁹

5.3 ANTENUPTIAL CONTRACTS

With the aid of an antenuptial contract, intending spouses may “... deviate from the normal consequences of universal community of property ... by excluding particular assets from the joint estate or excluding one spouse’s liability for the other’s antenuptial debts...”¹⁰⁰ It can expressly exclude community of property, community of profit and loss and the accrual system.¹⁰¹ Certain assets, like inheritances and gifts, can be included or excluded, and intending spouses can reach an agreement on their succession rights in respect of their property.¹⁰²

Simply put, intending spouses have the freedom to decide on the contents of their antenuptial contract. This freedom of choice is, however, restricted to the extent that the parties to such a contract do not include impossible, immoral or illegal provisions.¹⁰³ Provisions which are “... contrary to the law, good morals or the basic nature of the marriage ...” (as when intending spouses exclude the right to *consortium* and the duty to maintain each other) are not permitted.¹⁰⁴ While it is possible for intending spouses to agree on their financial obligations and property rights in the event of a divorce, they are not permitted by law to stipulate provisions

⁹⁷ See s 8(1) of the Matrimonial Property Act 88 of 1984. See also *Reeder v Softline Ltd and Another* 2001 (2) SA 844 (W) at 849.

⁹⁸ See s 8(1) of the Matrimonial Property Act 88 of 1984.

⁹⁹ See s 8(2) of the Matrimonial Property Act 88 of 1984.

¹⁰⁰ Heaton and Kruger, *South African Family Law*, 83.

¹⁰¹ See s 2 of the Matrimonial Property Act 88 of 1984.

¹⁰² See s 5 of the Matrimonial Property Act 88 of 1984.

¹⁰³ See *Barnard v Barnard* 2000 3 SA 741 (C) at para 38.

¹⁰⁴ See *W v H* [2016] 4 All SA 260 (WCC) at 264 – 265. See also Robinson *et al*, 2012 *Introduction to South African Family Law*, 205.

which will encourage possible future divorce.¹⁰⁵

An antenuptial contract can be an informal or a formal agreement. It is said to be an informal agreement when it is concluded by intending spouses without fulfilling the requirements of the Deeds Registries Act 47 of 1937 in relation to a valid and enforceable antenuptial contract.¹⁰⁶ Although an informal antenuptial contract is not enforceable against third parties, it remains valid and enforceable only against the parties to such an agreement.¹⁰⁷

On the other hand, a formal antenuptial contract is an agreement between intending spouses which complies with the requirements of the Deeds Registries Act 47 of 1937 in terms of form and registration under sections 86 and 87(1) and (2) of the Act, and it is enforceable against third parties.¹⁰⁸

Where the court makes an order for the replacement of the community of property system with a different matrimonial property system under section 20 of the Matrimonial Property Act 88 of 1984, or where the court orders a change of the spouses' matrimonial property system on the application of both spouses under section 21 of the Matrimonial Property Act 88 of 1984,¹⁰⁹ any postnuptial contract entered into by the spouses is required to meet the provisions of sections 86 and 87 of the Deeds Registries Act 47 of 1937.¹¹⁰

It should, however, be noted that divorce or the death of either spouse does not necessarily terminate an antenuptial contract. An antenuptial contract can be terminated only by a court order when all its terms are fulfilled or where "... the terms have become irrelevant or impossible ..."¹¹¹

5.4 ALTERATION OF THE MATRIMONIAL PROPERTY SYSTEM

It is noted that spouses are free either to amend or terminate their antenuptial

¹⁰⁵ See *Stembridge v Stembridge* [1998] 2 All SA 4 (D) at 14; *Mills v Mills* [2017] 2 All SA 364 (SCA) at 368.

¹⁰⁶ See *Odendaal v Odendaal* [2002] 2 All SA 94 (W) at 99.

¹⁰⁷ See *Ex parte Spinazze and Another NNO* 1985 (3) SA 650 (A) at 658; *Odendaal v Odendaal* [2002] 2 All SA 94 (W) at 99; *Schmitz v Schmitz* [2015] 3 All SA 85 (KZD) at 88.

¹⁰⁸ See *Ex parte Spinazze and Another NNO* 1985 (3) SA 650 (A) at 657 – 658; *Schmitz v Schmitz* [2015] 3 All SA 85 (KZD) at 87.

¹⁰⁹ See 5.4 below.

¹¹⁰ See s 89(1)(a) and (b) of the Deeds Registries Act 47 of 1937.

¹¹¹ See Skelton and Carnelley ed., *Family Law in South Africa*, 104.

contract.¹¹² Where intending spouses are yet to conclude their marriage, they can, with the aid of an informal agreement, amend any clause in their formal antenuptial contract or cancel the formal antenuptial contract. This applies only *inter partes*.¹¹³

Section 21(1) of the Matrimonial Property Act 88 of 1984 makes provision for the possibility of changing an antenuptial contract after marriage. This is possible only when spouses intend to change their matrimonial property system to a different one.¹¹⁴ This is a court-ordered change which can be made only on the application of both spouses to the court based on sound reasons,¹¹⁵ sufficient notice to creditors, and given that it does not prejudice the interest of any other person who could be affected by the application.¹¹⁶ Upon such change, spouses would be mandated to execute a notarial contract in accordance with the Deeds Registries Act 47 of 1937 "... by which their future matrimonial property system is regulated on such conditions as the court may think fit."¹¹⁷

In *Ex parte Engelbrecht*,¹¹⁸ the spouses were married in community of property. They successfully applied to the court for a change of the matrimonial property system to out of community of property with the exclusion of the marital power. The court granted the application on the ground that the spouses, before their marriage, had consented to be married out of community of property. It also found that, after their marriage, they administered their separate estates. They had not concluded an antenuptial contract before their marriage on the mistaken belief that they needed only to communicate their intention to the marriage officer.¹¹⁹

Where the court grants an application pursuant to section 21(1) of the Matrimonial Property Act 88 of 1984, it is enjoined to authorise the spouses to enter into a notarial contract pursuant to section 89 of the Deeds Registries Act 47 of 1937 by

¹¹² Skelton and Carnelley ed., *Family Law in South Africa*, 103.

¹¹³ They can also replace the default property system (community of property) with an informal antenuptial contract. See Skelton and Carnelley ed., *Family Law in South Africa*, 103.

¹¹⁴ See Skelton and Carnelley ed., *Family Law in South Africa*, 103.

¹¹⁵ In *Ex parte Engelbrecht* 1986 (2) SA 158 (NC) at 160H, "sound reasons" imply "... facts that are convincing, valid and anchored on reality." This case was reported in Afrikaans. Thus, the quotation above is a free translation from Van Schalkwyk, *General Principles of the Family Law*, 203.

¹¹⁶ See s 21(1)(a) to (c) of the Matrimonial Property Act 88 of 1984. See also *Ex parte Burger and Another* 1995 (1) SA 140 (D) at 141; *SB v RB* [2014] ZAWCHC 56 at paras 32, 33.

¹¹⁷ See s 21(1) of the Matrimonial Property Act 88 of 1984.

¹¹⁸ 1986 (2) SA 158 (NC).

¹¹⁹ See *Ex parte Burger and Another* 1995 (1) SA 140 (D), where the spouses successfully changed their matrimonial property regime from complete separation of property to the accrual system.

which the agreed matrimonial property system would be governed on the conditions stated by the court.

It is noted that, where an antenuptial contract does not reflect the actual or true intention of the spouses, spouses can apply to the High Court for the rectification of the terms of the antenuptial contract.¹²⁰

5.5 COURT'S POWERS IN THE DIVISION OF ASSETS UPON DIVORCE

Of particular importance to this discussion are sections 7 and 9 of the Divorce Act 70 of 1979. Section 7 of the Divorce Act 70 of 1979 deals with the powers of the court with regard to the redistribution of assets between spouses upon divorce, including the payment of maintenance, while section 9 of the Divorce Act 70 of 1979 deals with the power of the court to make a forfeiture order upon divorce.¹²¹

5.5.1 Giving Effect to Divorce Settlement Agreements

Similarly to the Australian,¹²² English¹²³ and Nigerian¹²⁴ jurisdictions, the South African law also creates a possibility for spouses to conclude divorce settlement agreements upon divorce.¹²⁵ The court is enjoined to give effect to divorce settlement agreements. Section 7(1) of the Divorce Act 70 of 1979 provides:

“A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.”

The use of “may” in the above section implies that the recognition of a settlement agreement by the court and an order made pursuant to it are discretionary in nature.¹²⁶ It is submitted that the court is not mandated by statute to make its orders

¹²⁰ See *Ex parte Venter et Uxor* 1948 (2) SA 175 (O) at 179; *Ex parte Dunn et Uxor* 1989 (2) SA 429 (N) at 432.

¹²¹ See Sinclair, 1983 *International and Comparative Law Quarterly*, 785 at 790.

¹²² See Part VIIIA of the Family Law Act No 53 of 1975 (Cth), particularly ss 90C and 90D of the Act. See also 4.3.7.1.2; 4.3.7.1.3 above.

¹²³ See 3.6.3.1 above. See also Lowe and Douglas, *Bromley's Family Law*, 1008.

¹²⁴ See s 73(1)(k) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004. See also 2.6 at 52 above.

¹²⁵ See s 7(1) of the Divorce Act 70 of 1979.

¹²⁶ See *Ex parte: PJLG and Another; In re: PJLG and Another* [2013] 4 All SA 41 (ECG) at 49. See also Heaton and Kruger, *South African Family Law*, 128.

in accordance with the settlement agreement.¹²⁷

Notwithstanding the matrimonial property system which is applicable to the spouses, they can, by a divorce settlement agreement, deviate from the usual consequences of the matrimonial property system applicable to their marriage upon divorce. Through this instrument, spouses can agree on issues ranging from how their assets should be divided, what assets are to be included or excluded in the division, and how maintenance should be paid.¹²⁸

It is submitted that a divorce settlement agreement made pursuant to section 7(1) of the Divorce Act 70 of 1979 is in the nature of a consent agreement between the spouses with regards to issues contained therein. Once made an order of court, it becomes a consent judgement¹²⁹ which is binding on both spouses.¹³⁰ A refusal to obey the order as contained in the settlement agreement is contemptuous.¹³¹

With reference to clauses related to asset division, the court is enjoined to make its order in line with the divorce settlement agreement. The court's power to rescind, suspend or vary its orders under section 8 of the Divorce Act 70 of 1979¹³² does not extend to the agreed division of the spouses' assets.¹³³

Since a divorce settlement agreement is, however, in the nature of a contract, the

¹²⁷ See *Ex parte: PJLG and Another; In re: PJLG and Another* [2013] 4 All SA 41 (ECG) at 48 – 49.

¹²⁸ Where the spouses are unable to reach a settlement agreement with regards to the payment of maintenance, or the court for one reason or the other could not make a maintenance order in terms of the provision of s 7(1) of the Divorce Act 70 of 1979, the court may be approached in terms of s 7(2) of the Divorce Act 70 of 1979 to make a maintenance order which it considers just in favour of a spouse until the remarriage or death of that spouse. In arriving at a just maintenance order, the court takes into consideration "...the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the breakdown of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account ...".

¹²⁹ See *Ex parte: PJLG and Another; In re: PJLG and Another* [2013] 4 All SA 41 (ECG) at 46, 59 62 – 63. See fn 87 at 189 for the meaning of consent judgement.

¹³⁰ See *Lebeloane v Lebeloane* [2000] All SA 525 (W) at 530 and 532.

¹³¹ See *Lebeloane v Lebeloane* [2000] 4 All SA 525 (W) at 532; *Ex parte: PJLG and Another; In re: PJLG and Another* [2013] 4 All SA 41 (ECG) at 59. See also Heaton and Kruger, *South African Family Law*, 129.

¹³² S 8 of the Divorce Act 70 of 1979 deals with the power of the court to rescind, suspend or vary its order made pursuant to the Act with respect to the maintenance, custody, guardianship or access to a child of the marriage. S 8(1) of the Divorce Act 70 of 1979 provides: "A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor ...".

¹³³ It should be noted that parties to a divorce settlement agreement can by mutual consent rescind, vary or suspend their settlement agreement. See Heaton and Kruger, *South African Family Law*, 129.

court has the power under common law to set aside the agreement where it is shown that it vitiates the elements of a valid contract.¹³⁴ Fraud, duress, undue influence, misrepresentation, illegality, amongst other factors, can constitute sufficient basis for the setting aside of a divorce settlement agreement by the court.¹³⁵ The court can also rectify a divorce settlement agreement which does not reflect the true intentions of the spouses.¹³⁶

5.5.2 Forfeiture of Patrimonial Benefits

Section 9(1) of the Divorce Act 70 of 1979 vests the court with the power to make a forfeiture order regarding patrimonial benefits upon divorce. It provides:

“When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.”

The above provision does not apply to “... a decree of divorce granted on the ground of the mental illness or the continuous unconsciousness of ...” a spouse.¹³⁷

By the forfeiture of patrimonial benefits, a spouse does not lose his or her personal assets or assets brought into the marriage.¹³⁸ Under section 9(1) of the Divorce Act 70 of 1979, a spouse is liable to forfeit only his or her claim against the other spouse’s assets. For instance, in a marriage in community of property where a total forfeiture order is made, the spouse against whom the order is made will receive only the total assets brought into the joint estate and nothing more.¹³⁹ He or she will forfeit benefits derived from the joint estate.¹⁴⁰

Similarly, where the marriage is governed by the accrual system, a spouse against whom an order for forfeiture is sought (the spouse with no or less accrual) loses the

¹³⁴ See *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 163, 167; Heaton and Kruger, *South African Family Law*, 129.

¹³⁵ See *Ex parte: PJLG and Another; In re: PJLG and Another* [2013] 4 All SA 41 (ECG) at 49 – 50.

¹³⁶ See *Ex parte: PJLG and Another; In re: PJLG and Another* [2013] 4 All SA 41 (ECG) at 66.

¹³⁷ See s 9(2) of the Divorce Act 70 of 1979.

¹³⁸ See *Celliers v Celliers* 1904 TS 926 at 926 – 927; *Rousalis v Rousalis* 1980 (3) SA 446 (C) at 450.

¹³⁹ See *Leeb and Another v Leeb and Another* [1999] 2 All SA 588 (N) at 597.

¹⁴⁰ See *Leeb and Another v Leeb and Another* [1999] 2 All SA 588 (N) at 597.

right in full or partially to a half claim in the growth of the respective estates of the spouses.¹⁴¹ The spouse whose estate indicates the larger accrual will, thus, be permitted to retain in full or partially “... the difference between the accrual of their respective estates ...” while the other spouse loses the legal right of participation in the division of the accrual.¹⁴²

Whether or not a spouse should be entitled to the patrimonial benefits of a marriage upon divorce would hinge on the duration of the marriage,¹⁴³ the circumstances surrounding the breakdown of the marriage and any substantial misconduct¹⁴⁴ by the spouse. These factors are not to be viewed cumulatively and neither will all three factors have to be present for a forfeiture order to be made.¹⁴⁵ It is submitted that the provision of section 9(1) of the Divorce Act 70 of 1979 is to prevent the undue benefit of a spouse in relation to other spouse.¹⁴⁶

¹⁴¹ S 9 of the Matrimonial Property Act 88 of 1984 provides that the right to accrual sharing is a patrimonial benefit which is liable to total or partial forfeiture upon the divorce. See Heaton and Kruger, *South African Family Law*, 136.

¹⁴² Heaton and Kruger, *South African Family Law*, 136.

¹⁴³ Where the court establishes that the marriage is of a short duration, a forfeiture order will be made where a spouse will be unduly benefitted if it is not made. In the absence of a statutory definition of a long or short marriage, the court determines the length of a marriage from the facts of each case. See Marumoagae, 2014 *De Jure* 85 at 93. A marriage of one year and four months was held to be of a short duration in *Malatji v Malatji* [2005] ZAGPHC 142, while, in *Swanepoel v Swanepoel* [1996] 3 All SA 440 (SE), a marriage in community of property which lasted for four years and six months (where there was evidence that one of the spouses had concluded the marriage for the primary purpose of benefitting materially) was held to be a marriage of short duration.

¹⁴⁴ “Substantial misconduct” will include conducts which are not relevant to the breakdown of the marriage. See *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) at 601 F – G; *Wijker v Wijker* 1993 (4) SA 720 (A) at 731 E –G; *Botha v Botha* 2006 (4) SA 144 (SCA).

¹⁴⁵ In *Matyila v Matyila* 1987 (3) SA 230 (W) at 234, the court held that for a forfeiture order to be made, the three factors as stated in s 9(1) of the Divorce Act No 70 of 1979 had to be alleged and proved by the spouse in favour of whom the forfeiture order is to be made, and that substantial misconduct had to be proved in relation to the spouse whose conduct led to the breakdown of the marriage. The courts, however, held to the contrary in the latter cases of *Klerck v Klerck* 1991 (1) SA 265 (W), *Binda v Binda* 1993 (2) SA 123 (W), *Wijker v Wijker* 1993 (4) SA 720 (A) at 729. In *Binda v Binda* 1993 (2) SA 123 (W) at 125 – 127, which is in respect of a forfeiture order in relation to the benefits of a marriage in community of property, the court after considering whether the word “and” in s 9(1) of the Divorce Act No 70 of 1979 is used conjunctively or disjunctively, held that although each of the three factors as stated in the section needed “... to be given due and proper weight ...”, they are not to be viewed cumulatively. Earlier, in *Klerck v Klerck* 1991 (1) SA 265 (W) at 266 (a case where a spouse was discharged from obligations arising from an antenuptial contract between the spouses), the court held that its primary duty under s 9(1) of the Divorce Act No 70 of 1979 was to determine whether a party would be unduly benefitted if an order for forfeiture was not made. In resolving this issue, the court held that it is required to consider the three factors stated in the section. Most importantly, Kriegler J held that even where substantial misconduct was not established but that a party would be unduly benefitted as a result of the short duration of the marriage, an order for forfeiture of benefits would be made.

¹⁴⁶ See the latter part of s 9(1) of the Divorce Act No 70 of 1979 which states that the court making an order for forfeiture must be “... satisfied that, if the order for forfeiture is not made, the one party will in

An order for the forfeiture of patrimonial benefit will not lie in circumstances where the court comes to the conclusion that the division of the spouses' assets will lead to an inequitable result because of the discrepancy in the respective contributions of the spouses to the growth of each other's estate.¹⁴⁷ According to Heaton and Kruger,¹⁴⁸ a forfeiture order may not be used by a court "... as a mechanism for deviating from the normal consequences of the spouses' matrimonial property system and achieving a redistribution of assets simply because it considers this fair and just."

The court noted in *Engelbrecht v Engelbrecht*¹⁴⁹ the fact that one spouse contributed more than the other spouse in a community of property system does not imply that, upon divorce, the spouse who contributed more should get a greater share of the joint estate. It noted that the equal distribution of estate is the inevitable consequence of the community of property notwithstanding the disparity in the assets and liabilities of the spouses at the commencement and subsistence of the marriage.¹⁵⁰ The court held that this consequence (that is, equal sharing) can be deviated from only where it can be proved that a spouse would be unduly benefitted under section 9(1) of the Divorce Act No 70 of 1979.¹⁵¹

In *Wijker v Wijker*¹⁵² the Court of Appeal faulted the trial court's judgement in respect of a forfeiture order which was based on the principle of fairness. It held:

"The fact that the appellant is entitled to share in the successful business established by the respondent is a consequence of their marriage in community of property. In making a value judgment this equitable principle applied by the Court *a quo* is not justified. Not only is it contrary to the basic concept of community of property, but there is no provision in the section for the application of such a principle. Even if it is assumed that the appellant made no contribution to the success of the business and that the benefit which he will receive will be a substantial one, it does not necessarily follow that he will be unduly benefitted ... The benefit that will be received cannot be viewed in isolation, but in order to determine whether a party will be unduly benefitted the Court must have regard to the factors mentioned in the section. In my judgment the approach

relation to the other be unduly benefitted." See *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) at 601 F – G; *Wijker v Wijker* 1993 (4) SA 720 (A) at 731 E – G.

¹⁴⁷ See *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C).

¹⁴⁸ *South African Family Law*, 135.

¹⁴⁹ 1989 (1) SA 597 (C) at 598.

¹⁵⁰ *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) at 598.

¹⁵¹ *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) at 598, 601.

¹⁵² 1993 (4) SA 720 (A) at 731.

adopted by the Court *a quo* in concluding that the appellant would be unduly benefitted should a forfeiture order not be granted was clearly wrong.”¹⁵³

While in *Botha v Botha*¹⁵⁴ which was a marriage regulated by an antenuptial contract subject to the accrual system, the Supreme Court of Appeal held that, in determining the question of whether a party will be unduly benefitted¹⁵⁵ under section 9(1) of the Divorce Act 70 of 1979, it is not permitted to consider other factors save the three factors stated in the section.¹⁵⁶

It has been observed that an order for forfeiture is effective and readily lies against the financial weaker spouse.¹⁵⁷ While it is conceded that the provision of section 9(1) of the Divorce Act 70 of 1979 is to reduce the harsh effect which is occasioned by a strict application of the matrimonial property regime which could allow a spouse to enrich himself or herself from the increase in assets of the other spouse, it is argued that the practical application of the section is aimed at protecting the wealthier spouse.¹⁵⁸

In the light of the foregoing, it is submitted that, if the redistributive powers of the court are extended to all matrimonial property systems for the purpose of doing what is just and equitable in the circumstance of each case, the requirement of forfeiture of patrimonial benefit will no longer be necessary.¹⁵⁹

5.5.3 Redistribution of Property Orders by the Court

The redistributive power of the court is limited by the type and time of marriage concluded by the spouses.¹⁶⁰ Upon the grant of a decree of divorce, section 7(3) of

¹⁵³ *Wijker v Wijker* 1993 (4) SA 720 (A) at 731 E – G.

¹⁵⁴ 2006 (4) SA 144 (SCA).

¹⁵⁵ It is noted that the phrase “unduly benefitted” is not defined in the Divorce Act 70 of 1979. According to Marumoagae, 2014 *De Jure* 85 at 98, the phrase “unduly benefitted” as used in s 9(1) of the Divorce Act 70 of 1979 implies “... a benefit (being property subject to the joint estate) accruing to a person whose conduct does not justify such a person receiving such a benefit. In other words, the person to whom the benefit is due has, through his or her conduct, shown him- or herself not to be entitled, worthy, warranted or deserving to receive such a benefit.”

¹⁵⁶ *Botha v Botha* 2006 (4) SA 144 (SCA) at 149.

¹⁵⁷ See Heaton, 2005 *SAJHR* 547 at 557; Heaton and Kruger, *South African Family Law*, 136.

¹⁵⁸ See Bonthuys, 2014 *SALJ* 439; Lowndes, *The Need for a Flexible and Discretionary System of Marital Property Distribution in South African Law of Divorce*, 27.

¹⁵⁹ See 5.5.3.1 below. See also Heaton, 2005 *SAJHR* 547 at 557 – 558.

¹⁶⁰ Unlike the situation in England, South African courts do not have the wide discretion to redistribute the assets of spouses upon divorce as they deem fair and just in all cases. The courts’ redistributive powers are restricted to certain marriages. See Carnelley and Bhamjee 2012 *Obiter* 482 at 488.

the Divorce Act 70 of 1979¹⁶¹ limits the court's redistributive power to a marriage out of community of property:

- “(a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or¹⁶²
- (b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22 (6) of the Black Administration Act, 1927 (Act No. 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988 ...”¹⁶³

On an application brought by a disadvantaged spouse to a marriage affected by the provision of section 7(3) of the Divorce Act 70 of 1979, the court may, “... in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the other ...” spouse's assets be transferred to the disadvantaged spouse.¹⁶⁴ A claim brought pursuant to s 7(3) of the Divorce Act 70 of 1979 is based on the contributions whether directly or indirectly made by one spouse to the growth or maintenance of the other spouse's estate during the subsistence of their marriage.¹⁶⁵ A spouse, therefore, who makes a claim for a redistribution order, must show on the balance of probability, that his or her direct or indirect contributions gave rise to the growth or maintenance in the other spouse's estate.¹⁶⁶

The court shall not make a redistribution order under section 7(3) of the Divorce Act 70 of 1979 unless it is satisfied that it will be just and equitable to make such an order.¹⁶⁷ The “just and equitable” requirement will be readily satisfied if the spouse in whose favour a redistribution order is to be made has directly or indirectly

¹⁶¹ This subsection was added by s 36(b) of the Matrimonial Property Act 88 of 1984 and was later substituted by s 2(a) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

¹⁶² S 7(3)(a) of the Divorce Act 70 of 1979.

¹⁶³ S 7(3)(b) of the Divorce Act 70 of 1979. It is noted that s 2(a) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 amended s 7(3) of the Divorce Act 70 of 1979.

¹⁶⁴ See s 7(3) of the Divorce Act 70 of 1979.

¹⁶⁵ See s 7(4) of the Divorce Act 70 of 1979.

¹⁶⁶ See *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) at 88.

¹⁶⁷ See s 7(4) of the Divorce Act 70 of 1979. It is noted that, where a spouse does not make the kind of contribution envisaged by s 7(4) of the Divorce Act 70 of 1979, an order for redistribution will be refused. See *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) at 89. See also *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C) at 703.

contributed to the maintenance or increase of the estate of the other spouse.¹⁶⁸ The indirect contribution of a spouse as contemplated by section 7(4) of the Divorce Act 70 of 1979 will comprise the role of a spouse as a diligent and prudent homemaker and his or her duty towards the welfare of the family and the children of the marriage.¹⁶⁹ Thus, in *Beaumont v Beaumont*,¹⁷⁰ Botha J stated:

“Our legislation does refer specifically to contributions made 'directly or indirectly... by the rendering of services, or the saving of expenses... or in any other manner'. In my view there can be no doubt that the plain meaning of these words is so wide that they embrace the performance by the wife of her ordinary duties of 'looking after the home' and 'caring for the family'; by doing that, she is assuredly rendering services and saving expenses which must necessarily contribute indirectly to the maintenance or increase of the husband's estate.”¹⁷¹

When “... the court is satisfied that it is just and equitable ...” to exercise its discretion to redistribute the assets of the spouses or either of them, it is required to consider the particular assets of a spouse(s) which should be redistributed.¹⁷² The direct and indirect contributions of a spouse to the maintenance or the increase of the other spouse's estate together with other factors are to be considered by the court in arriving at a decision of the proper assets to be transferred.¹⁷³ These factors will include:

- “(a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3) (b) of this section may have in terms of section 22 (7) of the Black Administration Act, 1927 (Act No. 38 of 1927);**
- (b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;**
- (c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and**
- (d) any other factor which should in the opinion of the court be**

¹⁶⁸ S 7(4) of the Divorce Act 70 of 1979 provides: “An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.” See also *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C) at 702.

¹⁶⁹ *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C) at 711 – 712.

¹⁷⁰ 1987 (1) SA 967 (A) at 997.

¹⁷¹ Italics, my emphasis.

¹⁷² See s 7(5) of the Divorce Act 70 of 1979.

¹⁷³ See s 7(5) of the Divorce Act 70 of 1979.

taken into account.”¹⁷⁴

The reason advanced for the enactment of sections 7(3) and 7(4) of the Divorce Act 70 of 1979 was to protect disadvantaged spouses who were married in complete separation of property system before the commencement of the Matrimonial Property Act 88 of 1984 or the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 instead of the default community of property system.¹⁷⁵ It was argued that the absence of the accrual system before the enactment of the Matrimonial Property Act 88 of 1984 left spouses who concluded their marriages out of community of property with no other option than to have their marriages regulated by the complete separation of property system which resulted in inequalities upon divorce because the financial weaker spouse was left with a little or nothing to move on with after divorce.¹⁷⁶

In redistributing the assets of the spouses pursuant to section 7(3) of the Divorce Act 70 of 1979, the court has noted that discrimination should be eschewed in assessing the respective roles played by a husband and a wife during the subsistence of their marriage.¹⁷⁷ The court in *Bezuidenhout v Bezuidenhout*¹⁷⁸ gave equal weight to the contributions of the spouses with particular reference to the circumstances of the case.¹⁷⁹ In reaching this decision, it placed reliance on the English case of *White v*

¹⁷⁴ The court in *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 992 held that, in making a redistribution order under s 7(3) of the Divorce Act 70 of 1979, it can take a maintenance order pursuant to s 7(2) of the Divorce Act 70 of 1979 into account. S 7(2) provides: “In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the breakdown of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.” See also s 7(5) of the Divorce Act 70 of 1979.

¹⁷⁵ See Lowndes, *The Need for a Flexible and Discretionary System of Marital property Distribution in South African Law of Divorce*, 22.

¹⁷⁶ See Barratt, 2013 SALJ, 688 at 690.

¹⁷⁷ See *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C) at 704.

¹⁷⁸ 2003 (6) SA 691 (C) at 704.

¹⁷⁹ In that case, the wife as plaintiff sought a redistribution order which will entitle her to a 50% of the assets of the spouses while the husband as defendant opposed the claim and petitioned to award the plaintiff assets which represented her shares in the family business only on the basis that his contributions towards the success of the business had exceeded the plaintiff's contributions which the defendant described as being marginal. It was established in evidence that, besides the homemaker role performed by the wife, she had also contributed to the growth of the family business. Hence, the court discountenanced the husband's argument against equal sharing. See *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C) at 696 – 700, 703 – 707 and 711 – 712.

*White*¹⁸⁰ to hold as follows:¹⁸¹

“In the case presently before me, the defendant's counsel, as I have stated above, sought to minimise the contribution made by the plaintiff in the business domain. It was argued that defendant was the 'brains' of the business and that plaintiff's contribution was marginal. In my view, however, the 'traditional' role played by a South African housewife in the plaintiff's position cannot be held against her. It is abundantly clear that both parties did their utmost in their differing roles and one cannot argue logically that the defendant's contribution, because it is primarily a business contribution, is worth more than the contribution of the plaintiff. The roles played by the plaintiff in the circumstances of this case, must, in my view, be given equal weight and I must be mindful of the historically disadvantaged position occupied by women in the labour market and the fact that there has traditionally been a gendered division of labour in the household. A contrary approach would, in my view, amount to gender discrimination.”

On the value to be given to the contributions of a homemaker and the breadwinner of the family, the court reasoned “... that it is unacceptable to place greater value on the contribution of the breadwinner than that of the homemaker as a justification for dividing the product of the breadwinner's efforts unequally between them.”¹⁸²

On appeal, however, the trial court's decision for an equal division of the combined assets of the spouses was rejected.¹⁸³ The Supreme Court of Appeal noted that the approach adopted by English law which creates a starting point of equal division (the equality principle) of the spouses' combined assets except when there is a good reason to decide otherwise is not part of South African Law.¹⁸⁴ Unlike English law, South African matrimonial property law does not work by rule of thumb.¹⁸⁵ It does not permit a starting point in the exercise of the court's power under section 7(3) of the Divorce Act 70 of 1979.¹⁸⁶ It is also noted that, unlike section 7(3) of the Divorce Act 70 of 1979, section 25 of the Matrimonial Causes Act Cap 18 of 1973 vests the

¹⁸⁰ [2001] 1 AC 596 (HL) at 605, where the House of Lords stated: “... whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering . . . the parties' contributions. . . . If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the homemaker and the child-carer.”

¹⁸¹ *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C) at 707.

¹⁸² See *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C) at 712. See, however, *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at para 29.

¹⁸³ See *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at para 26.

¹⁸⁴ *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at paras 20, 22.

¹⁸⁵ *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at para 23.

¹⁸⁶ *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at para 23.

English court with a broader discretion.¹⁸⁷

Upholding the appeal, the court took into consideration the substantial contribution of both spouses to the success of their business, the additional contribution of the wife as a mother and a homemaker, and the exceptional efforts of the husband to the growth of the business¹⁸⁸ to redistribute the joint assets of the spouses in the ratio of 60:40 in the husband's favour.¹⁸⁹

In exercising its power under section 7(3) of the Divorce Act 70 of 1979, the court can also make a clean break order. A clean break order enables divorcing spouses to achieve financial independence immediately after divorce, and it absolves a spouse from continuous financial obligation to the other spouse after divorce.¹⁹⁰ The order is made only where circumstances permit.¹⁹¹ Where a clean break order will lead to unjust results as between the spouses, therefore, the court will desist from making it.¹⁹² The opinion is expressed that, where there is sufficient capital to meet for the financial needs of a spouse, the court will readily make an order for a clean break under section 7(3) of the Divorce Act 70 of 1979.¹⁹³

In England, the courts usually make a clean break order where the circumstances of the case permits it so as to make a spouse self-sufficient after divorce¹⁹⁴ in compliance with section 25A of the Matrimonial Causes Act Cap 18 of 1973.¹⁹⁵

¹⁸⁷ *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at para 20.

¹⁸⁸ *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at para 33.

¹⁸⁹ *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at para 36.

¹⁹⁰ See 3.5.3.2; 4.3.3.1 at 192 – 193 above.

¹⁹¹ *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 993.

¹⁹² See *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 993. See also Heaton and Kruger, *South African Family Law*, 147.

¹⁹³ See *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 993 where the appeal court upheld the decision of the court of first instance which refused to make a clean break order, after considering the possibility, on the basis that it would result to undue hardship either on the appellant as a result of the huge capital sum which would be required or on the respondent owing to the fact that the amount of capital which is ordered to be paid might not meet her reasonable needs and those of her children. Heaton and Kruger, *South African Family Law*, 147 argue that, in most cases, a clean break order may not be feasible because large capital is required to meet the financial needs of a spouse. According to Heaton and Kruger, a heavy burden is placed on the spouse who is required to provide the capital necessary to achieve the clean break, and sometimes the amount awarded by the court to achieve a clean break may be insufficient to meet the needs of the recipient.

¹⁹⁴ See *White v White* [2001] 1 AC 596 (HL) at 602, *Miller v Miller*; *McFarlane v McFarlane* [2006] 2 AC 618 (HL). See 3.5.3.2 above.

¹⁹⁵ S 25A(1) provides: "Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under [section 23(1)(a), (b) or (c), 24, 24A, 24B or 24E] above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable."

Similarly, in Australia, the clean break principle is statutorily provided.¹⁹⁶ The Australian courts are enjoined, if practicable, to make orders that will terminate the financial obligations between the spouses and avoid further proceedings between them.¹⁹⁷

It is, however, noted that in South Africa, there is no legislative provision which directs the court to make a clean break order.¹⁹⁸ On account of its utility, however, South African courts apply the clean break principle where possible as regards section 7(3) of the Divorce Act 70 of 1979 to put an end to the financial ties between divorcing spouses.¹⁹⁹

In cases where a court can exercise its redistribute powers upon divorce, it can, for the purpose of putting an end to the financial obligations of the spouses after divorce, apply the clean break principle. In such cases, the court will make a redistribution order only under section 7(3) of the Divorce Act 70 of 1979 without making a maintenance order.²⁰⁰

5.5.3.1 Should Judicial Discretion be applied to All Matrimonial Property Systems?

Although the discussion in this chapter is limited to the proprietary consequences of civil marriages, the provisions of section 8(4) of the Recognition of Customary Marriages Act 120 of 1998 are worthy of consideration as they shed light on the validity or otherwise of section 7(3) and (4) of the Divorce Act 70 of 1979 and the need for the redistributive powers of the court in civil marriages notwithstanding the regulatory matrimonial property system in question.²⁰¹

It is pertinent to note that the redistributive powers of the court upon divorce also extend to customary marriages by virtue of sections 8(4)(a) and (b) of the Recognition of Customary Marriages Act 120 of 1998 which require the court

¹⁹⁶ See s 81 of the Family Law Act No 53 of 1975 (Cth).

¹⁹⁷ See s 81 of the Family Law Act No 53 of 1975 (Cth). See also 4.3.3.1 at 192 – 193 above.

¹⁹⁸ See *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 993. See also Heaton and Kruger, *South African Family Law*, 147.

¹⁹⁹ See *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 993.

²⁰⁰ See *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 993 where the court stated that the manner of achieving a clean break is by making only a redistribution order pursuant to s 7(3) of the Divorce Act 70 of 1979 without making a maintenance order with regard to s 7(2) of the Divorce Act 70 of 1979.

²⁰¹ See 6.3.1 below.

charged with jurisdiction over the dissolution of customary marriages to *inter alia* apply section 7 of the Divorce Act 70 of 1979.

The limitation placed by section 7(3) of the Divorce Act 70 of 1979 on the power of the court to redistribute property upon the dissolution of a customary marriage by divorce was brought to the fore in the case of *Gumede v President of the Republic of South Africa and Others*.²⁰² It was held that there had been no sound reason for the limitation placed on the power of the court to redistribute property only in customary marriages concluded out of community of property.²⁰³

Arising from the judgement of the Constitutional Court in the above case,²⁰⁴ it is submitted that a court charged with jurisdiction over a divorce in the case of a customary marriage has the power to redistribute the property of both spouses in a just and equitable manner notwithstanding the applicable matrimonial property system.

The foregoing brings us to the question of whether the court's power to redistribute the assets of the spouses in an equitable fashion upon the dissolution of civil marriages notwithstanding their matrimonial property system should be advanced.

It is noted that, by a redistribution order, the court transfers the assets of a spouse or a part of it to the other spouse "... in the absence of any agreement between them regarding the division of their assets ..." ²⁰⁵ upon divorce.²⁰⁶ The power of the court to redistribute property under section 7 of the Divorce Act 70 of 1979 is founded on equitable considerations.²⁰⁷ The court's power is exercised "... to achieve a just patrimonial settlement between the divorcing spouses."²⁰⁸

Unlike the Australian²⁰⁹ and English²¹⁰ positions where the court can alter the property interests of spouses and redistribute assets, a redistribution order in South Africa, which alters the interest of spouses in property, is available only in limited

²⁰² 2009 (3) SA 152 (CC).

²⁰³ See *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) at 172 B – D.

²⁰⁴ *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC).

²⁰⁵ See 7(3) of the Divorce Act 70 of 1979.

²⁰⁶ See Heaton and Kruger, *South African Family Law*, 138.

²⁰⁷ Du Toit, 2015 *Journal of Civil Law Studies*, 655 at 664.

²⁰⁸ Du Toit, 2015 *Journal of Civil Law Studies*, 655 at 664.

²⁰⁹ See s 79 of the Family Law Act 53 of 1975 (Cth). See also 4.3.3 above.

²¹⁰ See ss 23 – 25 of the Matrimonial Causes Act Cap 18 of 1973. See also 3.5 above.

cases.²¹¹ As noted earlier,²¹² spouses who are eligible for a redistribution order under section 7(3) of the Divorce Act 70 of 1979 are those who were "... married subject to complete separation of property prior to the commencement of the Matrimonial Property Act 88 of 1984 or the Marriage and Matrimonial Property Law Amendment Act 3 of 1988."²¹³

Academic writers²¹⁴ have argued that the limitation placed by the Divorce Act 70 of 1979 on the redistributive powers of the court upon divorce should be amended and, in turn, courts should have unlimited discretion. This discretion, they argue, should be readily available to order the transfer of an asset from one spouse to the other notwithstanding the matrimonial property system that governed the marriage of spouses and the length of time they were married.²¹⁵

Sinclair and Heaton²¹⁶ argue that the limitation of judicial discretion to certain marriages as stated by section 7(3) of the Divorce Act 70 of 1979 cannot withstand a constitutional challenge and is an antithesis to gender equality.²¹⁷ They argue that the application of judicial discretion should be justified in situations where spouses, in their antenuptial contracts, exclude the accrual system from applying to their marriage, thereby preserving the will of the "... richer and stronger spouse..." (most often the husband) to prevail "... rather than the informed choice of both parties."²¹⁸

Heaton²¹⁹ argues in favour of the redistributive powers of the court in respect of all types of civil marriages in South Africa. The author also argues that to place a restriction on the exercise of judicial discretion in certain marriages is in contradistinction to the principles of gender equality.²²⁰ She notes that a good number of women who marry out of community of property are usually left empty-handed upon divorce because their antenuptial contracts often exclude the accrual

²¹¹ See 5.5.3 above.

²¹² See 5.5.3 above.

²¹³ Heaton and Kruger, *South African Family Law*, 138.

²¹⁴ See Sinclair, *An Introduction to the Matrimonial Property Act 1984*, 48 – 50; Clark and Van Heerden 1989 *SALJ* 243; Sinclair and Heaton, *The Law of Marriage*, 143 – 158; Bonthuys, 2004 *SALJ* 879 at 895 – 896; Dillon, 1986 *CILSA* 271; Heaton, 2005 *SAJHR*, 547; Heaton and Kruger, *South African Family Law*, 141 – 143; Barratt, 2013 *SALJ*, 688 at 690 - 691.

²¹⁵ See Sinclair, 1983 *Acta Juridica*, 75 at 78 – 79.

²¹⁶ *The Law of Marriage*, 143 – 158.

²¹⁷ See also Heaton and Kruger, *South African Family Law*, 141 – 143.

²¹⁸ Sinclair and Heaton, *The Law of Marriage*, 143.

²¹⁹ 2005 *SAJHR*, 547 at 554 – 557.

²²⁰ Heaton, 2005 *SAJHR*, 547 at 554 – 557.

system from applying to their marriages.²²¹

It is recalled that one of the reasons advanced for the refusal to allow the redistributive powers of the court to extend to all marriages where spouses had concluded antenuptial contracts which excluded community of property and community of profit and loss was based on the fact that a permission of such discretion will negate the informed choice of spouses to have their property relationship regulated by the complete separation of property system.²²² There is also the argument that an exercise of judicial discretion in this regard would create an avenue of legal uncertainty where the proprietary rights of spouses upon divorce would remain unknown to them until interpreted by a court in the manner it deems fit and just.

In response to the arguments that the rationale behind the restriction of judicial discretion to certain types of marriage is to uphold and respect the contractual choice of spouses who opt for a complete separation of property system and to prevent uncertainty in the financial positions of the spouses upon divorce as a result of a wide judicial discretion to redistribute property,²²³ Heaton and Kruger²²⁴ state that such arguments should be discountenanced "... because a degree of uncertainty is preferable to 'the rigid, irremediable harshness acknowledged to derive from complete separation of property'." For this reason, Heaton and Kruger²²⁵ support a statutory recognition of judicial discretion in the division of assets between spouses upon divorce regardless of the matrimonial property system.

Visser and Potgieler²²⁶ base their argument on section 9 (Bill of Rights) of the Constitution of the Republic of South Africa, which makes provision for equality of all persons "... before the law and ... the right to equal protection and benefit of the law."²²⁷ To these authors, to limit the exercise of judicial discretion to redistribute the assets of spouses upon divorce to certain marriages will amount to an unfair

²²¹ Heaton and Kruger, *South African Family Law*, 142.

²²² See South African Law Commission, *Report on the Review of the Law of Divorce: Amendment of Section 7(3) of the Divorce Act, 1979*, para 3.1 at 12; 3.4 at 17.

²²³ See South African Law Commission, *Report on the Review of the Law of Divorce: Amendment of Section 7(3) of the Divorce Act, 1979*, para 1.3.10 at 24.

²²⁴ *South African Family Law*, 142.

²²⁵ *South African Family Law*, 141 – 143.

²²⁶ *Introduction to Family Law*, 185. See also Robinson, *et al.*, *Introduction to South African Family Law*, 276.

²²⁷ See s 9(1) of the Constitution of the Republic of South Africa, 1996.

discrimination²²⁸ against other spouses who concluded their marriages in a similar matrimonial property system which do not fall within the ambit of section 7(3) of the Divorce Act 70 of 1979. It is, thus, argued that the vesting of the court with a limited discretionary power amounts to a vehicle of injustice.²²⁹

According to Barratt,²³⁰ although courts have no discretion to intervene in situations where parties have, on their own, concluded a no-sharing antenuptial contract whether or not it results in inequality or unfairness, courts should do substantial justice by intervening where a rigid and compulsory enforcement of a no-sharing antenuptial contract will propagate inequality and infringe on "... the substantive equality rights of women."²³¹

While it is necessary for courts to adopt discretionary redistributive mechanisms in order to do justice in deserving cases notwithstanding the matrimonial property system that applies, it is suggested that the court's discretion must not be exercised except where it is necessary to do so.

The point being made is that, if spouses had by their choices elected any distributive

²²⁸ See s 9(3) – (5) of the Constitution of the Republic of South Africa, 1996. S 9(3) of the South African Constitution 1996 prohibits direct or indirect unfair discrimination on the grounds of "... race, gender, sex, pregnancy, marital status, ethnic or social origin, colour ..." amongst others by the state. S 9(4) prohibits any person from unfair discrimination against another on the grounds set out in s 9(3) of the Constitution. Also s 9(4) charged the South African Parliament to enact laws to prevent or prohibit unfair discrimination. It is not arguable that the standpoint of Sinclair, Heaton and Kruger, Visser and Potgieler, amongst other authors, is that s 7(3) of the Divorce Act 70 of 1979 is inconsistent with the provision of s 9(4) of the Constitution of the Republic of South Africa 1996 to the extent that the section has been a vehicle of unfair discrimination against spouses who did not marry "... subject to complete separation of property prior to the commencement of the Matrimonial Property Act 88 of 1984 or the Marriage and Matrimonial Property Law Amendment Act 3 of 1988." (See Heaton and Kruger, *South African Family Law*, 138). By s 9(5) of the Constitution of the Republic of South Africa, 1996, there is a presumption of unfair discrimination once it is established that such discrimination is based on any of the grounds spelt out in s 9(3) of the Constitution. The onus then lies on whoever alleges that the discrimination is fair to prove it. Whether the discrimination birthed by s 7(3) of the Divorce Act 70 of 1979 is fair or unfair lies within the competence of the court to proclaim or interpret. Hence, the researcher argues that, within the purview of the South African Constitution, certain discrimination, can be said to be fair. The justification for the provision of s 9(5) can be found in s 36 of the Constitution of the Republic of South African, 1996 which makes provision for the limitation of certain rights within the ambit of the Constitution by taking into consideration "... all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the limitation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose." Compare the South African position on the issue of fair and unfair discrimination with s 42 of the Constitution of the Federal Republic of Nigeria, 1999 which makes provision for the freedom of her citizens from all forms of discrimination without justifying the nature of the discrimination whether it is fair or unfair.

²²⁹ Clark and Van Heerden, 1989 *SALJ*, 243.

²³⁰ 2013 *SALJ*, 688 at 688 – 704.

²³¹ Barratt, 2013 *SALJ*, 688 at 704.

formulae or concluded an antenuptial or postnuptial contract in respect of their property division amongst others, the court should give effect to it. Choices made by spouses before their marriage must be respected to the extent that third parties are not prejudiced. In doing this, cognisance is given to the autonomy of the spouses in respect of the property consequences of their marriage.

A fundamental exception to this rule which could warrant the court's equitable discretion is cases where it will lead to an inequitable and unjust result (manifest injustice) to uphold the matrimonial property system elected by the spouses. For instance, the court's redistributive power should be invoked where, upon the division of the spouses' assets, a spouse would be left in the predicament of real need or he or she would be left destitute and would be unable to cater for himself or herself thereby becoming a burden on the society.

In the South African situation, where there is no provision in law which recognises the right of a spouse (mostly the wife) who is married in complete separation of property after the Matrimonial Property Act 88 of 1984 to share in the increase of the other spouse's estate and income which were brought about as a result of the moral, physical, household and spiritual support, which the latter spouse received from the former, the court should be granted the power of equitable redistribution to compensate the disadvantaged spouse for her hard work, diligence, prudence and contribution to the marriage and to prevent the spouse from any harsh consequences which a complete separation of property system may cause.

In terms of marriages regulated by the community of property system where the spouses are entitled to half shares in their indivisible assets upon divorce, the redistributive powers of the court should be invoked. It is suggested that the court's discretion can be exercised to deviate from the equal sharing principle in peculiar circumstances. For instance, where, upon the evidence adduced at trial, the court reaches a conclusion that to allow a spouse to have an equal share in the joint estate would amount to the undue benefit of that spouse; it may readily deviate from the implication of the community of property system.²³² A similar argument is also

²³² It is noted that what the South African court does at present in such situations is to grant an order for the forfeiture of patrimonial benefit in terms of s 9(1) of the Divorce Act 70 of 1979. By this provision, an avenue is created where a spouse could forfeit the patrimonial benefits of the marriage upon divorce based on certain considerations as spelt out in the Divorce Act 70 of 1979. See also s 9

canvassed in respect of the accrual system as practised in South Africa.

Although the opinion has been expressed that a community sharing or an accrual sharing could aggravate the tendency of divorce between spouses where one of the spouses decides to take a dishonest and selfish advantage of the property system to push for his or her share in the spouses' estate (which in most cases the spouse never toiled for) especially in marriages of short duration,²³³ a recognition of the power of equitable redistribution will help to discourage divorce based on financial gains.

5.6 PARTNERSHIP AGREEMENTS BETWEEN SPOUSES MARRIED OUT OF COMMUNITY OF PROPERTY

While the matrimonial property law in South Africa approves a no-sharing antenuptial contract between spouses which is enforceable upon divorce,²³⁴ there are cases²³⁵ in which spouses (wives) have approached courts for a redistribution of assets upon divorce notwithstanding the effects of their no-sharing antenuptial contracts.²³⁶ In *JW v CW*²³⁷ and *EA v EC*,²³⁸ the arguments of the respective spouses to redistribute their assets and prevent the harsh consequences of a no-sharing antenuptial contract were based on the existence of a universal partnership²³⁹ between the divorcing spouses during the subsistence of their marriage.²⁴⁰

In upholding the no-sharing antenuptial contract between the spouses, the courts in

of the Matrimonial Property Act 88 of 1984 for a similar power of the court in respect of the accrual system.

²³³ See *Swanepoel v Swanepoel* [1996] 3 All SA 440 (SE).

²³⁴ See s 2 of the Matrimonial Property Act No 88 of 1984. See also Barratt, 2013 SALJ, 688.

²³⁵ See *EA v EC* [2012] ZAGPJHC 219; *JW v CW* 2012 (2) SA 529 (NCK).

²³⁶ See Barratt, 2013 SALJ, 688.

²³⁷ 2012 (2) SA 529 (NCK).

²³⁸ [2012] ZAGPJHC 219.

²³⁹ This kind of partnership can be either a *societas universorum quae ex quaestu veniunt* or a *societas universorum bonorum*. Under Roman-Dutch law, as well as South African law, the latter relates to an agreement where the parties agree to deal in common with all their present and future property whether from commercial undertaking or otherwise, while the former concerns an agreement between the parties to contract a partnership in relation to all the property acquired from every kind of commercial transaction during the subsistence of the marriage. An express or tacit agreement can give rise to a universal partnership of all property. See *Isaacs v Isaacs* 1949 (1) SA 952 (C) at 955; *JW v CW* 2012 (2) SA 529 (NCK) at para 9; *EA v EC* [2012] ZAGPJHC 219 at para 5; *Butters v Mncora* 2012 (4) SA 1 (SCA) at paras 14, 17 – 18. There is a second kind of partnership known as particular or specific partnership which is limited to a specific property or undertaking. This can either be an ordinary or extraordinary partnership. See *V v V* [2013] ZAGPPHC 530 at para 37.

²⁴⁰ See Barratt, 2013 SALJ, 688; Lowndes, *The Need for a Flexible and Discretionary System of Marital property Distribution in South African Law of Divorce* University of South Africa, 29.

*JW v CW*²⁴¹ and *EA v EC*²⁴² rejected the arguments based on universal partnership for a redistribution of assets because to uphold it in view of the existence of a no-sharing antenuptial contract would amount to making an order which will be contrary to the terms of the antenuptial contract.²⁴³

In *JW v CW*,²⁴⁴ the spouses were married in complete separation of property with the aid of an antenuptial contract. The husband as plaintiff filed a petition for divorce and claimed ancillary relief with regards to the children of the marriage while the wife as defendant counterclaimed against the husband alleging that a universal partnership existed between them on which the court should distribute the assets of the spouses in accordance with the universal partnership. It was alleged by the wife that the spouses had pooled their resources and ran a farming business from which household expenses and obligations were met and that an implied agreement existed between her and the husband to form a universal partnership where it was agreed by both parties that their movable and immovable assets should form part of the partnership assets.

On the argument of the wife's counsel that the partnership which existed between the parties "... was a *societas universorum quae ex quaestu veniunt* and not a *universorum bonorum ...*",²⁴⁵ Olivier J held that the defendant's counterclaim is "... irreconcilable with the notion of a *universorum quae ex quaestu veniunt*."²⁴⁶ The judge reached this conclusion on the basis that the defendant's petition stated that the partnership formed by the spouses included all existing and future assets of the spouses.²⁴⁷ According to the judge, a partnership which included all existing and future assets of the spouses (*societas universorum bonorum*) would amount to a marriage in community of property (which is capable of defeating the matrimonial property system elected by the spouses at the commencement of their marriage) and any evidence adduced to prove the partnership would not be consistent with the stipulations in the spouses' antenuptial contract.²⁴⁸ Since the alleged partnership

²⁴¹ 2012 (2) SA 529 (NCK).

²⁴² [2012] ZAGPJHC 219.

²⁴³ See Barratt, 2013 SALJ, 688 at 689.

²⁴⁴ 2012 (2) SA 529 (NCK).

²⁴⁵ *JW v CW* 2012 (2) SA 529 (NCK) at para 17.

²⁴⁶ *JW v CW* 2012 (2) SA 529 (NCK) at para 19.

²⁴⁷ *JW v CW* 2012 (2) SA 529 (NCK) at para 20.

²⁴⁸ *JW v CW* 2012 (2) SA 529 (NCK) at paras 22 – 25.

agreement was neither concluded before the antenuptial contract nor collateral to it, any attempt to give effect to it would amount to an amendment or a revocation of the antenuptial contract which existed between the spouses.²⁴⁹

It is noted that, for an antenuptial contract to be revoked or amended in the manner as alleged by the defendant, a court order must first be sought and obtained on good cause shown.²⁵⁰ It cannot be done by the mutual consent of the spouses.²⁵¹

Similarly, in *EA v EC*²⁵² the couple was married in complete separation of property. The defendant (wife) counterclaimed against the plaintiff (husband) *inter alia* for a declaration that a partnership *universorum bonorum* existed between them and for a division of the partnership assets. The counterclaim was strongly opposed on the grounds of incompetence and inadmissibility of parol evidence needed to prove the existence of the alleged partnership, as same would amount to a revocation or invalid amendment of the antenuptial contract which existed between the spouses.²⁵³

Kathree-Setiloane J was of the view that a partnership *universorum bonorum* as alleged by the defendant connotes a community of property system which negates the antenuptial contract concluded by the spouses before their marriage where it was agreed that each spouse would deal with property acquired before and after their marriage as their separate property.²⁵⁴ In the absence of any proof on the part of the defendant that the antenuptial contract was unintended by the spouses "... to be the exclusive memorial of the whole of their agreement, but that it merely recorded a portion of their agreement, leaving the remainder as an oral agreement...",²⁵⁵ Kathree-Setiloane J held that the antenuptial contract, having complied with the requirement of the Deeds Registries Act 47 of 1937, is a conclusive proof of the terms of the agreement between the spouses (being "... the exclusive memorial of the transaction between them ..."). Extrinsic evidence was,

²⁴⁹ *JW v CW* 2012 (2) SA 529 (NCK) at para 28.

²⁵⁰ S 21 of the Matrimonial Property Act 88 of 1984; *JW v CW* 2012 (2) SA 529 (NCK) at paras 30, 31; *EA v EC* [2012] ZAGPJHC 219 at paras 10, 11.

²⁵¹ *JW v CW* 2012 (2) SA 529 (NCK) at para 29.

²⁵² [2012] ZAGPJHC 219.

²⁵³ *EA v EC* [2012] ZAGPJHC 219 at paras 3, 12 – 14.

²⁵⁴ *EA v EC* [2012] ZAGPJHC 219 at paras 7 – 9.

²⁵⁵ Kathree-Setiloane J in *EA v EC* [2012] ZAGPJHC 219 at para 17 relying on the dictum of Corbett JA in *Johnston v Leal* 1980 (3) SA 927 (A) at 944B-C.

thus, not permissible either to prove or contradict it.²⁵⁶

It is noted that statements which precede the conclusion of antenuptial contracts whether oral or documentary do not form part of such contracts.²⁵⁷ They are considered irrelevant and inadmissible in evidence.²⁵⁸ They do not, therefore, have any legal consequences.²⁵⁹

The position of the law in respect of the immutability principle is re-emphasised in the case of *SB v RB*.²⁶⁰ The spouses were married in complete separation of property. When the marriage initially headed for breakdown, the parties were able to salvage it by virtue of an agreement between the two of them and on promises made to each other that, notwithstanding their antenuptial contract, they would conduct the affairs of their marriage as if married in community of property. This compromise was reached based on wrong legal advice which they had obtained from an attorney who had informed them that the only possible way of changing their matrimonial property regime was to be divorced and marry again.²⁶¹ In a summons for divorce, the wife claimed, amongst other things, an equal division of the spouses' joint estate based on a contract which had been concluded during the marriage. Alternatively, she advanced a claim on the basis that a partnership existed between the spouses.

Cloete J, citing *Honey v Honey*,²⁶² held that the wife's claim for equal division of the joint estate as if married in community of property could not be sustained because she was affected by the immutability principle by virtue of their failure to apply to court for a change of their matrimonial property system in pursuance of the provision of section 21 of the Matrimonial Property Act 88 of 1984.²⁶³ It will be recalled that

²⁵⁶ *EA v EC* [2012] ZAGPJHC 219 at para 17.

²⁵⁷ *EA v EC* [2012] ZAGPJHC 219 at para 18.

²⁵⁸ *EA v EC* [2012] ZAGPJHC 219 at para 18.

²⁵⁹ See *De Klerk v Old Mutual Insurance Co Ltd* 1990 (3) SA 34 (E) at 39. This does not preclude the fact that a universal partnership could exist regardless of the fact that the parties are married, engaged or cohabiting. Once the necessary requirements are proved, the court would enforce the universal partnership. See *Muhlmann v Muhlmann* 1984 (3) SA 102 (A) at 123 – 124; *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at 213 – 214, para 22. The three essential elements needed to establish a universal partnership are: (a) Joint contribution of money or money's worth (includes labour and skill); (b) the business is conducted for the mutual benefit of the partners; and (3) profit making should be the object of the partnership business. See *Butters v Mncora* 2012 (4) SA 1 (SCA) at para 11; *V v V* [2013] ZAGPPHC 530 at para 40; *SB v RB* [2014] ZAWCHC 56 at para 43; *Cloete v Maritz* [2014] ZAWCHC 108 at paras 89 – 90.

²⁶⁰ [2014] ZAWCHC 56.

²⁶¹ *SB v RB* [2014] ZAWCHC 56 at para 10.

²⁶² 1992 (3) SA 609 (W).

²⁶³ *SB v RB* [2014] ZAWCHC 56 at para 33. See also 5.4 above.

only a court-ordered sanction can effectively change the matrimonial property system of spouses after the conclusion of the marriage.²⁶⁴

The claim for the existence of a partnership (based on a *societas universorum quae ex quaestu veniunt* or a purely commercial enterprise) between the parties was also dismissed because, according to the court, the wife had failed to prove the same. Cloete J noted that to prove "... a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended, and did in fact, contract on the terms alleged."²⁶⁵

It was also observed that, if the wife had claimed that the property transactions between the parties had formed part of a universal partnership, she would have been confronted with the decisions in *JW v CW*²⁶⁶ and *EA v EC*²⁶⁷ to the effect that the recognition of the existence of a universal partnership in a marriage regulated by the complete separation of property system would result in a revocation or an amendment of the property system elected by the parties in their antenuptial contract.²⁶⁸

It is, however, noted that the court in *RD v TD*²⁶⁹ upheld the defendant's claim for the recognition of a *societas universorum quae ex quaestu veniunt* between the spouses who were married in complete separation of property with the aid of an antenuptial contract. The defendant was able to establish that the universal partnership was based on a purely commercial enterprise which was related to a particular asset of the spouses (fish farming business).²⁷⁰ The court held:²⁷¹

"... where spouses who are married to each other out of community of property, with the exclusion of community of property, profit and loss, carry on a *bona fide* business and the *essentialia* to create a partnership agreement are present, a partnership exists."

It is submitted that arguments advanced for the recognition of a universal partnership

²⁶⁴ See s 21(1) of the Matrimonial Property Act 88 of 1984.

²⁶⁵ *SB v RB* [2014] ZAWCHC 56 at para 48.

²⁶⁶ 2012 (2) SA 529 (NCK).

²⁶⁷ [2012] ZAGPJHC 219.

²⁶⁸ *SB v RB* [2014] ZAWCHC 56 at para 44.

²⁶⁹ 2014 (4) SA 200 (GP).

²⁷⁰ *RD v TD* 2014 (4) SA 200 (GP) at para 29.

²⁷¹ *RD v TD* 2014 (4) SA 200 (GP) at para 31.

within a complete separation of property system must not be stretched too far. For instance, it has been argued that the refusal by the court to permit extrinsic evidence to be adduced (for the purpose of advancing a universal partnership [*societas universorum bonorum*] between the spouses) in order to contradict the terms of an antenuptial contract on divorce is discriminatory against women and encourages male dominance within marriage.²⁷² The words of Kathree-Setiloane J²⁷³ are instructive in this regard:

“The refusal, by reason of the parol evidence rule, to allow inadmissible evidence to be lead [sic] in circumstances where the defendant was well aware of exactly what she was doing when she concluded the antenuptial contract excluding the accrual system, will not, in my view, perpetuate discrimination against women. Nor would it offend against the rights and values of equality, dignity, and autonomy of women, as enshrined in our Constitution.”

It can, however, be argued that, in cases where the court finds that the parties (despite their antenuptial contract) had by a tacit or express agreement conducted their affairs in the manner which necessitated the existence of a partnership, substantive justice will be done if the court recognises and upholds the same to the extent that it binds only the parties.²⁷⁴ It is submitted that the antenuptial contract should be made enforceable only against third parties who were not privy to the partnership arrangement. To this extent, it is suggested that the immutability principle should be relaxed between spouses who knowingly conclude a *societas universorum bonorum* which varies the terms of their antenuptial contract. The decisions in *SB v RB*²⁷⁵ and *Honey v Honey*²⁷⁶ would have been prevented had the law permitted the recognition of the subsequent agreement made by the spouses.²⁷⁷

5.7 CONCLUSION

Arising from the discussion above, it is observed that, while the discretionary powers of the court to redistribute the assets of spouses upon divorce is recognised in

²⁷² See *EA v EC* [2012] ZAGPJHC 219 at para 23.

²⁷³ *EA v EC* [2012] ZAGPJHC 219 at para 26.

²⁷⁴ In *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at para 22, although the parties were not married, the court held that it is possible for a universal partnership to exist in marriage. According to the court, whether or not the parties are married, engaged or cohabiting, a universal partnership will be recognised if the necessary requirements are satisfied.

²⁷⁵ [2014] ZAWCHC 56 at para 33.

²⁷⁶ 1992 (3) SA 609 (W).

²⁷⁷ See Visser and Potgieler *Introduction to Family Law*, 92.

customary marriages notwithstanding the applicable matrimonial property system as was held in *Gumede v President of the Republic of South Africa and Others*,²⁷⁸ there is still a limitation of redistributive discretion in respect of civil marriages. This limitation has generated a heated debate in the South African jurisprudence. The distinction created by the Divorce Act 70 of 1979 for the applicability of the redistributive powers of the court has been repeatedly questioned on the grounds of equality and non-discrimination as guaranteed by the South African Constitution.²⁷⁹ While there is a need for judicial and legislative remedies in this regard, the utility of some aspects of the South African matrimonial property regime cannot be overemphasised.

The recognition of the universal community of property system as the default matrimonial property system is commendable. It is acknowledged that the community of property system is aimed at attaining equality between spouses in a monogamous (civil) marriage. It is, however, the opinion of the researcher that the universal community of property system will not be feasible in a country like Nigeria, with an entirely different legal culture and social orientation. Besides the fact that it is completely alien to Nigeria, a system which places legal restrictions on spouses' capacity to perform certain legal acts only when the required consent has been obtained,²⁸⁰ will hamper commercial transactions and impede the ease of doing business in Nigeria. It is submitted that the universal community of property will not, in practical terms, provide a reform to Nigerian law. This system will run contrary to the legitimate expectations of the Nigerian society.

Admitting the harsh consequences of a complete separation of property system, "equality" within the out of community of property system was advanced through the instrumentality of the accrual system.²⁸¹ The accrual system ensures the equitable distribution of assets upon divorce and death.²⁸² It is submitted that a financially weaker spouse is better-off because he or she, without a forfeiture order, has a half share in the accrual produced by the marriage.²⁸³ The accrual system would

²⁷⁸ 2009 (3) SA 152 (CC).

²⁷⁹ See s 9(1) and (3) of the Constitution of the Republic of South Africa, 1996. See also Sinclair and Heaton, *The Law of Marriage*, 147; Barratt, 2013 *SALJ*, 688 at 691.

²⁸⁰ See s 15 of the Matrimonial Property Act 88 of 1984. See also 5.2.1 above.

²⁸¹ Du Toit, 2015 *Journal of Civil Law Studies*, 655 at 660.

²⁸² Du Toit, 2015 *Journal of Civil Law Studies*, 655 at 662.

²⁸³ See Visser and Potgieler, *Introduction to Family Law*, 88.

constitute a feasible avenue for reform in Nigeria. A modified version of this system will, however, be proposed in this study and considered to be suitable in Nigeria.²⁸⁴

The continuous usage and recognition of antenuptial and postnuptial contracts seem to give credence to the autonomy of spouses to engage in a private arranging technique whereby they jointly decide (without the court's intervention) how they would want their assets to be divided should the marriage end in divorce.

While there seems to be nothing wrong with properly regulated antenuptial and postnuptial contracts based on the informed choices of the spouses, it is suggested that such contracts should be subjected to the court's intervention and discretion where the terms of the contract could lead to unjust and inequitable results; especially results which were not foreseeable when the contract was concluded.²⁸⁵ For instance, where a spouse will be left in a predicament of real need²⁸⁶ by virtue of the enforcement of an antenuptial or postnuptial contract, the court's discretion should be invoked to remedy the situation on just grounds.²⁸⁷ Simply put, the underlying consideration for an antenuptial or postnuptial contract at all times should be based strictly not only on the autonomy of the spouses to have chosen what they wanted but also on the fairness of the terms of the contract in relation to disadvantaged spouses in exceptional circumstances.²⁸⁸

The recognition of divorce settlement agreements, the possibility for a postnuptial change of the matrimonial property system of the spouse *via* an application to court and the court's power to order an immediate division of the spouses' assets in cases where a spouse's interest may "... be seriously prejudiced by the conduct or proposed conduct of the other spouse ..." in respect of the joint estate as well as the accrual system also distinguish the matrimonial property regime in South Africa. The only icing needed on the cake is a statutory recognition of the judicial powers of the court to make redistribution orders in terms of the assets of spouses in civil marriages when it is just and equitable to do so notwithstanding the matrimonial

²⁸⁴ See 7.2.1.2 below.

²⁸⁵ See Heaton, 2005 *SAJHR* 547 at 556; Barratt, 2013 *SALJ*, 688 at 704.

²⁸⁶ See *Radmacher v Granatino* [2011] AC 534 SC(E) at 535, ratio 3.

²⁸⁷ See 3.6.3.2 above.

²⁸⁸ See Heaton, 2005 *SAJHR* 547 at 556; Barratt, 2013 *SALJ*, 688 at 694 – 695, 704 where the author discussed autonomy, judicial discretion and sanctity of contract with reference to the English case of *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)). See also 7.2.1.3 below.

property system which regulates their marriage.²⁸⁹

Should a general redistribution discretion be recognised someday, it is suggested that the provision which may grant the court such powers should be negatively worded as in section 79(2) of the Family Law Act No 59 of 1975 (of Australia) which states: “The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.” While acknowledging that the court’s discretionary power in this respect could possibly be exercised in sexist ways,²⁹⁰ the law must prescribe guidance (that is, factors which must be considered)²⁹¹ and judges must manifestly be seen as valuing “.... women’s typical contributions to marriage as highly as they do the (financial) contributions of men.”²⁹²

²⁸⁹ See Sinclair, 1983 *Acta Juridica*, 75 at 79; Heaton, 2005 *SAJHR* 547 at 562; Barratt, 2013 *SALJ*, 688 at 704. See 7.2.1.5 below.

²⁹⁰ Bonthuys, 2014 *SALJ* 439 at 460.

²⁹¹ See Heaton, 2005 *SAJHR* 547 at 563 – 565. See also 7.2.1.5 below.

²⁹² Bonthuys, 2014 *SALJ* 439 at 460. See also Heaton, 2005 *SAJHR* 547 at 564, 574; 6.3.1; 6.3.3 below.

**CHAPTER 6: TOWARDS A NEW APPROACH TO MATRIMONIAL
PROPERTY RIGHTS IN NIGERIA: LESSONS FROM
AUSTRALIA, ENGLAND AND SOUTH AFRICA**

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6.1 INTRODUCTION

The objective of this chapter is to focus on a comparative examination of the matrimonial property laws in Australia, England and South Africa with the aim of suggesting an appropriate matrimonial property system for Nigeria.

It must be noted that “[t]he family property policies adopted in particular jurisdictions are usually indicative of social attitudes towards both property issues and family relationships at the time of enactment.”¹ While one could, thus, argue in favour of the application of the decisions of courts in the comparative countries in similar cases in Nigeria, it is necessary to bear in mind that the countries under comparison have developed their legal framework over the years, and these frameworks may possibly not fit into similar circumstances in Nigeria. For instance, an argument for the application of the pronouncements of courts in Australian and English cases in Nigeria may not be possible for the simple reason that the developmental stages in these countries are practically different from those in Nigeria. The admonition of Aderemi JCA in *Mueller v Mueller*² is instructive in this regard:

“Law, to be useful, must reflect the norms and developmental stages reached in a society where it will apply. While I will say that it serves useful purpose to apply, in full force, the pronouncements of courts of other jurisdiction, in particular decisions of courts of very advanced countries in deciding cases of similar nature in developing countries; we must allow such decisions to provide only a guide without prejudice to keeping in mind the stage of our own development.”

It is right to state that “[t]he purpose of international comparison is to examine our own economic, social and legal practices, to seek other options, variations and refinements or to confirm present policies.”³

It is also noteworthy to mention that the extant laws in the countries under comparison are different from Nigerian law. The decisions of courts, except in exceptional cases where judicial activism was displayed, have been based on their respective laws and the courts’ interpretations of them. An argument for the application of a principle of law can, thus, be grounded only if a similar statutory provision exists in Nigeria.

¹ Fox, 2003 *Child and Family Law Quarterly*, 1.

² (2005) LPELR 12687 (CA) 1 at 21.

³ Funder, 1989 *Family Matters*, 18.

Decisions, however, which have been based on the application of equitable principles and trust concepts to determine the property rights of spouses can also be relied upon by Nigerian courts because, under Nigerian law, equity and trust form part of the received English law.

As seen in Australia, England and South Africa, the laws were developed over the years by taking cognisance of the state of civilisation in these countries. These countries undertook law reform processes and amended their laws at different times in order to achieve substantial equality between spouses by addressing elements of unfairness in their respective jurisdictions.

Consequently, it is submitted that, for a law to be effectively realised in a society, its contents must be in tune with the will of the people so as to achieve its desired effect.⁴ Furthermore, the law itself must be intelligible and intelligently made to be properly appreciated by the people whom it seeks to regulate.⁵ This is a basic requirement which must be met in order to avoid situations where the law is subject to different connotations and application by the courts because of its "... inherent vagueness and incoherence."⁶

The Nigerian position is different. As noted earlier, the Matrimonial Causes Act No 18 of 1970⁷ has not been amended.⁸ The property settlement provisions as contained in sections 72 and 73 of the Matrimonial Causes Act No 18 of 1970⁹ are anomalous,¹⁰ and the courts' interpretation and application of the law have always been to the disadvantage of the female spouse.¹¹

It is common ground that the law as it stands today in Nigeria does not reflect the present state of civilisation in the country with particular reference to the present emancipation of women in the country.¹² This has necessitated a clarion call towards

⁴ See *Mueller v Mueller* (2005) LPELR 12687 (CA) 1 at 21. See also Gasiokwu, *Sociology of Law*, 86

⁵ Gasiokwu, *Sociology of Law*, 85

⁶ Gasiokwu, *Sociology of Law*, 86.

⁷ Cap M7 Laws of the Federation of Nigeria, 2004.

⁸ See fn 9 at 2 – 3 above.

⁹ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁰ See 2.6.1 above.

¹¹ See 1.3 above.

¹² See *Mueller v Mueller* (2005) LPELR 12687 (CA) 1 at 21.

the recognition of equitable property rights of spouses in marriages.¹³ It becomes important to take lessons from other countries on the approaches adopted in determining the property rights of spouses on civil marriage breakdown, and to consider the best way to employ them in addressing the Nigerian situation.

6.2 ABSENCE OF THE CONCEPT OF MATRIMONIAL PROPERTY

In Nigeria, there is a complete absence of the concept of matrimonial property.¹⁴ The property rights of spouses are determined in precisely the same way as those of strangers and these are based on strict property rights.¹⁵ In the absence of any other legislation which deals with the property rights of spouses in Nigeria, Nigerian courts interpret and apply only the provision of section 17 of the Married Women's Property Act, 1882¹⁶ to determine ownership and not to vary vested titles to property.¹⁷ This is the primary duty of the court under this statutory provision. The question before the court is "Whose is this?" and not "To whom shall this be given?"¹⁸ This emphasises the assertion that the property rights of spouses in Nigeria are completely separate during the subsistence of the marriage and upon dissolution.

The foregoing was the position of the law under Australian and English laws before these countries reconsidered how best to regulate the property relationship between spouses by respectively enacting the Family Law Act No 53 of 1975 (Cth) and the Matrimonial Causes Act Cap 18 of 1973. As seen in chapter three, in England, marriage does not affect the property rights of spouses (ownership of property).¹⁹ Marriage does not confer on spouses joint ownership of property²⁰ as the universal community of property system does in South Africa.²¹ It affects only the enjoyment of such property in relation to ancillary relief.²² The Married Women's Property Act,

¹³ See Ashiru, 2007 *Journal of African Law*, 316 at 331; Alemika, 2010 *University of Maiduguri Law Journal*, 25 at 37; Muna, 2011 *Indiana Journal of Global Legal Studies*, 87 at 101; Ekhaton, 2015 *Journal of International Women Studies*, 285 at 293 – 294.

¹⁴ See Adekile, 2010 <http://ssrn.com/abstract=1616270>, 1 at 13 – 14. See also 1.3 above.

¹⁵ See *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1 at 4; *Aderounmu v Aderounmu* [2003] 2 NWLR (Pt. 803) 1; *Essien v Essien* [2009] 9 NWLR (Pt 1146) 306 at 331 – 332. See also Ashiru, 2007 *Journal of African Law*, 316 at 322. See also 10 – 11; 2.7.2 above.

¹⁶ [45 & 46 Vict. Cap 75].

¹⁷ See *Cobb v Cobb* [1955] 2 All ER 696 (CA) at 700.

¹⁸ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 393, per Lord Morris of Borth-Y-Gest. See also 3.3 above.

¹⁹ Masson, Bailey-Harris and Probert, *Cretney Principles of Family Law*, 115.

²⁰ See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 393.

²¹ See 5.2.1 above.

²² Miller, *Family Property and Financial Provision*, 17.

1882²³ introduced the doctrine of the separate estate of the spouses which ensured that the property rights of spouses are kept separate.²⁴ It is noted that, under common law, English courts had no discretion to redistribute the property of either of the spouses on marriage breakdown. For a court to adjust the property rights of spouses, a claimant had to prove either legal or beneficial interest in the property.²⁵

England, over the years, developed a comprehensive statute²⁶ to resolve the proprietary rights of spouses in each other's property, particularly property which had been used for the common good during the subsistence of the marriage. It was the judicial activism of the English courts that brought about a need for the enactment of the Matrimonial Causes Act Cap 18 of 1973 which presently gives the court the power to vary vested titles to property under section 24 of the Matrimonial Causes Act Cap 18 of 1973.²⁷

At present in England there is a separation of property system with judicial discretion to redistribute the property of spouses on the breakdown of marriage so as to provide for the financial needs of the disadvantaged spouse.²⁸ There is a benchmark of equal division.²⁹ The presumption under English law is that the spouses made contributions to the welfare of the family to the best of their abilities. The conduct of spouse does not affect financial claims.³⁰ The quantum of contribution by spouses is considered only in exceptional cases and assessed where it would be inequitable to disregard such when granting financial claims as a result of the disparity which exists.³¹

A similar assertion can also be made with regard to the provisions of the Family Law Act No 53 of 1975 (Cth) in Australia.³² Unlike the Australian courts under section 86(1) of the Matrimonial Causes Act No 104 of 1959 (Cth), Nigerian courts have failed to display judicial activism in the interpretation of section 72(1) of the

²³ [45 & 46 Vict. Cap 75].

²⁴ See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 392 – 393.

²⁵ *Gissing v Gissing* [1971] AC 886 (HL) at 892.

²⁶ Matrimonial Causes Act Cap 18 of 1973.

²⁷ See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 390 – 391. See also 3.1 above.

²⁸ See Masson, Bailey-Harris and Probert, *Cretney Principles of Family Law*, 340. See also 3.5 above.

²⁹ See *White v White* [2001] 1 AC 596 (HL); Lowe and Douglas, *Bromley's Family Law*, 1082. See also 3.1 at 97 above.

³⁰ Ellman, 2007 *Law Quarterly Review*, 2 at 3.

³¹ See *Miller v Miller*, *McFarlane v McFarlane* [2006] 2 AC 618 (HL); Ellman, 2007 *Law Quarterly Review*, 2 at 3.

³² See *Stanford v Stanford* [2012] HCA 52, para 39.

Matrimonial Causes Act No 18 of 1970.³³

Australia also adopts a separation of property system with judicial discretion to alter the property interests of the spouses only when it is considered just and equitable to do so.³⁴ Similar considerations that guide the English courts under section 25 of the Matrimonial Causes Act Cap 18 of 1973 in making a redistribution order also guide the Australian courts under section 79 of the Family Law Act No 53 of 1975 (Cth).

In South Africa, the universal community of property system operates by default where prospective spouses do not conclude an antenuptial contract.³⁵ The hardship caused by marriage out of community of property to financially disadvantaged spouses led to the introduction of the accrual system under the Matrimonial Property Act 88 of 1984 which recognises a spouse's entitlement to the accrual upon the dissolution of marriage save where a forfeiture order is made.³⁶ More so, section 7(3) of the Divorce Act 70 of 1979 recognises the power of the South African courts to redistribute the assets of spouses upon divorce in certain marriages.³⁷ Notwithstanding the powers granted to South African courts to make orders for the forfeiture of patrimonial benefits where a spouse will be unduly benefitted and to redistribute the assets of spouses, the clamour for the courts to be vested with the judicial discretion to redistribute the assets of spouses in all matrimonial property systems in South Africa still rages.³⁸

With lessons from these countries, it is safe to state that Nigeria urgently needs a law which recognises the concept of matrimonial property within marriage and upon its breakdown. The proposed law need not be adopted hook, line and sinker in terms identical to the Australian and English laws on the property rights of spouses upon marriage breakdown or the South African matrimonial property systems which have been appraised in this study. It will be worthwhile to contextualise the Nigerian concept of matrimonial property taking cognisance of local situations and the level of

³³ See Cap M7 Laws of the Federation of Nigeria, 2004.

³⁴ See ss 78 and 79 of Family Law Act No 53 of 1975 (Cth); *Stanford v Stanford* [2012] HCA 52, para 39. See also 4.3.3.2 above.

³⁵ See Monareng, *A Simple Guide to South African Family Law*, 13, Van Schalkwyk, *General Principles of the Family Law*, 241. See also 5.2.1 above.

³⁶ See 5.2.2.3 above.

³⁷ See 5.5.3 above.

³⁸ See 5.5.3.1 above.

legal socialisation among the people.³⁹ Whatever reform proposal is made,⁴⁰ however, the concept of matrimonial property must, where practicable and required by justice, answer the question: "... To whom shall this be given?"⁴¹

6.3 JUDICIAL DISCRETION

6.3.1 The Exercise of Judicial Discretion

In Australia and England, although the separate property system exists in these countries, the divorce courts have wide powers under their respective statutes to alter the property interests of spouses by way of redistribution as they deem just and equitable taking cognisance of statutory guidelines.⁴² In South Africa, however, the property rights of spouses on marriage breakdown are regulated by statute which recognises a limited judicial discretion to redistribute property in certain marriages.⁴³

In South Africa, the matrimonial property system chosen by the spouses before or after the commencement of their marriage or that which applies to them by default regulates the property relationship between the spouses during the subsistence of the marriage and upon its dissolution.

South African matrimonial property law is also distinct in some respects. South African law recognises the rights of the spouses to change their matrimonial property system.⁴⁴ The court is also empowered to make a forfeiture order pertaining to patrimonial benefits⁴⁵ which, to an extent, prevents the unfair distribution of assets upon divorce and also serves as a regulatory check on spouses who conclude marriages for their selfish interests.⁴⁶

It is the researcher's opinion that Nigeria can actually take a cue from these countries. Rather than give statutory recognition to a forfeiture order which is

³⁹ Gasiokwu, *Sociology of Law*, 81 has expressed the opinion that for a law to be effectively realised "... within a legal system ... it is necessary that the will of the legislator coincides with the will of the majority of the people." People must also be given the opportunity to be a part of the law-making process in order to ensure the suitability of such law when finally made.

⁴⁰ See 7.2 below.

⁴¹ *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 393, per Lord Morris of Borth-Y-Gest.

⁴² See s 79(4) of the Family Law Act No 53 of 1975 (Cth); s 25 of the Matrimonial Causes Act Cap 18 of 1973.

⁴³ See s 7(3) of the Divorce Act 70 of 1979.

⁴⁴ See s 21(1) of the Matrimonial Property Act 88 of 1984.

⁴⁵ See s 9(1) of the Divorce Act 70 of 1979.

⁴⁶ See *Swanepoel v Swanepoel* [1996] 3 All SA 440 (SE). See also 5.5.2 above.

perceived as serving the interest of the financially stronger spouse in South Africa,⁴⁷ however, the court's redistributive powers should be recognised and applied to the peculiar facts of each case.

While the South African matrimonial property law accommodates both a fixed and flexible approach in the determination of the matrimonial property rights of spouses on marriage breakdown, and equally confers a legal or equitable interest in property on spouses married in community of property or whose marriages are subject to the accrual system, in Australia and in England, the Family Law Act No 53 of 1975 (Cth) and the Matrimonial Causes Act Cap 18 of 1973 do not confer on a spouse any legal or equitable interest in property (except an interest founded under the establishment of an existing trust).⁴⁸ The redistribution of property in Australia and England is entirely flexible (that is, subject to the court's discretion).⁴⁹ It is observed that there is much emphasis on the powers of the courts in Australia and England⁵⁰ to adjust property rights rather than to determine strict property rights.⁵¹

It is observed that the South African position is radically different from the position in England. In England, the exercise of the discretionary powers of the court was opted for and is still the practice till date, as against a system which recognises fixed property rights.⁵² The matrimonial property regime in South Africa is, however, likened to a system with fixed property rights⁵³ save for the exception created by section 7(3) of the Divorce Act 70 of 1979 and the power of the court to make a forfeiture order. It is noted that the difference in the approach adopted by the two countries stems partly from the fact that, while England is a common law country, South Africa has a hybrid system of law.

With particular reference to the Married Women's Property Act, 1882⁵⁴ and the

⁴⁷ See Bonthuys, 2014 SALJ 439.

⁴⁸ It is noted that, under s 78 of the Family Law Act No 53 of 1975 (Cth), the court makes a declaration based on law and equity without exercising any discretion. See also Dickey, *Family Law*, 472.

⁴⁹ See 3.5.2; 4.3.3 above.

⁵⁰ Miller, *Family Property and Financial Provisions*, 8.

⁵¹ See 1.8.1 above.

⁵² See Miller, *Family Property and Financial Provisions*, 8.

⁵³ The complete separation of property system which is practised by default in Nigeria also adopts a fixed property right approach.

⁵⁴ [45 & 46 Vict. Cap 75].

Matrimonial Causes Act No 18 of 1970⁵⁵ (as considered) in chapter two of this study, what practically exists in Nigeria is a complete separation of property system without the judicial discretion to redistribute the property of spouses on marriage breakdown.⁵⁶ While there exists a redistribution of property by the courts in England, Australia and South Africa (in a limited form), it is pointed out that Nigerian law does not afford a spouse in a civil marriage the right to apply to the court for a redistribution order. It is submitted that Nigerian law can also adopt both a fixed and flexible approach in the determination of the property rights of spouses.

The researcher is, however, of the view that to allow the property interests of the spouses to be entirely at the court's discretion would not only create a room for future uncertainties, but would also lead to the usurpation of the autonomy of spouses to make choices with regards to the matrimonial property system which governs their marriage.⁵⁷

Judicial discretion is something personal to the judge, and the judge rules according to his or her perception of the facts in line with statutory guidelines which may be subjective or objective in nature. Notwithstanding this fact, the need for a just and equitable sharing of matrimonial property upon marriage breakdown, and to avoid a situation where one of the spouses will be left in the predicament of real need, supports the argument for the retention of judicial discretion in whatever matrimonial property system for which the spouses might have opted.⁵⁸

It is the opinion of the researcher that the redistributive powers of the court should still be invoked within a matrimonial property system where spouses elect how their property interests should be divided on the breakdown of marriage.⁵⁹ The court's discretion in this regard, however, must be exercised only in limited and special circumstances in a bid to do what is just and equitable.⁶⁰

Heaton's⁶¹ approach in this regard is commendable. The author suggests that "[t]he court should be empowered to deviate from the ordinary consequences of the

⁵⁵ Cap M7 Laws of the Federation of Nigeria, 2004.

⁵⁶ See 2.5; 2.6; 2.72 above.

⁵⁷ See 5.7 above.

⁵⁸ See 5.5.3.1 above for a discussion on the need for the redistributive powers of the court in the determination of the property rights of spouses on marriage breakdown in South Africa.

⁵⁹ Heaton, 2005 *SAJHR* 547 at 562.

⁶⁰ Heaton, 2005 *SAJHR* 547 at 562.

⁶¹ 2005 *SAJHR* 547 at 562

matrimonial property system if equity and justice demand this.”⁶² In this regard, the court should, amongst other things, give consideration to the following:

**“... the extent to which the spouses were in an unequal bargaining position when they selected their matrimonial property system;
the extent to which the selected matrimonial property system was inequitable and unjust in view of all the circumstances at the time it was selected; and
the extent to which the selected matrimonial property system has become inequitable and unjust in view of any subsequent change in the spouses’ circumstances.”**⁶³

In making a redistribution order, the court should give consideration to a number of factors.⁶⁴ It should consider the respective contributions of the spouses to the family welfare and to the estate of either or both spouses.⁶⁵ The categories of acts, which qualify as “contributions”, must not be closed.⁶⁶ The non-financial contributions of a spouse, in terms of his or her role as a homemaker and caregiver must not be presumed to be less than the monetary contributions of the other spouse.⁶⁷ Both contributions must be treated as having equal economic value.⁶⁸ The contribution of either spouse before the marriage was contracted, the length of the marriage, the age of the spouses at the time of divorce, the present and future financial positions and obligations of the spouses, “... serious financial misconduct during the subsistence of the marriage, such as the dissipation of assets ...”⁶⁹ amongst other things should constitute the other factors to be considered by the court.

⁶² Heaton, 2005 SAJHR 547 at 562.

⁶³ Heaton, 2005 SAJHR 547 at 563.

⁶⁴ Heaton, 2005 SAJHR 547 at 563.

⁶⁵ Heaton, 2005 SAJHR 547 at 563.

⁶⁶ Heaton, 2005 SAJHR 547 at 563 has expressed the view that they should include but not limited to “... the following: being the caregiver of a child, an aged, infirm or disabled member of the family, or an aged, infirm or disabled relative or dependant of either spouse, regardless of whether that relative or dependant lives or lived in the matrimonial home; performing household duties, including managing the household; acquiring or creating property, or any part of property, which falls into either spouse's estate or the joint estate, including earning an income; paying money, rendering services or making any other contribution towards maintaining or increasing the value of property, or any part of property, which falls into either spouse's estate or the joint estate; making career or business sacrifices or curtailing participation in the labour or business market; giving financial or non-financial assistance or support, including assistance or support that enables the other spouse to acquire qualifications or improve his or her employment or business prospects, and assistance and support that helps the other spouse in carrying on his or her employment or business; forgoing a higher standard of living than the spouse would otherwise have enjoyed; saving expenses which would otherwise have been incurred; and any other contribution to the welfare of the family or to the other spouse's estate or the joint estate.”

⁶⁷ Heaton, 2005 SAJHR 547 at 564.

⁶⁸ Heaton, 2005 SAJHR 547 at 574.

⁶⁹ Heaton, 2005 SAJHR 547 at 563.

It should, however, be noted, that the fact that the division of assets or the proprietary benefits of a marriage is in varying proportion between the husband and wife does not necessarily imply an inequitable result and should not form the basis for invoking the court's equitable discretion. The terms "fair and equitable" are subjective. For instance, a division of assets between spouses in a ratio of 20:80 could be fair to one couple, while to another couple a fair division could be 30:70, 45:55 or even 50:50.⁷⁰

It is pertinent to iterate at this point that the maxim "equality is equity" does not necessarily mean a half share.⁷¹ A fair share or equitable share in property could, thus, mean "... a tenth or a quarter or sometimes even more than a half."⁷² On this issue, the researcher adopts the recommendation of the Australian Law Reform Commission on Matrimonial Property:

"All the evidence leads to the conclusion that equal sharing of property at the end of a marriage is not necessarily fair sharing. A just sharing of property should be based upon a practical, rather than a merely formal, view of the equal status of husbands and wives within marriage. Their equal status entails that they should bear equal responsibility for the acquisition and management of income and property, the nurture of their children and the management of their household. If the allocation of these functions between them during the marriage places one of them at a disadvantage in relation to the other after they separate, this should be taken into account in the sharing of their property. Thus, a just sharing of property should take into account any disparity arising from the marriage in the standards of living reasonably attainable by the parties after separation."⁷³

6.3.2 The Nature of a Property Settlement Order and the Absence of Statutory Guidelines

Unlike the case in the Australian⁷⁴ and English laws,⁷⁵ where provision is made for the factors which must guide the court's discretion in adjusting the property rights of spouses as it thinks "just and equitable", the Matrimonial Causes Act No 18 of

⁷⁰ For instance in *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at [24], the court, having found that, there was a tacit universal partnership agreement between the parties, proceeded to distribute their property by giving the woman a 35% share while the husband received 65%. This distributive formula was upheld on appeal as being fair and equitable.

⁷¹ See *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 84.

⁷² See *Egunjobi v Egunjobi* [1976] 2 FNLR 78 at 84.

⁷³ See the Australian Law Reform Commission *Matrimonial Property Law*, para 273 as cited by Graycar, 1995 *Victorian University Wellington Law Review*, 9 at 15 – 17.

⁷⁴ See s 79(4) of the Family Law Act No 53 of 1975 (Cth).

⁷⁵ See S 25(2) of the Matrimonial Causes Act Cap 18 of 1973.

1970⁷⁶ did not outline any such considerations or criteria which Nigerian courts must follow in making appropriate orders in the circumstances of each case.⁷⁷

Section 72 of the Matrimonial Causes Act No 18 of 1970,⁷⁸ which has often been misinterpreted as vesting the court with powers to redistribute the property of spouses on marriage breakdown in Nigeria, has been properly analysed in chapter two of this study.⁷⁹ A comparison of the provisions of sections 72 and 73 of the Matrimonial Causes Act No 18 of 1970⁸⁰ (which makes provision for the settlement of property and the general powers of the court) and similar provisions in the Family Law Act No 53 of 1975 (Cth) and the Matrimonial Causes Act Cap 18 of 1973 (which make provisions for financial provisions and property adjustment orders) reveal that Nigerian courts have, over the years, not applied the above provisions to redistribute the property of spouses on marriage breakdown.⁸¹

This is so because the powers of Nigerian courts to settle property under sections 72 and 73 of the Matrimonial Causes Act No 18 of 1970⁸² do not envisage a redistribution of property.⁸³ As has been argued in this study, a transfer of property implies an assignment or transfer of the totality of interests which a person has in a property to another person.⁸⁴ Such a transfer is, thus, unconditional, and whatever property interest which a spouse obtains by virtue of a court order is full and final and cannot be reversed.⁸⁵ In Nigeria, however, a property settlement order made under section 72 of the Matrimonial Causes Act No 18 of 1970⁸⁶ is conditional and can be discharged or modified by the court as stated under section 73(1)(j) of the

⁷⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

⁷⁷ Arinze-Umobi, 2004 *Unizik Law Journal*, 188 at 198 expressed the need for the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 to be reviewed in order to accommodate express factors to be considered by courts in the exercise of their discretion to make a property settlement order.

⁷⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

⁷⁹ See 2.6 above.

⁸⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

⁸¹ See 2.6 above.

⁸² Cap M7 Laws of the Federation of Nigeria, 2004.

⁸³ See 2.6; 2.6.1 above.

⁸⁴ See 2.6 above.

⁸⁵ Under Australian law, a property order can be set aside or varied only on the basis of fraud, duress, lack of material disclosure, false evidence, lack of feasibility to execute the order, to prevent an applicant from suffering a likely hardship, amongst other things. See s 79A of the Family Law Act No 53 of 1975 (Cth).

⁸⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

Matrimonial Causes Act No 18 of 1970.⁸⁷

As established in chapter four of this study, the interpretation given to section 72(1) of the Matrimonial Causes Act No 18 of 1970⁸⁸ is flawed,⁸⁹ and the reference to section 72 of the Matrimonial Causes Act No 18 of 1970⁹⁰ in section 73(1)(j) of the Matrimonial Causes Act No 18 of 1970⁹¹ is an anomaly which requires an amendment.⁹² The interpretation and application of section 86(1) of the repealed Matrimonial Causes Act No 104 of 1959 (Cth) which is similar to section 72(1) of the Matrimonial Causes Act No 18 of 1970,⁹³ justifies this assertion.⁹⁴

In Australia and England, the court, in the general exercise of its discretion to redistribute the property of spouses, can make provision for the maintenance of a spouse by way of making an order for the settlement of property.⁹⁵ It is submitted that it is only in such cases that the provision of section 73(1)(j) of the Matrimonial Causes Act No 18 of 1970⁹⁶ can be justified. Where such an order is made by the court, it must be expressly stated that the order made is a maintenance order and not, strictly speaking, a property order in terms of a transfer of ownership.⁹⁷

6.3.3 Indirect Contributions

Unlike the practice in other countries, Nigerian courts approach matrimonial property disputes with a discriminatory attitude.⁹⁸ In advanced countries, like Australia⁹⁹ and England,¹⁰⁰ their respective matrimonial property laws make provision for the recognition of a spouse's contributions to the family welfare and his or her indirect contributions to the property of the other spouse when there is a need for the adjustment of the property rights of spouses upon the breakdown of their marriage. The position in Nigeria is different.

⁸⁷ Cap M7 Laws of the Federation of Nigeria, 2004. See 2.6 above.

⁸⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

⁸⁹ See 4.2.1; 4.2.2 above.

⁹⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

⁹¹ Cap M7 Laws of the Federation of Nigeria, 2004.

⁹² See 2.6 above.

⁹³ Cap M7 Laws of the Federation of Nigeria, 2004.

⁹⁴ See 4.2.1; 4.2.2 above.

⁹⁵ See 4.2.1 above.

⁹⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

⁹⁷ See *Sanders v Sanders* (1967) 116 CLR 366 at 375. See also 4.2.1 above.

⁹⁸ See Arinze-Umobi, 2004 *Unizik Law Journal*, 188 at 198.

⁹⁹ See s 79(4)(b) and (c) of the Family Law Act No 53 of 1975 (Cth).

¹⁰⁰ See s 25(2)(f) of the Matrimonial Causes Act Cap 18 of 1973.

The Family Law Act No 53 of 1975 (Cth) gives recognition to both the financial¹⁰¹ and non-financial¹⁰² contributions of spouses to the purchase and improvement of property and their contributions to family welfare¹⁰³ as being capable of creating an interest in property subject to the court's discretion.¹⁰⁴ The non-financial contribution of a spouse to the acquisition of property and its improvement, together with the contribution of a spouse to the family welfare and as a homemaker, are given considerable weight in the exercise of the court's redistributive powers under section 79 of the Family Law Act No 53 of 1975 (Cth).¹⁰⁵

Similarly, under English law, section 24 of the Matrimonial Causes Act Cap 18 of 1973 empowers the English courts to make property adjustment orders with regards to the property rights of the spouses for the purpose of adjusting their financial positions on marriage breakdown.¹⁰⁶ In making this order, the court considers a spouse's contribution to the upkeep of the matrimonial home, amongst other things.¹⁰⁷ Section 25(2)(f) of the Matrimonial Causes Act Cap 18 of 1973 enjoins the court to consider "... the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family."

The situation is not different in South Africa. Section 7(3) of the Divorce Act 70 of 1979 also gives recognition to the redistribution powers of the court.¹⁰⁸ By section 7(4) of the Divorce Act 70 of 1979, a spouse's direct or indirect contribution to the maintenance or increase of the estate of the other spouse is considered before a redistribution order is made.¹⁰⁹ The indirect contributions of a spouse will include a wife's "... ordinary duties of 'looking after the home' and 'caring for the family' ..."¹¹⁰

As has been seen, under Nigerian law the reverse is the case. While there are no similar statutory provisions as there are in Australia, England and South Africa, Nigerian courts have refused to give a liberal interpretation to the provision of section

¹⁰¹ See s 79(4)(a) of the Family Law Act No 53 of 1975 (Cth).

¹⁰² See s 79(4)(b) of the Family Law Act No 53 of 1975 (Cth).

¹⁰³ See s 79(4)(c) of the Family Law Act No 53 of 1975 (Cth).

¹⁰⁴ Dickey, *Family Law*, 473.

¹⁰⁵ *Mahon v Mahon* [2015] FCCA 510, para 105.

¹⁰⁶ See Lowe and Douglas, *Bromley's Family Law*, 1005. See also 3.5.2 above.

¹⁰⁷ See 3.5.3.3 above.

¹⁰⁸ See 5.5.3 above.

¹⁰⁹ See 5.5.3 above.

¹¹⁰ See *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 997.

72 of the Matrimonial causes Act No 18 of 1970¹¹¹ as was done by Australian courts when confronted by similar circumstances.¹¹²

Non-financial contributions¹¹³ by a spouse (especially the wife) which include her obligations as a homemaker, the payment of bills and rates and attending to the business of the husband which relieve the husband of some domestic and financial burdens and enable his business to progress cannot be relied upon in Nigeria in an application for a beneficial interest in property which was purchased solely by the husband during the subsistence of the marriage. For a spouse's claim to succeed under Nigerian law, he or she must prove a joint financial contribution. Arinze-Umobi¹¹⁴ describes this requirement of the law as absurd and discriminatory in terms of the relationship between a husband and wife.

In the cases considered in chapter two of this study, there appears to be no instance where a spouse approached the court for the settlement of matrimonial property on him or her on the sole basis of his or her domestic contributions to the family welfare and the spouses' children. The closest example relative to this point is the case of *Kafi v Kafi*¹¹⁵ where the court, besides the financial contributions made by the wife to the growth of the husband's business, also took cognisance of the wife's indirect contributions and responsibilities to the home which afforded the husband sufficient time and energy to amass wealth.

*Dairo's*¹¹⁶ case also presented another opportunity for the High Court sitting in Lagos to hold that the wife had a beneficial interest in the property which was acquired by the husband. It will be recalled that the wife's uncontroverted evidence at trial was that there was an agreement between her and the husband to the effect that, while she spent her money on the welfare of the family, the husband spent his in acquiring and building the house. The court, however, failed to recognise the wife's beneficial

¹¹¹ Cap M7 Laws of the Federation of Nigeria, 2004.

¹¹² See 4.2.1; 4.2.2 above.

¹¹³ This type of contribution is also known as indirect contribution. Quansah, *Determining Matrimonial Property Rights of Spouses on Divorce: An Appraisal of the Legal Regimes in Botswana*, 450 - 451 argues that there is need to take indirect contributions into consideration in the determination of the matrimonial property rights of spouses on divorce. The author points out that such "... indirect contribution is progressively being given prominence in other jurisdictions in the determination of disputes over matrimonial property."

¹¹⁴ 2004 *Unizik Law Journal*, 188.

¹¹⁵ [1986] 3 NWLR (Pt 27) 175 at 185 – 187.

¹¹⁶ Suit No ID/90HD/86 of 15/7/88 (Unreported) Lagos High Court.

interest in this regard.

In the light of Lord Denning's view in *Falconer v Falconer*,¹¹⁷ financial contributions made to the purchase of a house may be direct or indirect. In his words:

“It may be indirect, as where both go out to work, and one pays for the housekeeping and other the mortgage installments. It does not matter who pays what so long as there is a substantial financial contribution towards the family expenses, it raises the inference of a trust.”

It is submitted that this case would have been persuasive enough for the court in *Dairo's*¹¹⁸ case to decide otherwise. It is further submitted that the recognition of financial contributions as the sole basis of entitlement to property upon marriage breakdown in Nigeria is antithetical to the principle of equity and justice which ought to be the major factor guiding the exercise of the distribution of “matrimonial property” by the court. Nigerian law needs urgent attention in this regard.

6.4 Employing Equity and Trust Principles

Acknowledging that the wide discretion conferred on English courts by the Matrimonial Causes Act Cap 18 of 1973 has whittled down the utility of the role of trust in the determination of the property rights of spouses, English courts have, however, continued to develop and employ trust concepts and equitable principles in bridging the property gap which exists between spouses. In chapter three of this study, it was demonstrated how the principles of equity and trust are used to determine the property rights of spouses on marriage breakdown, especially in cases where the spouses approach the court for an interest in a disputed property.¹¹⁹

It will be recalled that, even before a property adjustment order is made, it is the court's responsibility to determine the extent of the interests which the spouses have in their respective property, whether individually or jointly owned. In the absence of a proof of legal ownership, the courts have applied either the resulting trust or constructive trust, or they have invoked the doctrine of proprietary estoppel to the property relationship of spouses to determine their beneficial entitlement in the absence of an agreement or a declaration of trust where the legal estate is in the

¹¹⁷ (1970) 1 WLR 1333.

¹¹⁸ Suit No ID/90HD/86 of 15/7/88 (Unreported) Lagos High Court.

¹¹⁹ See 3.4 above.

name of one of the spouses.¹²⁰

It is noted that, in the present English jurisprudence, the doctrine of constructive trust has been preferred to resulting trust with respect to a marital relationship.¹²¹ It is submitted that, although both the resulting and constructive trusts have their place in the property relation between a husband and wife, this study takes the viewpoint that the application of the common intention constructive trust in the determination of the interest in matrimonial property will produce a just and equitable outcome bearing in mind the fact that the property rights of married people in Nigeria are currently determined in the same way as those of strangers.¹²²

The Australian case of *Baumgartner v Baumgartner*¹²³ is instructive in this regard. Although the parties were not married in this case, the High Court considered the fact that they had conducted their affairs in a family-kind relationship to give effect to the existence of a constructive trust in respect of a property which was acquired in the name of the male partner and used as their family home. It held that "... a constructive trust may be imposed, even though the person on whom the trust is imposed had no intention to create a trust or to hold the property on trust."¹²⁴

Here, the court deduces what the intentions of the parties were from their general conduct in relation to the property.¹²⁵ In circumstances where it is necessary to impute an intention or an equitable obligation, the court will readily do so.¹²⁶ For instance, in cases where the wife earns money and expends it all in taking care of the family needs, thereby permitting the husband to expend his income towards purchasing a house which is used as the family home, or where the wife expends her earnings in maintaining and developing a family home, which had been purchased by the husband (in his name), with the firm belief and assurances from the husband that the house belonged to both of them, the onus would be on the court to determine whether, in such circumstances, the wife should be entitled to a

¹²⁰ See *Stack v Dowden* [2007] WL 1157953 (HL); *Abbott v Abbott* [2007] WL 2126565 (PCA) and *Jones v Kernott* [2012] 1 AC 776 (SC(E)). See also Lee, 2008 *Law Quarterly Review*, 209 at 209 – 210; Smithdale, 2011 *Cambridge Student Law Review*, 74.

¹²¹ See 3.4.2.1; 3.4.2.2 above.

¹²² See 2.7.2 above.

¹²³ [1987] HCA 59.

¹²⁴ *Baumgartner v Baumgartner* [1987] HCA 59, para 30.

¹²⁵ See *Baumgartner v Baumgartner* [1987] HCA 59, para 9.

¹²⁶ *Baumgartner v Baumgartner* [1987] HCA 59, para 30.

proprietary interest in the house. If the court comes to the conclusion that a spouse's refusal to give recognition to the existence of the other spouse's equitable interest in property would amount to an unconscionable conduct, constructive trust will be "...imposed as a remedy to circumvent that unconscionable conduct."¹²⁷

It is reiterated that a constructive trust arises in situations where it will "... be unconscionable for the owner of a legal title to assert his own beneficial interest and deny the beneficial interest of another."¹²⁸ Instead of relying fully on financial contributions to determine beneficial interests in property, the court relies on the evidence of common intention between the spouses that they are to share in the ownership of the property.¹²⁹

Resulting trust within the marital context gives a spouse only the ratio of his or her contribution to the purchase price of the property.¹³⁰ This does not always reflect the true position between spouses.¹³¹ It is submitted that ownership of property within the marital context does not always depend on the quantum of contribution by the spouses.¹³² In most cases, married spouses do not state what their respective interests in an acquired property are.¹³³ Spouses always regard each other as having beneficial interests in an acquired property.¹³⁴

It is advised that, in "joint name cases", spouses should always ensure that an express declaration of trust, stating their respective interests in the property, is included in their deed.¹³⁵ In the absence of an express declaration of trust, however, or in "single name cases", once spouses have by an oral agreement or by implication (conduct) demonstrated that they both hold beneficial interests in property, the court should always be willing to apply constructive trust because this kind of trust is based on a common intention for a shared beneficial interest in property which

¹²⁷ See *Baumgartner v Baumgartner* [1987] HCA 59, para 30.

¹²⁸ See *Baumgartner v Baumgartner* [1987] HCA 59, para 36; Emiri and Giwa *Equity and Trusts in Nigeria*, 424.

¹²⁹ See *Baumgartner v Baumgartner* [1987] HCA 59, para 36.

¹³⁰ See 3.4.2.1 above. See also Miller, *Family Property and Financial Provision*, 27.

¹³¹ See 3.4.2.2 above.

¹³² See 3.4.2.2 above.

¹³³ See Smithdale, 2011 *Cambridge Student Law Review*, 74 at 76 – 77.

¹³⁴ See *Pettitt v Pettitt* [1969] 2 All ER 385 (HL) at 395.

¹³⁵ See *Wilson v Wilson* [1963] 1 WLR 601 (CA); *Goodman v Gallant* [1986] Fam 106 (CA).

guarantees an equitable and fair solution to the property rights of spouses.¹³⁶

Most importantly, in the bid to establish the common intention, a claimant should be able to rely on an indirect contribution to the acquisition of the property. The facts of *Le Foe v Le Foe*¹³⁷ and *Dairo v Dairo*,¹³⁸ where there was an understanding between the spouses that, while the husband contributed towards the purchase of a property, the wife took care of household expenditure, explain this position. An indirect financial contribution which is referable to the purchase price of property should, thus, lead to an inference of a common intention between the spouses, thereby establishing a beneficial interest in the property.¹³⁹

There seems to be a glimmer of hope towards a liberal and just interpretation of the property rights of spouses upon the dissolution of marriage in Nigeria. A consideration of some judicial pronouncements by some courts in Nigeria leads one to the affirmative conclusion that there is a gradual change in the courts' stance on how it determines the property rights of spouses upon marriage breakdown. One of such instances can be seen from the judgement of the judge in *Mueller v Mueller*,¹⁴⁰ who, having found that the property in dispute was substantially financed and constructed by the husband, stated:

“The finance for the land and the construction definitely came from the petitioner and, since they were married, it is only fair that the entire property be partitioned...”

Although the reason for the order for equitable partitioning in this case was not made on the basis of the married state of the spouses but in accordance with the relief sought by the husband, the court took into consideration the fact that the parties were married. Expressing his view on the need for an equitable partitioning of a joint matrimonial property, Adeyemi JCA in *Mueller v Mueller*¹⁴¹ said:

“... I also agree that it must be done on the basis of equity. After all, EQUITY favours true equality, both of rights and liabilities,

¹³⁶ See Lee, 2008 *Law Quarterly Review*, 209; Smithdale, 2011 *Cambridge Student Law Review*, 74 at 76. See also 3.4.2.2.1 above.

¹³⁷ [2001] 2 FLR 97 (Fam).

¹³⁸ Suit No ID/90HD/86 of 15/7/88 (Unreported) Lagos High Court.

¹³⁹ See *Stack v Dowden* [2007] WL 1157953 (HL) at paras 26, 34; *Abbott v Abbott* [2007] WL 2126565 (PCA) at paras 5 – 6. See also Lowe and Douglas, *Bromley's Family Law*, 162; Masson, Bailey-Harris and Probert, *Cretney Principles of Family Law*, 140.

¹⁴⁰ (2005) LPELR 12687 (CA) 1 at 16, per Fabiyi, JCA.

¹⁴¹ (2005) LPELR 12687 (CA) 1 at 22.

dividing burdens and benefits in equal shares. ... A just order which Courts, including appellate Courts, must always do, is what my learned brother has done in the lead judgment; the undeveloped portion of the land going to the appellant, while two of the three houses on the land shall be retained by the respondent - equality and goodness find expression in this.”

The Court of Appeal in *Oghoyone v Oghoyone*¹⁴² expressed the view that it would be unconscionable to allow a spouse to claim exclusive possession of a matrimonial property, especially where the court can by the conduct of the spouses, either express or inferred, determine the shared intentions. Rhodes-Vivour JCA¹⁴³ stated:

“I am satisfied that the order of the learned trial Judge on Plot L Block 26 Amuwo Odofin Scheme was fair, just and equitable. It would be unconscionable for any party to claim exclusive ownership. *Bearing in mind the changing social and economic realities, a Judge is to ascertain the parties shared intentions, actual, inferred with respect to the property in the light of their conduct.* In that light I am satisfied that when the going was good the parties made contributions to ensure that they had good living accommodation. When the going turns bad it is only right and equitable that each side recoups its contribution and call it a day.”

Similarly the Court of Appeal, in *Okere v Akaluka*,¹⁴⁴ has also expressed approval for the doctrine of constructive trust in relation to matrimonial property disputes. According to the court, it would be most unconscionable to deprive a woman and her children the right in a property to which she contributed substantially with regard to its acquisition and development.¹⁴⁵ It favoured the need for the recognition of a wife’s indirect contributions to matrimonial property in certain cases. In the words of Agube JCA:¹⁴⁶

“Rather, the dictum of Denning, M.R. in the *Falconer's* case (*supra*) where he held that *sometimes the indirect contributions of a wife to the marital property cannot be quantified in monetary terms which would entitle her to a share in the property should apply, accords with modern reality particularly where the parties were husband and wife of Christian and Statutory marriage.* Thus, it was held in the *Falconer* and *Rimmer* cases, that wives were entitled without further proof to share in the marital property acquired during marriage since it was the performance of their functions as wives that enabled their husbands (if at all in this case) to perform theirs.”

¹⁴² [2010] 3 NWLR (Pt 1182) 564 at 584.

¹⁴³ *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564 at 584. Words in italics are my emphasis.

¹⁴⁴ (2014) LPELR-24287 (CA) 1 at 60; 61.

¹⁴⁵ *Okere v Akaluka* (2014) LPELR-24287 (CA) 1 at 60; 61.

¹⁴⁶ *Okere v Akaluka* (2014) LPELR-24287 (CA) 1 at 61. Words in italics are my emphasis.

Although it is only in limited cases that the courts have, through the ingenuity of counsel, sustained a claim for matrimonial property rights based on the doctrine of constructive trust,¹⁴⁷ the researcher submits that this is a step in the right direction.

It should, however, be noted that the discussion in relation to the English approach of determining the beneficial interest of spouses in matrimonial property would be very useful under Nigerian law where trust principles apply.

6.5 RECOGNISING AND ENFORCING NUPTIAL AGREEMENTS

As is the case in England, the Nigerian Matrimonial Causes Act No 18 of 1970¹⁴⁸ is completely silent on “nuptial agreements” or “financial agreements”.¹⁴⁹ It is submitted that in Nigeria, such agreements are hardly concluded by spouses¹⁵⁰ because of the lack of awareness of their utility and the extent to which they could afford the needed protection to spouses on the breakdown of marriage. It is pertinent to state that one area of divergence between the English and Australian matrimonial property system is the statutory recognition of financial agreements between spouses in Australia, especially those made before and during marriage.¹⁵¹

It will be recalled from the discussion in chapter three that English courts are yet to give statutory recognition to nuptial agreements, and only recently did the United Kingdom Supreme Court hold that such agreements would be given substantial weight if properly concluded but would not be capable of ousting the court’s jurisdiction in an application for ancillary relief.¹⁵² At best, nuptial agreements are considered in England as one of the factors which a court must look at when exercising its discretion to make property adjustment orders.¹⁵³

It is worthy of note that, in 2000,¹⁵⁴ by way of a legislative amendment to the Family

¹⁴⁷ See *Okere v Akaluka* (2014) LPELR-24287 (CA) 1. The doctrine of constructive trust is discussed in 3.4.2.2 above.

¹⁴⁸ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁴⁹ “Financial agreements” are used interchangeably with “nuptial agreements” and “nuptial contracts”, which can be either antenuptial or postnuptial in nature.

¹⁵⁰ See Etomi and Asia, 2015 available at: global.practicallaw.com/6-613-4665, 1 at 2.

¹⁵¹ Secondly, in Australia, pursuant to the Family Law Act No 53 of 1975 (Cth), special courts, designated as “family courts” are created to deal with matrimonial causes. See Ingleby, 2005 *International Journal of Law, Policy and Family*, 137 at 140.

¹⁵² See *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 542 – 543. See also Lang, 2014 *Private Client Business* 248 at 248; 3.6.3.2 above.

¹⁵³ See Herring, Harris and George, 2011 *Law Quarterly Review*, 335. See also 3.6.3.2 above.

¹⁵⁴ Family Law Amendment Act No 143 of 2000 (Cth).

Law Act No 53 of 1975 (Cth), a new Part VIIIA titled “Financial agreements” was added to the extant law. This is a radical departure from the English position. Financial agreements became binding in the Australian jurisdiction if properly concluded. They are also capable of ousting the court’s jurisdiction to alter the proprietary rights of spouses.¹⁵⁵

Unlike the situation in Australia¹⁵⁶ and South Africa,¹⁵⁷ where there is statutory recognition and enforcement of nuptial contracts, and in England, where there is recent judicial recognition of nuptial contracts,¹⁵⁸ Nigerian law is silent on whether or not intending spouses or spouses can conclude a contract whereby they specify how their respective property should be shared upon the breakdown of marriage with or without judicial intervention. Spouses, in a proceeding for principal relief, can conclude a separation agreement only in respect of how issues of maintenance and their finances can be dealt with.¹⁵⁹

On the question of whether there is a statutory recognition of antenuptial and postnuptial contracts between spouses in Nigeria, Etomi and Asia¹⁶⁰ are of the opinion that the right of spouses to conclude such contracts is recognised by virtue of section 72(2) of the Matrimonial Causes Act No 18 of 1970¹⁶¹. While Etomi and Asia¹⁶² agree that it is uncommon for Nigerian spouses to conclude antenuptial and postnuptial contracts, they submit that the validity and enforcement of the contract would rest on judicial discretion.¹⁶³

The statement credited to Etomi and Asia¹⁶⁴ that section 72(2) of the Matrimonial Causes Act No 18 of 1970¹⁶⁵ gives statutory recognition to the right of spouses to conclude antenuptial and postnuptial contracts cannot be correct. Section 72(2) of the Matrimonial Causes Act No 18 of 1970¹⁶⁶ gives the court judicial discretion to

¹⁵⁵ See 4.3.7.2 above.

¹⁵⁶ See Part VIIIA of the Family Law Act No 53 of 1975 (Cth); 4.3.7 above.

¹⁵⁷ See 5.3 above.

¹⁵⁸ See *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)).

¹⁵⁹ See s 73(1)(k) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004. See also 2.6 at 52 above.

¹⁶⁰ 2015 available at: global.practicallaw.com/6-613-4665, 1 at 2.

¹⁶¹ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁶² 2015 global.practicallaw.com/6-613-4665, 1 at 2.

¹⁶³ Etomi and Asia, 2015 available at: global.practicallaw.com/6-613-4665, 1 at 2.

¹⁶⁴ 2015 global.practicallaw.com/6-613-4665, 1 at 2.

¹⁶⁵ Cap M7 Laws of the Federation of Nigeria, 2004.

¹⁶⁶ Cap M7 Laws of the Federation of Nigeria, 2004.

make property orders only in respect of any antenuptial or postnuptial settlement of either or both spouses.¹⁶⁷ It is submitted that “antenuptial or postnuptial settlements” are not the same as “antenuptial or postnuptial contracts” as the authors have construed.¹⁶⁸

A novel situation does, however, exist in *Oghoyone v Oghoyone*¹⁶⁹ where the court by its judgement upheld an antenuptial contract entitled: “Memorandum of understanding ...” which was concluded by intending spouses specifying how they intended to share their property.¹⁷⁰ The spouses had, by virtue of a contract which they had executed before marriage, agreed on how their property would be shared. On the breakdown of the marriage, when one of the spouses sought to vary the contract by adducing oral evidence in court in order to gain a property advantage, the court declined the request and went ahead to divide the property of the spouses in accordance with their antenuptial contract.¹⁷¹

It should be noted that the court, in *Oghoyone’s*¹⁷² case, proceeded to ascertain the proprietary rights of the spouses only in regard to the properties which were not covered by the spouses’ antenuptial contract. The Court of Appeal treated the antenuptial contract between the spouses as valid and enforced it.¹⁷³ Could this be a starting point for the recognition and enforcement of antenuptial contracts (in relation to the property rights of spouses) in Nigeria?

In the true sense, the need for nuptial contracts cannot be overemphasised. The arguments for and against nuptial contracts within the common law tradition were highlighted in chapter three of this study.¹⁷⁴ Such contracts do not strictly create a contractual obligation between the spouses as some people may think, but they deal

¹⁶⁷ See s 86(2) of the (Australian) Matrimonial Causes Act No 104 of 1959 where the Nigerian provision was adapted from. See also Nwogugu, *Family Law in Nigeria*, 272.

¹⁶⁸ See the discussion on the Property Rights of Spouses under the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 at 2.6 above; particularly on the concept of antenuptial and postnuptial settlements under s 72(2) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004. Note also that s 72(2) of the Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004 was not considered in *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564.

¹⁶⁹ [2010] 3 NWLR (Pt 1182) 564.

¹⁷⁰ See *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564 at 580 – 584.

¹⁷¹ *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564 at 583.

¹⁷² [2010] 3 NWLR (Pt. 1182) 564 at 583 – 584.

¹⁷³ *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564 at 583 – 584. See also Etomi and Asia, 2015 *global.practicallaw.com/6-613-4665*, section 5 at 2.

¹⁷⁴ See 3.6.3.2 above.

only with the property relationship and financial resources of spouses during marriage and upon its breakdown.¹⁷⁵ The argument that nuptial contracts encourage divorce and that they are contrary to public policy has been discountenanced.¹⁷⁶ It has, however, been admitted that nuptial contracts will be rendered unfair and unenforceable in situations where a spouse will be left in the predicament of real need while the other spouse enjoys an abundance if they are held binding.¹⁷⁷ The researcher is of the view that the concept of nuptial contracts is worthy of consideration in Nigeria.

6.6 CONCLUSION

From the totality of the foregoing discussion, it is seen that Nigerian law with respect to the property rights of spouses on civil marriage breakdown is in dire need of reform. The lessons which have been highlighted in this chapter can indeed shape Nigerian law in this regard to fit local situations and circumstances. Based on this fact, proposals for reform are made in the next chapter.¹⁷⁸

¹⁷⁵ Dickey, Family Law, 502. See 7.2.1.3 below. Skelton and Carnelley ed., *Family Law in South Africa*, 101 state that such contracts only govern the patrimonial consequences of marriage. See also Robinson *et al*, 2012 *Introduction to South African Family Law*, 201; 5.3 above.

¹⁷⁶ See *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 535, ratio 1.

¹⁷⁷ See *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 565; *Luckwell v Limata* [2014] EWHC 536 (Fam), paras 143; 148.

¹⁷⁸ See 7.2 below.

CHAPTER 7: CONCLUSION AND PROPOSALS FOR REFORM

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7.1 CONCLUSION

Nigerian law in relation to the property rights of spouses is still conservative and traditionalist, and has refused to develop alongside the laws of other countries such as England and Australia, from where the provisions of the Matrimonial Causes Act No 18 of 1970¹ were derived.²

The complete separation of property system in Nigeria has its roots in the English common law. Besides common law, there is no legislation which has been enacted by the National Assembly to determine how the property rights of spouses should be regulated in relation to the property rights of spouses on the breakdown of civil marriages in Nigeria. There is a complete absence of the concept of matrimonial property in Nigeria.³

The Married Women's Property Act, 1882⁴ or the Married Women's Property Law, 1959,⁵ which is often relied upon by the court with reference to the concept of the separation of property to determine the ownership of property on the breakdown of marriage, is not legislation which deals with the redistributive powers of the court with respect to "matrimonial property" on civil marriage breakdown.⁶ These laws recognise only the contractual rights of women in civil marriages and the right of women to own separate property. Invoking the provisions of these statutes at the breakdown of marriage, therefore, to determine the property rights of spouses often results in financial injustice in respect of the spouse who is less financially stable.⁷ This justifies the assertion that equality is not guaranteed by the strict application of property rights but rather by the principle of "matrimonial property" on the breakdown of civil marriage.

From the totality of the foregoing, it is common ground that women married in civil marriages in Nigeria are not privy to a statutory remedy of judicial redistribution of matrimonial property on marriage breakdown. There is no doubt that, in a social, cultural and economic setting such as Nigeria, the wife is usually the financially

¹ Cap M7 Laws of the Federation of Nigeria, 2004.

² See 2.9 above.

³ See 6.2 above.

⁴ [45 & 46 Vict. Cap 75].

⁵ Cap 76 Laws of Western Region of Nigeria, 1959.

⁶ See 2.5 above.

⁷ See 3.3; 4.1 above.

weaker spouse⁸ on marriage breakdown. It is little wonder then that a majority of the cases which have been analysed in this study have dealt with cases where the applicants or petitioners were wives who had approached the courts for property settlement orders.⁹ Writing on the moral justification for the alteration of property interests, Dickey¹⁰ warns:

“... if spouses cannot enter into a legally binding agreement concerning the distribution of their property in the event of marriage breakdown, and if there is no way in which the property can be distributed according to principles which are fairer than the ordinary rules of law and equity, the institution of marriage will not be attractive to anyone who realizes that he or (more usually) she will be prejudiced in respect of economic contributions to the property of the parties in particular, and to the marriage relationship generally, if the marriage does not last for life.”

Nigerian law in this regard presently yearns for judicial and legislative attention. It is the researcher’s viewpoint that a reform in this field of law is better started in the court while a legislative intervention is awaited.

7.2 RECOMMENDATIONS/REFORM PROPOSALS

7.2.1 Highlight of Areas for Legislative Intervention

7.2.1.1 The Need for a New Law

Nigeria needs a law which recognises the concept of matrimonial property within marriage and upon its breakdown. There is, thus, either a need for a new law in this regard or an amendment of the existing law on matrimonial causes.¹¹ The proposed legal framework will give recognition to a default matrimonial property system amongst other alternatives which can be opted out of by spouses with the aid of a nuptial agreement as in South Africa.

7.2.1.2 Default Matrimonial Property System

The default matrimonial property system advanced here would share similarities with

⁸ See Edu, “Women and Property Rights under Customary Law” in Oho and Edu ed., *Women, Law & Family*, 145.

⁹ See Ashiru, 2007 *Journal of African Law*, 316 at 318 who observed that it is the woman who more often makes an application for a property settlement order.

¹⁰ 1988 *University of South Wales Law Journal*, 158 at 163 – 164.

¹¹ The Matrimonial Causes Act No 18 of 1970 Cap M7 Laws of the Federation of Nigeria, 2004.

the accrual system in South Africa.¹²

In the proposed default matrimonial property system, the property of spouses remains separate, as marriage will not have an impact on or alter the ownership of property. Upon the breakdown of marriage, however, both spouses will be entitled to share in the financial benefits generated by their marriage (that is, the matrimonial property).¹³ This gives a financially weaker spouse some measure of certainty that he or she will be beneficially entitled to a share in the matrimonial property should the marriage breakdown.

This matrimonial property system preserves the independence and equality of the spouses during the marriage.¹⁴ It also recognises the partnership element in marriage and does away with the untold hardship which a complete separation of property system melts on a financially disadvantaged spouse upon divorce.¹⁵

As in South Africa, where spouses are by statute entitled to an equal division of the accrual except in cases of a forfeiture order¹⁶ or an order for the immediate division of the accrual pursuant to section 8(1) of the Matrimonial Property Act 88 of 1984, where the court could opt to make an order based on what it deems just rather than

¹² See 5.2.2.3 above. It is also akin to the “participation in acquisitions” system proposed by Boele-Woelki *et al*, *The Principles of European Family Law Regarding Property Relations Between Spouses*, 139 - 217. In a “participation in acquisitions” system, there are two assets – (a) the acquisitions which are assets acquired while the property system is in operation and (b) the reserved property which are assets acquired before the commencement of the property system. In this property system, property is separately owned by the spouses but, on marriage breakdown, each spouse is entitled to participate equally in the net acquisitions made by the other spouse. It is noted that the Commission developed two models of matrimonial property systems which may be used for the harmonisation of Family Law in Europe (which includes the United Kingdom). They are the “participation in acquisitions” and the “community of acquisitions”. The latter is a property system “... in which property acquired during the marriage, other than that acquired by gift, inheritance or bequest, is considered community property and which is shared upon the dissolution of the regime.” – Boele-Woelki *et al*, *The Principles of European Family Law Regarding Property Relations Between Spouses*, 220. It is noted that in Denmark, Finland and Sweden, a deferred community of property system is practised. Under this system, there is a separate ownership of assets acquired before and after the property system regardless of their mode of acquisition. Upon divorce, however, except where otherwise stated in a nuptial agreement, the net value of all the assets are divided equally between the spouses. See Boele-Woelki *et al*, *The Principles of European Family Law Regarding Property Relations Between Spouses*, 145.

¹³ See 1.7 above on the definition of “matrimonial property”.

¹⁴ See Boele-Woelki *et al*, *The Principles of European Family Law Regarding Property Relations Between Spouses*, 144.

¹⁵ See Sinclair, 1983 *International and Comparative Law Quarterly*, 785 at 797 – 798; De Jong, 2011 *THRHR* 472 at 474; Boele-Woelki *et al*, *The Principles of European Family Law Regarding Property Relations Between Spouses*, 144. See also 5.2.2.3 above.

¹⁶ See s 9 of the Matrimonial Property Act 88 of 1984. See also 5.5.2 above.

on equal basis,¹⁷ in Nigeria, the rule should be on the “equal distribution” of the matrimonial property which can be departed from only when there is a just cause for doing so.

Should the court decide to exercise its discretion, it should proceed on the presumption of “fair sharing”, by regarding the spouses as having contributed to the marriage to the best of their abilities. “Equitable distribution” should characterise the court’s order. That is, what is fair and just in the circumstances of each case. The opinion has been expressed that:

“... equal sharing of property at the end of a marriage is not necessarily fair sharing. A just sharing of property should be based upon a practical, rather than a merely formal, view of the equal status of husbands and wives within marriage. ... Thus, a just sharing of property should take into account any disparity arising from the marriage in the standards of living reasonably attainable by the parties after separation.”¹⁸

Rather than make an order of forfeiture as this exists in South Africa,¹⁹ the court should be enjoined to exercise its redistributive powers subject to similar statutory guidelines as they exist in Australia²⁰ and England²¹ to determine the extent of a spouse’s interest in the matrimonial property.²²

The law will require spouses to make a full material disclosure of the particulars of the values of their assets before marriage. This can be done either by way of a declaration on oath (affidavit) or by completing a declaration of assets form in the marriage registry before the celebration of the marriage. Where a spouse fails or, for one reason or another, chooses not to make a declaration of the net commencement value of his or her assets, the spouse’s net commencement value will be deemed to be nil.

A full material disclosure of the net commencement value of the spouses’ assets is necessary. This is to enable the court to determine the particular assets of the spouses that constitute the “matrimonial property” which will be liable to equal distribution at the breakdown of marriage. In practical terms, to determine what

¹⁷ See 5.2.2.3 above.

¹⁸ Australian Law Reform Commission, *Matrimonial Property Law*, para 273 as cited by Graycar, 1995 *Victoria University Wellington Law Review*, 9 at 17

¹⁹ See 5.5.2 above.

²⁰ See s 79(4) of the Family Law Act No 53 of 1975 (Cth).

²¹ See 25(2) of the Matrimonial Causes Act Cap 18 of 1973.

²² See Heaton, 2005 *SAJHR*, 547 at 557 – 558.

constitutes the “matrimonial property”, the net commencement value of each spouse’s assets is deducted from net value of his or her assets at the breakdown of marriage. All the separate property of the spouses as declared by them before the commencement of the marriage and any asset acquired by gift, inheritance or bequest during the subsistence of the marriage are excluded from the “matrimonial property”. All other separate and joint assets acquired by the spouses during the subsistence of the marriage will fall into the category of “matrimonial property”.

The default matrimonial property system will ensure that, upon the breakdown of marriage: the reasonable needs of spouses are met; compensation for losses²³ caused by the marriage is provided; and the financial benefits of the marriage are shared.²⁴

In developing a comprehensive matrimonial property regime,²⁵ there will be a need for a comparative assessment of societal attitudes in respect of this system. The Nigerian Law Reform Commission must also embark on a study of the consequences of adopting this matrimonial property system *vis-a-vis* other matrimonial property systems highlighted in this study.²⁶

7.2.1.3 Nuptial Agreements

The law should make it possible for spouses to conclude nuptial agreements which deal with their property relationship and financial resources²⁷ in the probable event that there is a breakdown of marriage. According to Dickey, “... if spouses are reasonably intelligent they will be aware that their union might breakdown, and they might even recognise the statistical probability that this might occur. But so far as the spouses are concerned, they marry for life, or at least for the indefinite future.”²⁸

The proposed legal framework should recognise the autonomy of spouses to make private arrangements as to how their financial resources will be divided on the

²³ This will include loss of employment, potential earnings, skills, professional development, education, income, amongst others. This will not be a closed list but subject to the reasonable discretion of the judge and the peculiar facts of each case.

²⁴ See Herring, Harris and George, 2011 *Law Quarterly Review*, 335 at 338.

²⁵ This suggestion was first made by Boele-Woelki in her lecture on European Research into Informal Relationships, 2016.

²⁶ See also Graycar, 1995 *Victorian University wellington Law Review*, 9 at 25 citing The Joint Select Committee on the Family Law Act, *Family Law in Australia*, para 5.158.

²⁷ See Dickey, *Family Law*, 502.

²⁸ Dickey, *Family Law*, 473.

breakdown of marriage. There should be room for the recognition and enforcement of nuptial agreements (financial agreements). Spouses who wish to be married in a matrimonial property system other than the default system must indicate so in a nuptial agreement.

With the aid of a nuptial agreement, spouses should be capable of modifying the default matrimonial property regime, elect the separation of property regime with the possibility of compensating either spouse for any loss suffered as a result of the marriage, or create their own regime where they could determine how their existing and future property should be shared and in the proportion they want it to be shared.

When spouses conclude a nuptial agreement, they do that with the intention that their marriage remains permanent with the primary objective of defining their financial rights and responsibilities during the marriage and should there be a breakdown.²⁹ It, thus, reduces the possibility of litigation in the nearest future should the marriage run sour.³⁰ Private resolution of matrimonial property disputes and maintenance entitlement is promoted by this arrangement.³¹ This diminishes the wide discretion granted to the courts to adjust property rights upon marriage breakdown.³²

Nuptial agreements can be either prenuptial or postnuptial. Spouses should be given the freedom to change their matrimonial property system. Where spouses have concluded a nuptial agreement, such agreements must be registered to be binding on third parties. Registered nuptial agreements should be capable of replacing earlier nuptial agreements between the spouses.³³ Unregistered nuptial agreements (whether prenuptial or postnuptial) should be binding only on the spouses and their heirs.³⁴

All nuptial agreements to be enforceable against non-contracting third parties must, however, be concluded within the ambit of the law. There must be guidelines as to

²⁹ See *Piper v Mueller* [2015] FamCAFC 241, para 8.

³⁰ *Piper v Mueller* [2015] FamCAFC 241, para 8; Keyes and Burns, 2002 *Melbourne University Law Review*, 577 at 587.

³¹ Keyes and Burns, 2002 *Melbourne University Law Review*, 577 at 587.

³² Keyes and Burns, 2002 *Melbourne University Law Review*, 577 at 587.

³³ See Boele-Woelkiet al, *The Principles of European Family Law Regarding Property Relations Between Spouses*, 103.

³⁴ See Boele-Woelkiet al, *The Principles of European Family Law Regarding Property Relations Between Spouses*, 103.

their contents and forms. The legislative requirements stated by the Family Law Act No 53 of 1975 (Cth) and the “*Radmacher* guidance”,³⁵ as spelt out by the United Kingdom Supreme Court in the case of *Radmacher v Granatino*,³⁶ can serve as useful factors within the Nigerian context in the recognition of the binding nature of nuptial contracts.

Autonomy within this context must be checked as spouses should not be allowed to contract out their real needs. The court’s jurisdiction in respect of nuptial agreements should not be entirely ousted by legislation. The discretion should be retained to serve as a protective measure to spouses, their children and the state for any probable (unfair) consequence which such agreements might have on them. There should, thus, be possible exceptions which could give rise to a court exercising its discretion to depart from the stipulations of nuptial agreements.³⁷

7.2.1.4 Separation Agreements

The matrimonial property regime should permit spouses to conclude separation agreements at the time of divorce. This is a negotiated settlement between the spouses in respect of their financial resources and the evaluation and allocation of property. Settlement agreements should be enforced as consent orders³⁸ except where the court is of the opinion that enforcing a separation agreement will result in injustice on the part of either spouse.³⁹

7.2.1.5 The Court’s Redistributive Powers

The redistributive powers of the court will be exercised in accordance with statutory guidelines which must recognise both the financial and non-financial contributions of spouses to matrimonial property as capable of creating an entitlement in the matrimonial property. The role of a homemaker and the contributions of a spouse to the welfare of the family must, thus, be accorded proportionate weight to the contribution of the breadwinner. It is stated:

“Creation of a scheme that promotes social and economic justice requires a fundamental recognition of marriage as an

³⁵ See Lang, 2014 *Private Client Business*, 248 at 252.

³⁶ [2011] 1 AC 534 (SC(E)). See 3.6.3.2 above.

³⁷ See *Radmacher v Granatino* [2011] 1 AC 534 (SC(E)) at 564 – 565.

³⁸ See 3.6.3; 3.6.3.1 above.

³⁹ See 3.6.3; 3.6.3.1 above.

equal partnership in which the partners make contributions which are different in nature but equally valuable.”⁴⁰

It is a truism that the female spouses perform the majority of the family domestic chores whether or not they are in full time employment,⁴¹ and they contribute hugely to the family’s welfare.⁴² Their responsibility towards discharging their domestic services at home often limits their employment opportunities and the hours they can put into labour.⁴³ As “... mothers, they are more likely than single women to work part time ...”⁴⁴ which is likely to affect their earning capacity even after they have returned to full time employment.⁴⁵ Even women who work full time also sacrifice their earning potential in order to save their marriage.⁴⁶ Asiyanbola⁴⁷ states:

“As long as women are burdened with the responsibility of a household and children while they pursue a career, they can never devote enough time and energy to occupational demands to compete with men who can and who are encouraged to devote their entire time and energy to pursuing careers.”

It is noted that “... marriage not only leads to the acquisition of assets, but also to the loss of assets – namely, the homemaker’s earning capacity, job skills and professional contacts ...”⁴⁸ Most of the domestic duties discharged by the homemaker are essentially to the benefit of the husband.⁴⁹ Upon the breakdown of marriage, the male spouse “... often walks away from the marriage with an array of marketable skills and contacts which have been built up while the homemaker spouse has progressively lost those same assets.”⁵⁰ Women are, thus, exploited within the marital relationship.⁵¹ The reason for this, amongst other things, is the result of the inequality which exists in marriage which is birthed by the high earning

⁴⁰ Lawson, 1994 *University of Tasmania Law Review* 294 at 297.

⁴¹ Ellman, 2007-2008 *Family Law Quarterly*, 455 at 461, 469.

⁴² Omolayo, *et al.* 2013 *Journal of Psychology and Behavioral Science*, 8 at 9; Lasode and Awotedu, 2014 *Procedia – Social and Behavioral Sciences*, 102 at 103 – 104.

⁴³ Ellman, 2007-2008 *Family Law Quarterly*, 455 at 470; Edu, “Women and Property Rights under Customary Law” in Oho and Edu ed., *Women, Law & Family*, 145.

⁴⁴ Ellman, 2007-2008 *Family Law Quarterly*, 455 at 468.

⁴⁵ See Jacobsen and Levin, 1995 *Monthly Labour Review*, 14. See also Hotchkiss and Pitts, 2003 *Federal Reserve Bank of Atlanta: Working Paper Series*, 1 – 2; Hotchkiss and Pitts, 2007 *Federal Reserve Bank of Atlanta: Working Paper Series*, 1.

⁴⁶ Ellman, 2007-2008 *Family Law Quarterly*, 455 at 470. Omolayo, *et al.* 2013 *Journal of Psychology and Behavioral Science*, 8 at 11 argue that despite a woman’s dual roles as a homemaker and a working mother; she strives to satisfy the need of the family.

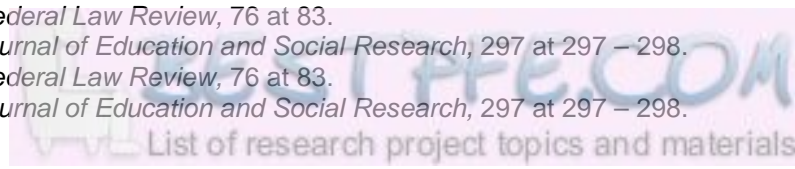
⁴⁷ 2005 *Presentation Paper, International Union for Scientific Study of Population (IUSSP/UIESP) XXV International Population Conference Tours, France*, 1 at 8.

⁴⁸ See Wade, 1985 *Federal Law Review*, 76 at 83.

⁴⁹ See Musa, 2014 *Journal of Education and Social Research*, 297 at 297 – 298.

⁵⁰ See Wade, 1985 *Federal Law Review*, 76 at 83.

⁵¹ See Musa, 2014 *Journal of Education and Social Research*, 297 at 297 – 298.



capacity of the men *vis-à-vis* the traditional roles of women as wives, mothers, carers and homemakers.⁵²

The duration of the marriage, the responsibilities of the spouses during the subsistence of the marriage, their future responsibilities after marriage breakdown, and the need to prevent a situation where one of the spouses will be left in the predicament of real need while the other is in a better financial state should all constitute special circumstances for the exercise of the court's discretion to alter the property rights of spouses in a bid to do what is just and equitable.

Courts should be vested with redistributive powers notwithstanding the matrimonial property system elected by the spouses. The court's power, however, should only be exercised to depart from the agreed sharing principle or statutory principle only when it will be just and equitable to do so. Similar to the Australian position, therefore, the discretionary power of the court will be negatively worded.

7.2.1.6 Statutory Creation of Family Courts

The researcher's years in a family law practice have revealed that the absence of special courts (family courts) to determine matrimonial causes has led to the court's inappropriate evaluation of the complicated issues involved in family law litigation, especially upon the dissolution of marriages as it relates to the ownership, occupation and the beneficial interests of spouses in the matrimonial home and other matrimonial property, the financial and economic position of the spouses, their future expectations which have been abruptly cut short by the fact of divorce, and the general welfare of the children of the spouses.

Arising from the foregoing, and in view of the high rate of divorce in the country⁵³ as can be seen from the number of divorce petitions filed in and determined by the High Courts,⁵⁴ it is proposed that it is high time that the legislature took steps, by way of enacting a law, to create special "family courts" with coordinate powers with the

⁵² See Levitan and Belous, 1981 *Monthly Labour Review*, 26 at 27; Edu, "Women and Property Rights under Customary Law" in Oho and Edu ed., *Women, Law & Family*, 145.

⁵³ See Adegoke, 2010 *Stud Tribes Tribals*, 107 at 107 – 108; Animasahun and Fatile, 2011 *Journal of African Studies and Development*, 192 at 194; Omolayo, et al. 2013 *Journal of Psychology and Behavioral Science*, 8 at 11; Musa, 2014 *Journal of Education and Social Research*, 297; Sharang, 2015 *News Agency of Nigeria*, <http://nannewsnigeria.com/node/39926>.

⁵⁴ See Onuegbu, 2013, *The Nigerian Voice*, <http://www.thenigerianvoice.com/news/124075/1/the-spate-of-divorce-in-nigeria-pastors-entertaine.html>.

State High Courts to hear and determine issues concerning marriages and matrimonial causes in Nigeria.⁵⁵

7.2.2 Highlight of Areas for Judicial Intervention

7.2.2.1 Equity and Trust Principles

It is suggested that the frontiers of a property settlement order should be extended to accommodate equity and trust concepts before the proposals for a new legislative framework, as set out in this study, will eventually be accomplished by an Act of the National Assembly.

The doctrine of constructive trust could serve as an alternative tool in the determination of the property rights of spouses upon marriage breakdown in Nigeria. Activist lawyers should play a vital role by incorporating facts and reliefs, which are based on trust and equity, in their pleadings for a property settlement order.

The trust model remains relevant even after the suggested reform is implemented. This view finds credence in the approach of English courts in the determination of the property rights of spouses before and after the enactment of the Matrimonial Causes Act Cap 18 of 1973 which granted the court wide discretion to redistribute the assets of spouses on marriage breakdown where it would be just and equitable to do so.⁵⁶

To an extent, the injustice occasioned by the strict application of property law can be ameliorated if equitable principles, such as the doctrine of proprietary estoppel, resulting trust and the common intention constructive trust, are invoked by legal practitioners and judges alike.

⁵⁵ It is noted that the National Assembly took a similar step when it created the National Industrial Court of Nigeria as a superior court of record pursuant to the National Industrial Court Act No 37 of 2006. This led to the alteration of the Constitution via the Constitution of the Federal Republic of Nigeria (Third Alteration) Act No 3 of 2010. The commencement date of the latter Act was the 4th day of March, 2011. The Chief Judges of the States of the Federation can also, by the practice rules and procedures which they make from time to time, designate various High Courts in their respective States as “family Courts”. It is noted that some High Court judges in the Federal Capital Territory, Abuja are assigned the function of dealing with matrimonial causes by the Chief Judge; however, the courts where these judges sit are not special family courts. They also preside over other criminal and civil matters. Edo State of Nigeria also designates some high courts and magistrate courts as “family courts” within the State. See ss 146 and 147 of the Edo State Child Rights Law, 2007. However, the Edo State Family Court (Civil Procedure) Rules 2017 only relates “... to the rights, advancement and welfare of the child under the Edo State Child Rights Law, 2007 ...” The Rules are applicable only to family courts. See Order 3 of the Edo State Family Court (Civil Procedure) Rules 2017.

⁵⁶ See 3.4 above.

7.2.2.2 No Place for Custom in the Property Rights of Spouses

The status of the Nigerian wife is inferior to her husband's.⁵⁷ In Nigeria, women are in practice discriminated against on the basis of deep-rooted societal norms which are founded on customs that should be considered obsolete in present day Nigeria.⁵⁸ Alemika⁵⁹ observes that such cultural and societal practices hinder the actualisation of the rights of women in the society. These invariably impact negatively on the general development of the Nigerian woman after divorce.⁶⁰

It is common knowledge that most statutory marriages in Nigeria today are preceded by the celebration of customary law marriages between the same couples.⁶¹ The legal rule in respect of this type of marriage arrangement is that the statutory marriage supersedes the prior customary marriage.⁶² The legal approach to matrimonial property should not, thus, be influenced by the dual approach to marriage in Nigeria. It is submitted that custom as a basis for the lack of development of matrimonial property law in Nigeria, especially in civil marriages, is not tenable. Spouses who do not want their matrimonial property shared or redistributed on civil marriage breakdown, as the justice of the case demands, are advised to conclude marriages only under customary law and be bound by the incidents of such marriages. Even in such marriages, the researcher doubts whether customs which deprive women of their property rights in marriages will survive a constitutional challenge in view of the provisions of section 42(1) of the Constitution of the Federal Republic of Nigeria, 1999⁶³ because such customs are inherently discriminatory.⁶⁴

⁵⁷ See Omege, 2013 *European Scientific Journal*, 324 at 326; Edu, "Women and Property Rights under Customary Law" in Oho and Edu ed., *Women, Law & Family*, 136.

⁵⁸ See Alemika, 2010 *University of Maiduguri Law Journal*, 25 at 33; Daley and Englert, 2010 *Journal of Easter African Studies*, 91 at 98; Odiaka, 2013 *Afe Babalola University: Journal of Sustainable Development Law and Policy*, 190 at 191, 204, 205; Ekhaton, 2015 *Journal of International Women's Studies*, 285 at 285, 293; Edu, "Women and Property Rights under Customary Law" in Oho and Edu ed., *Women, Law & Family*, 144. See also 2.8 above.

⁵⁹ 2010 *University of Maiduguri Law Journal*, 25.

⁶⁰ Enwereji, 2008 *Eur J Gen Med*, 165.

⁶¹ Nwogugu, *Family Law in Nigeria*, 81.

⁶² *Jadesimi v Okotie-Eboh & Ors* [1996] 2 NWLR (Pt. 429) 128 at 153. See also Nwogugu, *Family Law in Nigeria*, 82 – 84.

⁶³ Cap C23 Laws of the Federation of Nigeria 2004.

⁶⁴ See *Dawodu v Danmole* (1962) 2 SCNLR 215; *Onyibor Anekwe & Anor v Mrs. Maria Nweke* 2014 Legalpedia SC L43L.

In *Olabiwonnu v Olabiwonnu*,⁶⁵ the wife (petitioner) in her petition for the dissolution of the marriage sought an ancillary order to eject the husband (respondent) from a property which they both occupied as husband and wife. Alternatively, she asked the court either to direct the husband to pay her the total sum of ₦2, 300, 000.00 being the sum expended on the property or to mandate the husband to collect from her the total sum of ₦700, 000.00 as money which he had spent on the property. The husband challenged the wife's claim and asserted that the property belonged to him exclusively.

The trial court found that neither of the spouses had proved their respective claims to exclusive ownership and proceeded to hold that the property was a matrimonial home. Although the wife's claim for ejection failed, the trial court ordered the husband to vacate the matrimonial home in order for it to be sold by auction and the proceeds shared between the spouses in accordance with Yoruba customary law. Aggrieved by the judgement, the husband appealed. Overturning the judgement of the court in respect of the matrimonial home, the Court of Appeal⁶⁶ held:

“Having found that the Appellant cannot be ejected from the house it amounted to the same thing asking him to vacate the house and for it to be sold and the proceeds distributed according to Yoruba custom. I agree entirely with learned counsel for the Appellants that Yoruba customary Law was inapplicable to this petition for the dissolution of a statutory marriage. There was therefore no basis for invoking Customary Law principles of distribution of the proceeds of the sale of the house.”

It is emphasised that the above case⁶⁷ supports the argument that customs have no place in the determination of the property rights of spouses upon the breakdown of civil marriages.⁶⁸ The rights and obligations of spouses, including their right to a settlement of property, are, thus, governed by the Marriage Act of 1914⁶⁹ and the Matrimonial Causes Act No 18 of 1970⁷⁰ which expressly exclude the application of any customary law.⁷¹

It is submitted that the modern trend in family law practice and litigation the world

⁶⁵ (2014) LPELR 24065 (CA).

⁶⁶ *Olabiwonnu v Olabiwonnu* (2014) LPELR 24065 (CA) at 20.

⁶⁷ *Olabiwonnu v Olabiwonnu* (2014) LPELR 24065 (CA).

⁶⁸ See Nwogugu, *Family Law in Nigeria 2nd ed*, 67 – 68.

⁶⁹ Cap M6 Laws of the Federation of Nigeria, 2004.

⁷⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

⁷¹ *Olabiwonnu v Olabiwonnu* (2014) LPELR 24065 (CA) 1 at 20.

over seems to elude most lawyers and judges in Nigeria who prefer to adopt religious and orthodox concepts (customs) when considering the incidents of civil marriages and the division of marital property arising therefrom.⁷² It becomes appalling when a judge makes orders for ancillary relief on the dissolution of civil marriages based on his prejudice or what he believes accords with local customs. In such cases, judges make reference to the incompatibility of western customs to local customs as a justification for not altering the property interests of spouses except where there is evidence of financial joint contribution to the property in question.

It is further submitted that, where spouses have by their choice elected to go through the ceremony of marriage as provided for by the Marriage Act of 1914⁷³ which is alien to our local customs and traditions, they should also be willing and ready to accept all the incidents of such a marriage during its subsistence and upon its breakdown.⁷⁴ This also includes the property rights of spouses on the breakdown of marriage. According to Nwogugu,⁷⁵ when parties are married under the Marriage Act of 1914⁷⁶, they are entitled only to such rights and obligations as created by that marriage. In the words of Nwogugu "... marriage under the Marriage Act clothes the parties to it with rights and obligations which are unknown to customary law."⁷⁷

7.2.2.3 The Need for Judicial Activism

It is important to bear in mind that there is paucity of the Supreme Court's decisions in respect of the settlement of property between spouses on the breakdown of civil marriages in Nigeria.⁷⁸ The closest decision of the Supreme Court in relation to

⁷² See *Olabiwonnu v Olabiwonnu* (2014) LPELR 24065 (CA) 1 at 20.

⁷³ Cap M6 Laws of the Federation of Nigeria, 2004.

⁷⁴ The point is that customs are not applicable to marriages celebrated under the Marriage Act of 1914 Cap M6 Laws of the Federation of Nigeria, 2004. See *Olabiwonnu v Olabiwonnu* (2014) LPELR 24065 (CA) 1.

⁷⁵ *Family Law in Nigeria 2nd ed*, 67.

⁷⁶ Cap M6 Laws of the Federation of Nigeria, 2004.

⁷⁷ Nwogugu, *Family Law in Nigeria 2nd ed*, 68.

⁷⁸ It is observed that most of cases on dissolution of marriages end up in the high courts. A few, which relate to the grant or refusal of ancillary relief (including the determination of property rights), proceed to the Court of Appeal for appropriate redress where the parties are not satisfied. Such cases, after being decided by the Court of Appeal rarely proceed to the Supreme Court. Although the court is not an avenue where academic questions are decided, one may ask whether there are no legal (live) issues which necessarily arise from the appellate courts' judgements. The Supreme Court has stated in *Ozonma (Barr.) Chidi Nobis – Elendu v Independent National Electoral Commission (INEC) & Ors* (2015) LPELR-25127(SC) at ratio 6 that it is not the court's duty to determine an academic issue or solve a hypothetical question. Per Iyizoba JCA in *IPC (Nigeria) Ltd v NNPC* (2015) LPELR-24652(CA) at ratio 1 stated: "An academic question is an issue which does not require answer or adjudication by the court because it is not necessary to the case. A suit is said to be academic where it is merely

“matrimonial property” and questions relating to its ownership between spouses was decided in 1992 in the case of *Amadi v Nwosu*.⁷⁹ The judgement in this case has, since 1992, thus, guided the lower courts in the determination of the property rights of spouses on marriage breakdown. This strict property right approach adopted by the court has been criticised as having “... failed to recognise that because of the peculiar nature of marriage and its interwoven duties between spouses, strict rules of property law will not be proper in trying to arrive at a proper and commensurate compensation.”⁸⁰

It is lamentable that the “new approach” of the courts in the resolution of matrimonial property disputes as discussed in this study has proceeded from the Court of Appeal which is the penultimate court in Nigeria. The researcher is of the view that the judicial pronouncements which have emanated from the Court of Appeal are not unequivocal, until they are tested at, and approved by, the Supreme Court of Nigeria.

Bearing in mind the changing nature of the law and the state of civilisation which Nigeria has attained in respect of the emancipation of women,⁸¹ it is hoped that the Supreme Court will someday advance the property rights of spouses upon civil

theoretical and of no practical utilitarian value to the plaintiff even if judgment is given in his favour.” In *Agbakoba v INEC* [2008] NWLR (Pt. 1119) 489, the Supreme Court observed: “An action becomes hypothetical or raises mere academic point when there is no live matter in it to be adjudicated upon or when its determination holds no practical or tangible value for making a pronouncement upon it. It is otherwise an exercise in futility. When an issue in an appeal has become defunct it does not require to be answered or controverted about and leads to making of bare legal postulations which the court should not indulge in; it is like the salt that has lost its seasoning. And like the salt in that state it has no practical value to any body and so also, a suit in that state has none particularly, and practically to the plaintiff.” As noted earlier, arising from how the relief sought before the trial courts are drafted and the evidence adduced upon the pleaded facts, there is likely to be no legal (novel) issue which will warrant a further appeal to the Supreme Court. The researcher also notes the possibility of litigants being wary of protracted legal battles which could take a number of years before they are eventually determined on appeal. For instance, the case of *Mueller v Mueller* (2005) LPELR 12687 (CA) lasted for about six years between the time when the trial courts made its respective orders on 20/12/1999 and 15/02/2000 (both of which orders were appealed against) and when the Court of Appeal (Port-Harcourt Division) delivered judgement on 18/12/2005. In *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt. 1182) 564, seven years had elapsed before the Court of Appeal (Lagos Division) delivered its judgement. The appeal was entered in 2003 and judgement was delivered on 14/01/2010. *Okere v Akaluka* (2014) LPELR-24287 (CA) took eight years before the Court of Appeal (Port-Harcourt Division) finally delivered judgement on 14/11/2014 in an appeal that was entered in 2006. This could also be responsible for litigants’ lack of interest in further appeals to the Supreme Court. Spouses to failed marriages may want to recover from the shock and losses which arose from their marital union quickly and put them aside as fast as possible and hope for a promising future.

⁷⁹ 1992 Legalpedia SC UJBT 1. This case was not based on a petition for dissolution of marriage. It was a civil suit wherein a property which was alleged to be a “family property” (matrimonial property) was sold to a third party by one of the spouses who claimed sole ownership as against the other spouse’s claim for joint ownership.

⁸⁰ Arinze-Umobi, 2004 *Unizik Law Journal*, 188 at 197.

⁸¹ See *Mueller v Mueller* (2005) LPELR 12687 (CA) at 21, per Aderemi JCA (as he then was).

marriage breakdown in line with the existing realities in this country and as seen in other countries of the world while taking cognisance of our local situations as they relate to the financial conduct between husbands and wives in matrimony.

7.3 CONTRIBUTION TO KNOWLEDGE

This study questions the usefulness of the general perception in relation to the property rights of spouses on civil marriage breakdown in Nigeria.

It suggests a suitable solution to the established legal problems by proposing a default matrimonial property system in the absence of a marital property agreement between spouses which states otherwise.

The study also creates an avenue for, and opens up the possibility of, utilising trust and equitable principles in the determination of the property rights of spouses.

A matrimonial property regime which is devoid of discrimination and unfairness is advanced to give effect to the contractual rights of spouses (if any), recognise the equal rights of spouses to the “matrimonial property”, and give courts the discretion to redistribute “matrimonial property” in certain factual situations on the basis of what is just and equitable.

The study contributes to knowledge by making a case for the preservation of the independence and equality of spouses with regard to their proprietary rights in marriages.

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LIST OF ABBREVIATIONS

JOURNALS

<i>CILSA</i>	<i>Comparative and International Law Journal of Southern Africa</i>
<i>CJWLD/RFD</i>	<i>Canadian Journal of Women and the Law/Revue Femmes et droit</i>
<i>Eur J Gen Med</i>	<i>European Journal of General Medicine</i>
<i>JILI</i>	<i>Journal of the Indian Law Institute</i>
<i>PER</i>	<i>Potchefstroom Electronic Law Journal</i>
<i>SAJHR</i>	<i>South African Journal on Human Rights</i>
<i>SALJ</i>	<i>South African Law Journal</i>
<i>THRHR</i>	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>

LAW REPORTS

AC	Appeal Cases
All ER	All England Law Reports
All FWLR	All Federation Weekly Law Reports
All SA	All South African Law Reports
Ch	Law Reports, Chancery Division
CLR	Commonwealth Law Reports
ECSNLR	Eastern Central States of Nigeria Law Reports
EWCA Civ	England and Wales Court of Appeal Civil Division
EWHC	England and Wales High Court

Fam LR	Family Law Reports
Fam	Law Reports, Family Division
Fam. Law	Family Law
FamCA	Family Court of Australia
FamCAFC	Family Court of Australia – Full Court
FCCA	Federal Circuit Court of Australia
FCWA	Family Court of Western Australia
FLC	Family Law Cases
FLR	Family Law Reports (UK)
FLR	Federal Law Reports (Australia)
FMCAfam	Federal Magistrates Court of Australia, family law decisions
FNLR	Federation of Nigeria Law Reports
HCA	High Court of Australia
L R P & D	Law Reports, Probate and Divorce Cases
LJ Ch	Law Journal, Chancery
LLR	Lagos Law Reports
LPELR	Law Pavilion Electronic Law Reports
LRCN	Law Reports of Courts of Nigeria
NLR	Nigerian Law Reports
NMLR	Nigerian Monthly Law Reports
NSWR	New South Wales Reports

NWLR	Nigerian Weekly Law Reports
P & CR	Property, Planning and Compensation Reports
P	Law Reports, Probate Division
SA	South African Law Reports
SC	Supreme Court Cases (Nigeria)
SCNLR	Supreme Court of Nigeria Law Reports
TLR	Times Law Report
UKPC	United Kingdom Privy Council
WACA	West African Court of Appeal
WL	Westlaw
WLR	Weekly Law Reports
WRN	Weekly Reports of Nigeria

OTHERS

art	article
CA	Court of Appeal
Cap	Chapter
CC	Constitutional Court
cl	clause
Cth	Commonwealth
ed(s)	edition/editor(s)

<i>et al.</i>	and others
fn	footnote
HL	House of Lords
Iss	Issue
J	Judge
JCA	Justice of Court of Appeal
JJSC	Justices of the Supreme Court
JSC	Justice of the Supreme Court
LJ	Lord Justice
MCA	Matrimonial Causes Act
MR	Master of the Rolls
No/no	number
NSW	New South Wales
para(s)	paragraph(s)
PCA	Privy Council Appeal
Per/per	As laid down by/according to
Pt	Part
Q	Queensland
Rev	Revised
s(s)	section(s)
SC	Supreme Court

SC(E)	Supreme Court of England
SCA	Supreme Court of Appeal
ssrn	social science research network
UN	United Nations
Vol	Volume