



THE UNIVERSITY OF ZAMBIA
INSTITUTE OF DISTANCE EDUCATION
BACHELOR OF LAWS
MODULE

LPU 3940 FAMILY LAW AND SUCCESSION MODULE

ACKNOWLEDGEMENTS

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Inquiries concerning reproduction or rights and requests for additional training materials should be addressed to:

The Director,

Institute of Distance Education

The University of Zambia

P.O. Box 32379

Lusaka

Zambia

Tel: +211 290719 ,Fax: +211 253952 ,E-mail: director-ide@unza.zm Website: www.unza.zm

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In case you encounter any problem relating to this module, please get in touch with the Director, Institute of Distance Education, or Resident Lecturer in your province.

All enquiries in connection with your studies should directed to:

The Director,

Institute of Distance of Education

University of Zambia

P. O. Box 32379,

10101 Lusaka

Zambia

Coordinator, Learner Support Services (Land Cell): +260 978772248

Senior Administrative Officer

(Programme Development & Production) 0978772248

IDE Land Line: +260 211 290719, 0978772248

IDE Fax: +260 211 290719

IDE E-mail: director-ide@unza.zm

<http://ide.unza.zm>

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LPR: 3940 FAMILY LAW AND SUCCESSION

COURSE OUTLINE

Aim

The aim of this course is to introduce students to the principles of family law and succession in Zambia

Objectives

At the end of this course, students should be able to;

1. Define a family and discuss the challenges surrounding the definition;
2. Describe the creation and dissolution of the marital status, analyse the different kinds of marriages and discuss the rights and duties of the parties to a marriage;
3. Explain relations between parent and child and outline the law relating to legitimacy, custody, adoption, affiliation and maintenance;
4. Critically discuss gendered socio-economic status as it relates to marital relations; and
5. Analyse the law relating to succession and inheritance.

Content

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- Historical background of family law
- African understanding of family
- Sources of Family Law and Zambia's dual legal system

Readings: N Lowe & G Douglas, Bromley's Family Law, Oxford University Press, Oxford, 2015. Pages 1-19
Lillian Mushota, Family Law. Pages 35-53;1-6;9-33
Tully Vs Tully (1965 ZR 165

UNIT TWO FAMILY AND MARRIAGE

- Definition of family socially/legally
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- The legal effect of marriage
- Recognition of customary law marriages in Zambia
- Status of religious marriages in Zambia

- Co-habiting and the common marriage
- Presumption of Marriage
- Requirements for a valid marriage

Readings: N Lowe & G Douglas, Bromley's Family Law, Oxford University Press, Oxford, 2015, Pages 30-61
Lillian Mushota, Family Law. Pages 55-101
Marriage Act Chapter 50 of the laws of Zambia

Cases: The People Vs Chitambala (1969) ZR 142, Hyde Vs Hyde (1866) LR1, R Vs Chinjamba 5 NRLR 383, Fenias Mafemba Vs Esther Sitali SCZ/24/2007

UNIT THREE NULLITY OF MARRIAGE

- Introduction to Nullity of Marriage
- Voidable marriage
 - ✓ Non consummation, lack of consent, Wilful refusal to consummate
- Void marriages
 - ✓ Grounds on which a marriage is void

Readings: Bromley's Family Law. Pages 62-88
L. Mushota, Family Law. Pages 103-153
Marriage Act Chapter 50
Matrimonial Causes Act No. 20 of 2007

Cases: Muyumwa Vs Muyumwa (1976) ZR 146; Hafiz Ayub Durga Vs Najmunissa Ismail SCZ/67/1992; The People Vs Chitambala (1969) ZR 142; The People Vs Nkoma (1978) ZR 4; The people Vs Katongo (1974) ZR 290

UNIT FOUR DIVORCE

- **Statutory Law Marriage**
 - Divorce: ground and facts for divorce
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- **Customary Law Marriage**
 - Divorce under customary law
 - Grounds for divorce
 - ✓ Adultery, Behaviour. Desertion, Childlessness, illness and laziness

Readings: L. Mushota, Family Law.

Readings: Bromley's Family Law. Pages 211-243
L. Mushota, Family Law. Pages 155-356, Pages 369-375

Cases: Matrimonial Causes Act No. 20 of 2007
Re Meyrick's Settlement (1921) 1 CH 311; Anne Scott Vs Oliver Scott SCZ/3/2007; Somanje Vs Somanje (1972) ZR 301. Makata v Mukata 2011/HP/D.77; Chibwe Vs Chibwe SCZ/38/2000; Mwiya Vs. Mwiya (1977) ZR 73

UNIT FIVE PROPERTY AND FINANCIAL PROVISION AFTER DIVORCE

- Definition of maintenance
- Maintenance both within and after marriage
- Maintenance of spouse and children
- Application for maintenance order
- Property adjustment
- The needs test and other factors
- Custody of children
 - The Principle of the Best Interest of the Child
 - The rights of a child
 - ✓ Maintenance under statutory law
 - ✓ Maintenance under customary law

Readings: Matrimonial Causes Act, No. 20 of 2007

Bromley's Family Law. Pages 826-925

L. Mushota, Family Law. Pages 277-375

Cases:

Mukata Vs Mukata 2011/HP/D.77

Chibwe v Chibwe SCZ/38/200

C v C & D (1977) ZR 5

Suter v Suter & John (1987) 2 All ER 336

UNIT SIX LEGITIMACY AND ADOPTION OF A CHILD

- What is Legitimacy
 - ✓ Rights of illegitimate children
 - ✓ Extra Marital Children
- Definition of adoption
 - ✓ Procedure for adopting a child in Zambia
 - ✓ Status conferred by adoption of a child.

Cases: Lungowe Lubasi Mtonga v Elvis Mtonga SCZ/2003/37; Gary John Hindson Vs Valerie Joyce Sutherland 2009/HP/1057; Jussa v Jussa (1972) 2 All ER 600; M v M (1973) 2 All ER 81

Readings: Bromley's Family Law. Pages 296-772

L. Mushota, Family Law. Pages 377-419

Matrimonial Causes Act No. 20 of 2007

Legitimacy Act, Chapter 52 of the Laws of Zambia

Adoption and Maintenance of Children Act, Chapter 64 of the Laws of Zambia

UNIT SEVEN MAINTENANCE OF CHILDREN AFTER DIVORCE

- Child maintenance and affiliation

- Maintenance orders
 - ✓ Types of maintenance orders and their duration.
 - ✓ Maintenance under statutory law
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UNIT EIGHT CUSTODY OF CHILDREN AFTER DIVORCE

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 - ✓ The Principle of the Best Interest of the Child
 - ✓ The rights of a child

UNITY NINE INHERITANCE AND SUCCESSION

- Definition of inheritance
- Definition of succession
- Intestate succession
 - Purpose of the Intestate Succession Act
 - Distribution of estates
 - Appointment of administrators
 - Duties of administrators

Readings: Bromley's Family Law. Pages 951-991
L. Mushota, Family Law. Pages 411-542

Cases: Chali Vs Mwalla (1995-1997) ZR 199; Gary Nachandwe Mudenda Vs Dorothy Chileshe Mudenda SC/12/2006; Ireen Ngosa Vs Oliver Sapangwa 2005/HL/25; Weston Chilombo Vs Kapotwe Silomba and Morad Kapdi 2007/HN/100

UNITY TEN. TESTATE SUCCESSION

- Capacity to make a will
- Requirements of a valid will
- Unreasonable provision in a will
- Appointment of Executor
- Revocation

Readings: Bromley's Family Law. Pages 959-993
L. Mushota, Family Law. Pages 421-552

Cases: Lotta Frans Vs Inge Pascheke and others; cases No. (P) 11548/2005; Charity Oparacha Vs Winfridah Murambiwa SCZ/15/2004; Mwananshiku and others vs Kemp and Another (1990-1992) ZR 42

Method of teaching

Four hours of lecture and one tutorial per week

Assessment

Two Assignments	20%
Two tests of equal weight	20%
Examination	60%

Prescribed Readings

Bromley, Peter M. Family Law. London: Butterworths, 1974

Recommended Readings

Mushota, Lillian. Family Law in Zambia: cases and materials. Lusaka: UNZA Press-University of Zambia, 2005.

Levin, Irene, and Jan Trost. (Understanding the Concept of Family. "Family Relations 41, no. 3 (1992): 348

Rwezaura, Bart, Alice Armstrong, Welshaman, Julie Stewart, Puleng lekuta, Priscilla Musanya, Isabel Casimiro, and Mothokoa Mamashela. "Parting the Long Grass". The Journal of Pluralism and Unofficial Law 27, no 35 (1995): 25-73

Turkoz Meltem, 'Surname Narratives and the state-society boundary: Memories of Turkey's Family Name Law of 1934. "Middle Eastern Studies, Volume 6 (Nov. 2007) pp. 893-908.

Turkoz M, 'Surname Narratives and the state-society boundary: Memories of Turkey's Family Name Law of 1934. "Middle Eastern Studies, Volume 6 (Nov. 2007) pp. 893-908.

Matakala, Lungowe. Inheritance and disinheritance of widows and orphans in Zambia: getting the best out of Zambian Law. Great Britain: University of Cambridge, 2010

UNIT 1 INTRODUCTION TO FAMILY LAW

Introduction

Family law (also called matrimonial law) is an area of the law that deals with family matters and domestic relations, including:

- marriage, civil unions, and domestic partnerships;
- adoption and surrogacy
- child abuse and child abduction
- the termination of relationships and ancillary matters, including divorce, annulment, property settlements, alimony, child custody and visitation, child support and alimony awards.
- juvenile adjudication
- paternity testing and paternity fraud

This list is not exhaustive and varies depending on jurisdiction. In many jurisdictions in the United States, the family courts see the most crowded dockets. Litigants representative of all social and economic classes are parties within the system.

Objectives

At the end of this chapter students must be able to:

1. Define family law
2. Elaborate the scope of family law
3. Discuss the importance of family law to the country
4. Comprehensively discuss the various laws regulating family law in Zambia

Family law (also called matrimonial law) is an area of the law that deals with family matters and domestic relations, including:

- Family and marriage and other civil unions;

- Customary and Statutory marriage
- adoption and Legimaticy
- Child custody and Child maintenance
- Termination of relationships and ancillary matters, including divorce, annulment, property settlements, alimony, child custody and visitation, child support and alimony awards.
- Domestic violence in a marriage and remedies
- Inheritance and Succession

This list is not exhaustive and varies depending on jurisdiction. In many jurisdictions in the United States, the family courts see the most crowded dockets. Litigants representative of all social and economic classes are parties within the system.

1.1 What does Family Law consists of?

Family law consists of a body of statutes and case precedents that govern the legal responsibilities between individuals who share a domestic connection. These cases usually involve parties who are related by blood or marriage, but family law can affect those in more distant or casual relationships as well. Due to the emotionally-charged nature of most family law cases, litigants are strongly advised to retain legal counsel.

The vast majority of family law proceedings come about as a result of the termination of a marriage or romantic relationship. Family law attorneys help their clients file for separation or divorce, alimony, and child custody, visitation, and support. Spouses married a short time may seek an annulment, and special rights may exist between same-sex couples. The division of property at the end of a marriage is also a common issue in family law cases. With respect to property division at the time of divorce, every state has a comprehensive set of laws in place to determine the rights of the parties. However, couples who do not agree with the default rules in their state can “opt-out” by hiring a lawyer to draft a prenuptial agreement. Absent fraud or duress, courts will enforce these premarital agreements upon divorce, and distribute property and financial support accordingly.

Family law also involves the prevention of physical and emotional abuse. The potential for domestic abuse is not limited to relationships between current or former spouses and their children. Judges will not hesitate to assert jurisdiction to protect an elderly family member, someone in a dating relationship, or even a roommate. When allegations of abuse are made, the court will typically issue a restraining order to prevent further contact.

In a contested family law case, most people understand that hiring a skilled attorney will provide an

advantage. An attorney can find assets or income the other party is trying to hide, present arguments regarding child support and visitation, and even take the case to trial if settlement talks fail. Attorney representation is just as crucial in uncontested cases, however. Without it, a party is vulnerable and can unknowingly waive important legal rights.

Family law is the branch of private law dealing with issues relating to matrimony and attendant matters arising therefrom.

- **Family law** (also called **matrimonial law** or the *law of domestic relations*) is an area of the law that deals with family matters and domestic relations.
- It defines the rules and regulations governing marriages and relationships between man and woman as well as those between parent and child.
- Family law proposes that the basis of societal existence is the family through which procreation takes place and thereby the continuity of human society.
- Family law comprises the following issues: marriage, divorce, inheritance and succession. These are generally very broad categories encompassing the rights of individuals involved. There are also specific matters relating to women and children, especially as regards their human rights within the confines of the home.
- It is generally seen as the body of law which governs relationships between parents and children, between adults in close relationships and also between the state and the family.

1.2 Purpose of family law

- To protect the weakest in society e.g. children, women, victims of violence etc
- Offers support especially in difficult times and in times of family activities and events such as weddings, kitchen parties etc
- Regulates what happens in families especially those that have broken down through divorce or those where death has occurred.

1.3 Sources of Family Law

As with every other law, there are various sources from which family law draws its authenticity. Some of these sources are:

- a) Customary law as found and practiced by the various ethnic groupings in Zambia. Zambia has 73 ethnic groupings each with its traditions and customs. The family in Zambia is greatly influenced by custom and tradition. As such, customary law is a rich source of family law in the country.

- b) Statutory law which includes the following:
- i) The Marriage Act, Chapter 50 of the laws of Zambia. This provides rules and regulations relating to contracting of valid statutory law marriages.
 - ii) The Subordinate Courts Act chapter 28 of the Laws of Zambia, the High Court Act chapter 27 of the laws of Zambia as well as the Local Courts Act chapter 29 of the Laws of Zambia to the limited extent to which the said Acts allow courts to deal with matters of family law. For example the local courts have original jurisdiction in matters relating to marriages under customary law while the High Court has original jurisdiction in cases relating to marriages under the Marriage Act. The intestate succession Act and the Administration of Testate Estates Act deal with inheritance and succession. The Act to be used depends on the question before the court.
 - iii) The constitution, chapter 1 of the laws of Zambia. This is the supreme law of the land and every other law derives its authenticity from it. Of particular interest to family law is the bill of rights.
 - iv) English law as extended to Zambia through various pieces of legislation, chapter 11, chapter 27 and chapter 10 and also through case law
- c) Case law. This is at three levels. There are local judgments which are binding under the doctrine of stare decisis. There are also foreign cases which may be used by the courts for persuasive value and lastly English decisions which may be used for persuasive value or could be binding depending on whether Zambia has a precedent or not.
- d) Text books and other publications
- e) International law as contained in various instruments.

Revision Questions

1. Write comprehensively on the various aspects of family law discussed in this unit.
2. What are the various sources of family?

Recommended texts

Haviland, William A.; Prins, Harald E. L.; McBride, Bunny; Walrath, Dana (2011). Cultural Anthropology: The Human Challenge (13th ed.). Cengage Learning. [ISBN 978-0-495-81178-7](https://doi.org/10.1080/9780495811787).

UNIT TWO A FAMILY AND MARRIAGE

INTRODUCTION

The aim of this unit is to expose you to the laws of marriage that apply in Zambia, and the modifications that have been or may be made to the English Law that applies to Zambia to suit local conditions. The unit will give an expose of both civil and customary marriages, and the structures that administer them. At the end of this unit, you should be able to advise a client on the advantages and disadvantages of each type of marriage, so that they may make reasoned decisions.

Objectives

By the end of this chapter students must be able to :

1. Define of a family
2. Definition of marriage
3. Identify and explain the different types of marriage from the global perspective.
4. Identify and explain the requirements of a valid civil marriage
5. Explain the advantages and disadvantages of both civil and customary law marriages
6. Explain what a common law marriage is and its implications on the Zambian legal system
7. Identify and explain offences and penalties under the Marriage Act

2.1 What is a family?

- Defined as a social concept, a family is said to be “a community in itself, a small relatively permanent group of people related to each other in the most intimate way, bound together by the most personal aspects of life and who have to strive continually to resolve those claims and counter claims which stem from mutual but often conflicting needs; who experience continual responsibilities and obligations towards each other; who experience the sense of belonging to each other in the most intimately felt sense of the word.” R Fletcher, *The Family and Marriage in Britain* (1966/1969) Pelican Books.
- Defined as a legal entity, a family is the natural and fundamental group or unit of society and is entitled to protection by society and the state. See the UDHR 1948, article 16.
- Simply put, a family is the primary unit of existence for the human race. It is also the surest way of continuity of society in terms of procreation, values, morals etc. It provides support and stability to members.

- The notion of family is not confined to marriage based relationships and may encompass other groupings and defacto families. See Keegan v Ireland (1994) EHRR 342.
- Of course the ideal situation and popular image of the family is that of a marital relationship where husband and wife live together with their children.
- A family is also a group of people who come together for a common purpose. However, for purposes of this course, the family is one in which persons are related to one another through blood or marriage ie affinity and consanguinity.
- A family is an important institution in society and as such it is protected both at international and national levels. Both international and national human rights law protect the right to participate in family life.
- It is undisputable that a lot of changes have happened in relation to the notion of a family. The ideal situation does not seem to be so ideal any more. This is against the backdrop of claims for enjoyment of human rights. It should be noted however that the Zambian society believes in upholding the family and the morals in every society. Although divorce may seem common nowadays, the process is an arduous one.
- Note that there is a difference between a marriage and a family. The former refers to an intimate relationship between a man and woman while the latter refers to a group of people who come together for a common purpose. It is common for people to use the two interchangeably. However, that should not be the case.

2.2 MARRIAGE

This is the basis upon which a family is founded. It is the surest way of continuity of society because procreation takes place or is supposed to take place within the marriage.

Parties are supposed to enter into a marriage willingly and live in that relationship for their life time. It is important to recognize that love and companionship is the basis for a good marital relationship.

Sometimes people are forced to enter into marriage because of circumstances eg pregnancy outside wedlock, lack of family support etc.

Other times people have wrong reasons for entering into marriage eg having access to good cars, houses etc., beauty, and luxury among others.

Entering into a marriage for wrong reasons promotes violence and unruly upbringing of children

Like all other contracts, parties to a marriage must consent to its making. However, the relationship created goes beyond a mere contract as it confers on the parties' status, rights and duties.

The contract of marriage is based on the Christian understanding of marriage which promotes lifelong relationships. Therefore once married always married. Divorce brings disunity and suffering on the parties and offspring, if any, and should therefore not be entertained as part of the marriage contract.

2.3 Importance of Marriage

- Marriage is important for the continuation of society. Same sex marriages which have been topical of late are not legal in Zambia and further more procreation in these marriages is practically impossible. Promoting same sex marriages might lead the society to extinction.
- It legitimizes children
- It promotes stability of the nation through the duplication of the unity enjoyed in marriages at national level
- It reduces incidences of disease

2.4 Definition of Marriage

A statutory law marriage has been defined in the case of *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D130 as “a voluntary union for life of one man and one woman to the exclusion of all others”.

Under customary law, a marriage is a union of one man with one or more women.

The Christian doctrines also take a marriage to be a union of one and one woman for life until death parts them

From the above definitions, certain conclusions can be made after assessing the current situation of marriages. It can be said that the definitions especially the statutory law and Christian one have been overtaken by events in many ways including:

- i) Divorce defeats the aspect of a lifelong relationship thereby watering down the sanctity of marriage.
- ii) Multiple partners and polygamy defeats monogamy. Polygamy is allowed under customary law

iii) Arranged and forced marriages defeat the aspect of voluntariness (Sowa v Sowa (1991)ZR 68)

iv) Same sex marriages defeat the heterosexual nature of marriage

3.4 TYPES OF MARRIAGE

Monogamy

Monogamy is a form of marriage in which an individual has only one spouse during their lifetime or at any one time (serial monogamy). Anthropologist Jack Goody's comparative study of marriage around the world utilizing the Ethnographic Atlas found a strong correlation between intensive plough agriculture, dowry and monogamy. This pattern was found in a broad swath of Eurasian societies from Japan to Ireland. The majority of Sub-Saharan African societies that practice extensive hoe agriculture, in contrast, show a correlation between "Bride price," and polygamy. A further study drawing on the Ethnographic Atlas showed a statistical correlation between increasing size of the society, the belief in "high gods" to support human morality, and monogamy.

In the countries which do not permit polygamy, a person who marries in one of those countries a person while still being lawfully married to another commits the crime of bigamy. In all cases, the second marriage is considered legally null and void. Besides the second and subsequent marriages being void, the bigamist is also liable to other penalties, which also vary between jurisdictions.

Serial monogamy

Governments that support monogamy, may allow easy divorce. In a number of Western countries divorce rates approach 50%. Those who remarry do so on average 3 time. Divorce and remarriage can thus result in "serial monogamy", i.e. multiple marriages but only one legal spouse at a time. This can be interpreted as a form of plural mating, as are those societies dominated by female-headed families in the Caribbean, Mauritius and Brazil where there is frequent rotation of unmarried partners. In all, these account for 16 to 24% of the "monogamous" category.

Serial monogamy creates a new kind of relative, the "ex-". The "ex-wife", for example, remains an active part of her "ex-husband's" life, as they may be tied together by transfers of resources (alimony, child support), or shared child custody. Bob Simpson notes that in the British case, serial monogamy creates an "extended family" – a number of households tied together in this way, including mobile children (possible ex's may include an ex-wife, an ex-brother-in-law, etc., but not an "ex-child"). These "unclear families" do not fit the mould of the monogamous nuclear

family. As a series of connected households, they come to resemble the polygynous model of separate households maintained by mothers with children, tied by a male to whom they are married or divorced.

Polygamy

Polygamy is a marriage which includes more than two partners. When a man is married to more than one wife at a time, the relationship is called polygyny, and there is no marriage bond between the wives; and when a woman is married to more than one husband at a time, it is called polyandry, and there is no marriage bond between the husbands. If a marriage includes multiple husbands and wives, it can be called group marriage. Marriages are classified according to the number of legal spouses an individual has. The suffix "-gamy" refers specifically to the number of spouses, as in bi-gamy (two spouses, generally illegal in most nations), and poly-gamy (more than one spouse).

Plural marriage

Group marriage (also known as *multi-lateral marriage*) is a form of polyamory in which more than two persons form a family unit, with all the members of the group marriage being considered to be married to all the other members of the group marriage, and all members of the marriage share parental responsibility for any children arising from the marriage. No country legally condones group marriages, neither under the law nor as a common law marriage, but historically it has been practiced by some cultures of Polynesia, Asia, Papua New Guinea and the Americas – as well as in some intentional communities and alternative subcultures such as the Oneida Perfectionists in up-state New York. Of the 250 societies reported by the American anthropologist George P. Murdock in 1949, only the Caingang of Brazil had any group marriages at all.

Child marriage

A child marriage is a marriage where one or both spouses are under the age of 18. It is related to child betrothal and teenage pregnancy. Child marriage was common throughout history, even up until the 1900s in the United States, where in 1880 CE, in the state of Delaware, the age of consent for marriage was 7 years old. Today it is condemned by international human rights organizations. Child marriages are often arranged between the families of the future bride and groom, sometimes as soon as the girl is born. However, in the late 1800s in England and the United States, feminist activists began calling for raised age of consent laws, which was eventually handled in the 1920s, having been raised to 16-18. Child marriages can also occur in the context of marriage by abduction.

Temporary marriages

Several cultures have practiced temporary and conditional marriages. Examples include the Celtic practice of hand fasting and fixed-term marriages in the Muslim community. Pre-Islamic Arabs practiced a form of temporary marriage that carries on today in the practice of Nikah Mut'ah, a fixed-term marriage contract. The Islamic prophet Muhammad sanctioned a temporary marriage – sigheh in Iran and muta'a in Iraq – which can provide a legitimizing cover for sex workers. The same forms of temporary marriage have been used in Egypt, Lebanon and Iran to make the donation of a human ova legal for in vitro fertilization; a woman cannot, however, use this kind of marriage to obtain a sperm donation.^[52] Muslim controversies related to Nikah Mut'ah have resulted in the practice being confined mostly to Shi'ite communities. The matrilineal Mosuo of China practice what they call "walking marriage".

Prescriptive marriage

In a wide array of lineage-based societies with a classificatory kinship system, potential spouses are sought from a specific class of relative as determined by a prescriptive marriage rule. This rule may be expressed by anthropologists using a "descriptive" kinship term, such as a "man's mother's brother's daughter" (also known as a "cross-cousin"). Such descriptive rules mask the participant's perspective: a man should marry a woman from his mother's lineage. Within the society's kinship terminology, such relatives are usually indicated by a specific term which sets them apart as potentially marriageable. Pierre Bourdieu notes, however, that very few marriages ever follow the rule, and that when they do so, it is for "practical kinship" reasons such as the preservation of family property, rather than the "official kinship" ideology.^[77] Insofar as regular marriages following prescriptive rules occur, lineages are linked together in fixed relationships; these ties between lineages may form political alliances in kinship dominated societies.^[78] French structural anthropologist Claude Lévi-Strauss developed alliance theory to account for the "elementary" kinship structures created by the limited number of prescriptive marriage rules possible.^[79]

Forced marriage

A forced marriage is a marriage in which one or both of the parties is married against their will. Forced marriages continue to be practiced in parts of the world, especially in South Asia and Africa. The line between forced marriage and consensual marriage may become blurred, because the social norms of these cultures dictate that one should never oppose the desire of one's parents/relatives in regard to the choice of a spouse; in such cultures it is not necessary for violence, threats, intimidation etc. to occur, the person simply "consents" to the marriage even if he/she doesn't want it, out of the implied social pressure and duty. The customs of bride price and dowry that exist in parts of the world can lead to buying and selling people

a) Statutory Law Marriages

This type of marriage is monogamous as suggested by its definition in *Hyde v Hyde and Woodman see*. It is a contract for life which must be voluntarily entered into by the parties thereto. It presupposes the existence of an equal partnership between the parties.

Components of the definition

- i) It must be a voluntary union meaning that it should not be conducted under duress or threat to life, limb or liberty: *Cooper v Crane* (1891) Probate 369; *Buckland v same* (1968) Probate 269. Mental reservations or religious inclinations are not enough, *Singh v Singh* 1971 Probate 226, see also *CvC, Valier v Valier* and *Mehta V Mehta*
- ii) For life meaning that once married always married. A contract of marriage for a limited or specified period of time will be against public policy and therefore unenforceable
- iii) One man and one woman meaning that it must be heterosexual. Same sex marriages are not legal. *Cobbet v Cobbett* 1971 probate 83; *S.Y v S.Y* 1963 Probate 37

Concept of Marriage

The marriage is valid depending on the law under which it was contracted. In Zambia, parties must have capacity to contract the marriage and they must fulfill the laid down procedure for formalities.

Capacity to marry

- The parties must be one man and one woman *Cobbett v Cobbett* [1971] Probate 83 and *SY v SY* [1963] Probate 37. In *Cobbet* there was a sex change and the court annulled the marriage where as in *SY* there was an enlargement of the vagina and the court said the marriage was properly consummated.
- Parties must be either be single, divorced, widowed or married to the intended spouse under customary law or church doctrines. The subsisting marriage should not be polygamous.
- Parties must intend a monogamous relationship: see the *People v Katongo* and the *People v Nkhoma*
- They must be 21 years and above. If below 21 but above 16, the party requires parental consent. If below 16, consent can be given by a High Court judge *Muyamwa v Muyamwa* 1976 ZR. Parties went through a ceremony of marriage at

the office of the registrar of marriages at Lusaka. Before this, the parties were married under customary law. The petitioner was aged 18, her father was deceased and did not have parental consent of the mother as required by s17. Her mother was present at the ceremony. She petitioned for a decree of nullity. The court held that the presence of the mother implied consent, s17 does not provide that the absence of parental consent will make a marriage void, the ceremony was valid and that ceremony plus cohabitation was enough for a valid marriage.

- The parties must not be related within the prohibited degrees of consanguinity – blood relationship and affinity – marital relationship.
- Parties must have the capacity to give valid consent to the marriage. This means that the persons should not be minors or insane or wards of court.

Formalities

S6. Parties must give notice to the district Registrar in the prescribed form not less than 21 days before solemnization.

S9 the Registrar shall publish such notice and enter it into the Marriage Notice Book which is open to members of the public to inspect during office hours.

S10 where no caveat has been entered, the Registrar shall issue a certificate to the effect after 21 days thus allowing the parties to proceed with the ceremony.

- i) One of the parties should be resident within the district in which the marriage is to be solemnized at least for at least 15 days.
- ii) Each of the parties to the marriage, not being a widow or widower, is not less 21 years of age and if under parental consent has been obtained and should be annexed to the application.
- iii) There are no impediments of kindred or affinity or other lawful hindrance to the marriage
- iv) Neither party is marriage to another person under customary law

S11 parties must celebrate their marriage within three months of the notice otherwise the notice is void.

S12 allows for issuance of special licences for marriage to be solemnized in non-gazette places and also allows the Registrar to dispense with the giving of notice by the parties upon proof of no lawful impediments.

CAVEAT

S13 any person having reasonable cause may enter a caveat to any notice of intention to marry stating the reasons for such objection. Where there has been a caveat entered, the case shall be referred to the High Court for determination (s14) and the parties shall have an opportunity to present their case. The decision of the High Court is final and binding on the parties. By s15, the court may also upon determination cancel the caveat by writing in the Marriage Notice Book and thereupon the Registrar will have authority to issue the certificate.

CONSENT

S17 parental consent is required for any party to an intended marriage who is below 21 years of age. *Muyamwa v same* (1971) ZR court held that the requirement for consent under s17 is merely directory and not mandatory.

S19 allows a High Court Judge to give consent on application if the consent is withheld by the person who should ordinarily give it.

SOLEMNISATION

S20 marriages shall be solemnized in gazette buildings by gazette ministers in the presence of at least two witnesses. A special licence may direct that a marriage be solemnized in any other place. S22

b) Customary law marriages

Concept of marriage

A customary law marriage is one conducted between one man and one or more women according to the customs of the parties involved. In Zambia, polygamy is valid and has been practiced by various tribes as part of their belief but also by individuals depending on how they want to live their lives. Polygamy has two aspects to it. These are polyandry where a woman takes on more men and polygyny where a man takes on more women. The Zambian community has practiced polygyny and would frown upon a woman taking on more men as spouses.

What are some of the reasons advanced for men taking on more women rather than women taking on more men as spouses?

Capacity to contract the marriage

Just like statutory law marriages, parties to a customary law marriage must have the capacity to contract the marriage. The girl should have attained puberty and the boy

should be able to fend for his family. They should both have the support of their respective families for the marriage. Further, they should not be married to other persons unless under customary law.

Formalities

Tribes have different customs and traditions that they observe to validate a marriage.

Common customs include the following:

After the girl has been identified, there is payment of the mouth opener to start the whole process of marriage negotiations.

When that is accepted, the family of the boy asks for the charge to be paid as bride price.

Ordinarily, parties should not marry until after this payment has been made. However, practice has shown that often times people go ahead with the marriage even with just a part payment. In any case, the payment will have to be made in full at some point.

Ceremonies and public events start after the issues of payments are settled and agreed between the parties. Different tribes have different ceremonies. Some will cut out some and others will include even things not found in their tradition.

After these ceremonies, the girl is then taken to her man in the traditional way. Traditional society also insists on consummation of the marriage. This is because many a time, marriage is looked at as the institution that will produce children and hence the insistence on consummation and making sure everything in that department is ok. There are two tests that are conducted on the wedding night. For the girl there is a virginity test and for the boy there is a potency test. However, in today's interaction, these practices are slowly dying out as they are an affront to human rights of privacy and dignity of the individual.

Some tribes practice the payment of lobola. This refers to buying out children in matrilineal societies where the children belong to the woman and her family. The man's family pays to have rights over the children.

Applicable Law

Section 34 of the Marriage Act chapter 50 of the laws of Zambia allows the existence of customary law marriages. Under section 38, it is an offence for one to contract a marriage under the Act with another person whilst married to another under the Act and vice versa.

Contrast the cases of *The People v Nkhoma* (1978) ZR 4 and *The People v Katongo* (1974) ZR 290

Judging from the applicable law, it is clear that for one to contract a marriage in Zambia, he or she must have the capacity to do so. In that light therefore, it can safely be argued that the decision in *The People v Katongo* is not good law for present day Zambia.

c) Religious marriages

These are conducted according to the respective church doctrines. For Christians, these marriages are based on the bible. They are monogamous in nature allowing for only one man and one woman for life to the exclusion of all others until death parts them.

Divorce is generally not allowed unless one of the parties commits adultery. Only then can the higher authorities in the church be requested to annul the marriage.

Capacity

In terms of capacity, the parties must either be single, widowed, divorced or married under customary or statutory law to the intended spouse. They must also be of the right age as well.

The church considers consent of the girl (woman) to be very important for the marriage to be valid. A marriage contracted under duress does not fulfill the Godly requirements where everyone is expected to be happy and live happily ever after.

Parties must not be related within prohibited degrees.

The parties should also belong to the church which is supposed to solemnize the marriage, they must be regular congregants who should have been abiding by the conditions of membership such as tithing, attending community meetings etc.

Formalities

Parties are obliged to give notice of their intention to marry. The Priest or Pastor or designated authority will make marriage banns three times in church. On the first bann, the couple is introduced to the membership. All those with objections are required to file in caveats in confidence with the church administration.

Counselors are assigned to the intending couples who counsel them on how to live as married people.

Marriages are solemnized in church during the day. These are public events and so congregants are free to attend.

Parties sign the certificates in church

Applicable Law

The law applicable is canon law based on the bible. That is why even when it comes to differences in such marriages, the statutory or customary laws have not been very helpful.

Presumption of Marriage

This is a situation where parties have lived together as a married couple and the community in which they live regards them as married. There are two presumptions made. Firstly that the couple has capacity to enter into the marriage and have entered into it validly and secondly that the couple followed all the formalities required for a valid marriage. The couple does not however have any documentary evidence for their marriage. the couple's marriage thrives on cohabitation and reputation, meaning that they live together and carry themselves as married.

In terms of **formalities**, courts may be willing to hold marriages as valid where there is evidence of some sort of ceremony even though it may be defective. The evidence to rebut the presumption should be one beyond reasonable doubt.

In terms of **capacity**, parties are presumed to have the capacity to enter into a marriage unless evidence is adduced on a balance of probability to show that either of them lacked the capacity.

It is important to state here that even though neighbours may presume two people to be married, there will be no valid marriage if they have not entered into a valid marriage either under customary law, statutory law or religious doctrines. There is no such thing as common law marriage, mere cohabitation is not marriage.

Residence

This is an important concept in family. It refers to a place where one is based or where he or she continues to live. Two elements must be satisfied for residence to be proven. Firstly, there must be physical presence and secondly there must be a clear intention to remain in the same place for a long time. Temporary presence does not make one a resident and temporary absence does not deprive one of his or her residence.

Relevance of residence

Residence is relevant in domestic relations as it determines whether certain things can be done or not. For example according to section 10(1) (i), notice of an intended marriage shall be given by either of the parties to the intended marriage and the party should have been resident in the district in which such marriage is to be solemnized for atleast 15 days prior to the granting of the certificate by the Registrar. The Registrar will accept notice from a person not domiciled in Zambia after one year of habitual residence in the particular district.

Domicile

This refers to a place where one has a permanent home.

- i) A person can have a domicile of origin acquired at birth and communicated by operation of law. Matters of legitimacy determine which domicile is acquired at birth. The so called illegitimate children acquire the domiciles of their mothers while legitimate children acquire the domiciles of their fathers. Street children acquire the domicile of the place from which they were found.
- ii) Domicile signifies connection with the system of territorial law and is not connected to nationality or citizenship. This therefore means that a person can only have one domicile at a time.
- iii) There is a presumption of continuation of domicile unless positive action is taken to change from one to the other.
- iv) Domicile is relevant because the capacity to marry depends on the *lex domicilli* (law of the domicile) and the formalities depend on the *lex celebrationis* (place of celebration or solemnization).

See **Pugh v Pugh [1951] Probate 482**. A man over the age of 16 years and domiciled in England went through a form of marriage in Austria with a girl aged 15. She was domiciled in Hungary by the law of which country the marriage was valid. It was held that the marriage was void since the man had no capacity by English law to marry her.

Sattomayor v De Barros (1877) 3 Probate 1. In this case, the petitioner and the respondent, first cousins and domiciled in Portugal resided in England and went through a form of marriage. Later they returned to Portugal and their domiciles continued to be Portuguese. According to Portuguese law, a marriage between first cousins was illegal unless allowed by the Pope. It was held that the parties being by the law of the country of their domicile under personal disability to contract the marriage, their marriage ought to be declared null and void.

- v) Before 1973, a married woman acquired the domicile of her husband for her life time. However, the Matrimonial Proceedings Act of 1973 changed the position and the wife is now entitled to independent domicile. She can maintain her own or change as she likes and is also free to change later in life. Another change was that the courts had jurisdiction to hear matters relying on residence for a period of 12 months.

Types of domicile

- i) Domicile of origin acquired at birth automatically.
- ii) Domicile of choice. This can be acquired by anyone above the age of 16 years or a married person under that age. It is acquired by taking up residence and forming the *animus manendi* (intention to remain) voluntarily. The intention to remain in a place permanently should be formed independent of external pressures.

Revision Questions

1. Define marriage and explain the requirements for a valid marriage
2. Distinguish a customary marriage and a civil marriage
3. What are the strengths and weaknesses of :
 - (a) a civil marriage
 - (b) a customary marriageSupport your answers with cases

Recommended Texts

Gerstmann, Evan. Same-sex Marriage and the Constitution, p. 22 (Cambridge University Press, 2004).

Westermarck, Edward, (1922) The History of Human Marriage Volume 1, p. 71. ISBN 0-7661-4618-9.

UNIT THREE NULLITY OF MARRIAGE

Introduction

Flowing from the fact that there are various legal requirements for a valid marriage, the absence of any one or more of these requirements will affect the validity of the marriage. The effect can be to render the marriage voidable or void. This is different from terminating the marriage altogether. (Avoid confusing a decree of nullity with a decree of divorce). In the former case a marriage comes into existence but that marriage can, as a result of the non-compliance with a requirement, be set aside by the court. In the latter case there is in fact no marriage since the facts are insufficient to constitute a valid marriage. Thus one of the ways in which a marriage may come to an end is by a decree of nullity. Just like in the case of divorce, a decree of nullity ends the marriage and the parties are free to marry thereafter.

Objectives

By the end of this chapter, students must be able to:

1. Explain the meaning of nullity of marriage
2. Explain the difference between a void and an avoidable marriage
3. Identify factors that can render a marriage either void or avoidable
4. Show an understanding of the meaning of consanguinity and affinity with reference to prohibited degrees of marriage

3.1. What is nullity?

This is a statement to the effect that the marriage in question never existed, that is, the marriage is and has always been null and void. Thus a marriage may be void or voidable. The distinction between a void and a voidable marriage is very important. This is because certain grounds for a valid marriage are seen by the state as fundamental to the creation of a relationship and those grounds that are a matter for the parties themselves since any ‘interested person’ may take proceedings if the marriage is void, whereas only the parties themselves are entitled to seek an annulment if the defect is one that merely renders it voidable.

3.2 Differences between void and voidable marriage

Void	Voidable

1. Never existed from the beginning	Valid until annulled by the court
2. Unnecessary to obtain a decree	Necessary to obtain a decree
3. Can be pronounced void even after the parties have died	Can only be annulled during the lifetime of the parties
4. No bars	Decree may be barred in certain specified circumstances

4.3 Void Marriage

As earlier stated this is a marriage that never existed from the beginning and is said to be void ab initio. It was never a marriage at all notwithstanding its apparent celebration. The law under S 27 of the MCA 2007 provides that any marriage celebrated after the commencement of the Act shall be void on the following grounds:

- a. That the marriage is not valid under the marriage Act;
 - (i) Parties are within the prohibited degrees of consanguinity and affinity. This refers to sexual relations with close blood relatives and these are discouraged in order to protect children from being sexually exploited by their relatives or concern about the increased likelihood of development of inherited genetic disorders. The prohibited degrees go beyond relationships of consanguinity (blood relationships) to relationships created by marriage (relationship by affinity). For examples see the schedule in the MCA Act 2007.

Durga vs. Ismail (1992) ZR HC- *prohibited degrees of consanguinity*

The parties married before the registrar and thereafter discovered that they were blood cousins. It was held that the marriage was within the prohibited degrees of consanguinity and therefore void notwithstanding that there was no consummation.

(ii) Either of the parties to the marriage was under the age of 16 (distinguish with parental consent for 21 yrs.- failure to obtain does not invalidate the marriage in England, what is the position in Zambia). See **Muyamwa vs. Muyamwa (1976) ZR 146 HC** (brief facts in previous unit).

(iii) Parties have not complied with the requirements of the Marriage Act-s32(2)

(b) Either was lawfully married to someone else –bigamy see

The People vs. Chitambala (1969) ZR 142 HC- *offence of bigamy .The accused had been married under customary law and subsequently attempted to take a second wife under statutory law. He was convicted for the offence of bigamy as he was already married under customary law.*

(c) The parties to the marriage are of the same sex – not male and female.

3.4 Voidable Marriage

This is a valid marriage until it is annulled by a decree. The parties to such a marriage must therefore obtain a decree before they can start living as single people. The law under S29 of the MCA provides the grounds upon which a marriage shall be declared voidable.

(a) Marriage has not been consummated due to incapacity of either party to consummate it. Consummation is achieved by one act of sexual intercourse after the marriage ceremony. The act of sexual intercourse must be ‘ordinary and complete’ and not impartial and imperfect; there must be both erection and penetration for a reasonable period of time. Non consummation is due to incapacity of either party, it does not matter whether the reason for the incapacity is physical or psychological. The incapacity must be incurable or if curable only by an operation that is dangerous unlikely to succeed or refused by the party suffering the incapacity.

W. v W (1967) HL *A husband who can sustain an erection for only a short period has been found incapable of consummating his marriage.*

Baxter vs. Baxter (1948) AC 274*The House considered whether a wife who insisted that her husband always used a condom was thereby guilty of a*

willful refusal to consummate the marriage within the meaning of section 7(1)

(a). *Held: She was not, for a marriage may be consummated although artificial methods of contraception are used.*

(b) Wilful refusal to consummate by the respondent to the petition. A decree will only be granted under this ground if an examination of the whole history of the marriage reveals 'a settled and definite decision' on the part of the respondent, come to without "just excuse". A husband it has been held for example must take appropriate tact, persuasion and encouragement and his wife will not be guilty if he has failed to do so. The wilful refusal of the respondent must be proved before a decree will be granted on this ground.

Ford vs. Ford (1987) Fam. Law 232. *H and W had a sexual relationship until H was sent to prison. They married while he was in prison, but he refused to consummate the marriage at the time and later said he did not want to live with W even after he was released. W's petition for a decree of nullity was allowed: H's refusal to consummate the marriage in prison was not a "wilful refusal", but his clear determination never to do so was sufficient.*

Horton vs. Horton (1947) 2 All ER 871. *The couple were Roman Catholics who had married during the war. They failed to consummate the marriage at first, and were then separated. H now sought to have the marriage annulled on the basis of W's refusal to consummate the marriage. Held: the petition failed on the facts: a "wilful refusal" is an unjustified, settled and definite decision and taking into account the whole history of the marriage.*

(c) Lack of consent due to duress, mistake, unsoundness of the mind or otherwise. This is common in arranged marriages and is a ground for nullifying such a marriage.

(d) Unsoundness of the mind-mental disorder

(e) Sexually transmitted disease at the time of the marriage the respondent was suffering from a venereal disease in a communicable form. Petitioner must have been unaware of this fact at the time of the marriage and must bring the petition within 3 years.

(f) Pregnant by another at the time of the marriage.

3.5 Bars to a decree where marriage is voidable

S30 –if the above grounds exist the petitioner will usually be entitled to a decree. However the petition may fail if one of the 3 bars under the **MCA** is established;

- (a) **Approbation** – the decree will be denied if the court believes that the petitioner with the knowledge that it was open to him to have the marriage avoided, so conducted himself in relation to the respondent a to lead the respondent reasonably to believe that he would not seek to do so and in addition, that it would be unjust to the respondent to grant the decree.
- (b) It is unjust to do so –s 30 (2) 3 years bar if proceedings not instituted within 3 years of the marriage.

S 30(3) ignorance of facts alleged

3.6 Effects of a decree

At one time a decree of nullity operated retrospectively thus avoidable marriage and a void marriage had no legal consequences in the eyes of the law, the parties were not and had never been any more than cohabitants. However over the years the law has undergone reform in an attempt to meet the hardship that was sometimes caused by the common law rules.

Prior to 1971, the law relating to voidable marriage was that the marriage was valid until annulment, but once a decree absolute had been pronounced, they were deemed never to have been married. In 1971 this rule was abolished as being inconvenient, uncertain and anomalous. A voidable marriage that is annulled is now treated as if it had existed up to the date of the decree.

S33 of MCA

S33 (2) status of children of voidable marriage

The law of nullity is important for an understanding of the nature of marriage since it defines who can legally enter into such a relationship. However it remains to be seen whether the doctrine is relevant today especially that most marriages are ended by divorce and not decrees of nullity.

Revision Questions

Distinguish a void marriage from a voidable marriage

1. What are prohibited degrees of relationship and what effect do they have on:
 - (a) Civil marriages
 - (b) customary marriages
2. What are marriages of convenience?
3. In an undefended divorce petition for a decree of nullity on the ground that the marriage was never consummated, the petitioner pleaded the parties never cohabited together. She resides at 1 Eucalyptus Avenue, Chelston at Lusaka while the Respondent was domiciled in Zimbabwe. There were no children of the family living. What is the likely outcome of this case?

Recommended Texts

Family Law Update. *Springfield, IL: Family Law Section Council, Illinois State Bar Association, 1996. KF502.I3F31996*

Fox, Robin (1997). *Reproduction & Succession: Studies in Anthropology, Law and Society.*

Bromley's Family Law. Pages 62-88

L. Mushota, Family Law. Pages 103-153

Marriage Act Chapter 50

Matrimonial Causes Act No. 20 of 2007

Cases: Muyumwa Vs Muyumwa (1976) ZR 146; Hafiz Ayub Durga Vs Najmunissa Ismail SCZ/67/1992; The People Vs Chitambala (1969) ZR 142; The People Vs Nkoma (1978) ZR 4; The people Vs Katongo (1974) ZR 290

UNITY FOUR DIVORCE

Introduction

Divorce is a matrimonial cause that concerns dissolution of marriage on the ground that it has broken down irretrievably. There is only one statute that governs divorces and other matrimonial causes (nullity of marriages, judicial separation). There have been recent developments in divorce laws and judicial decisions such as the cases of *Wachtel v Wachtel* and *Chibwe and Chibwe* which have become landmarks in divorce law reforms. The cases have set the stage for subsequent development in which the contribution of women in the home are taken into account regardless of whether or not they contributed financially to acquisition of property during the subsistence of the marriage. Courts recognize that the wife who looks after the home and the family, contributes as much to the family assets as the wife who goes out to work. While one contributes in kind, the other contributes in money or money's worth. Thus where the home is acquired and maintained by the joint efforts of both, then, when the marriage breaks down, it should be regarded as the joint property of both of them, regardless of whose name it is in.

Objectives

By the end of this unit, a student must be able to:

1. Explain the meaning of dissolution of marriage
2. Display knowledge on the law governing divorce
3. Identify and elucidate the five main grounds upon which a divorce petition may be granted under a customary marriage and a civil law marriage.
4. Write the facts and holdings of the main cases cited under this chapter
5. Show knowledge of the Act governing divorce; the Matrimonial Cause Act, 2007

4.1. Grounds for divorce

The message in the MCA 2007 is that there is only one ground for divorce that is the irretrievable breakdown of the marriage. This statement is somewhat misleading. In practice relationship breakdown, without proof of one of the five facts, will not be sufficient to terminate the legal relationship.

Buffery vs. Buffery (1988) 2 F.L.R 365 CA *a failure by the W to show that the marriage had irretrievably broken down by establishing one of the five facts meant that she cannot succeed on her petition notwithstanding the fact that they had grown apart, no longer had anything in common and could not communicate.*

Before we look at the five facts let us look at the period within which one can bring a petition for divorce. In the past a petition for divorce could not be brought within the first three years of the marriage. This has since been changed to one year. The MCA 2007 provides in s 6 that no petition for divorce shall be presented to the court before the expiration of the period of one year from the date of the marriage. There are other legal remedies that can be used to provide redress during this period such as judicial separation and a decree of nullity depending on the ground a petitioner wants to rely on.

4.2.1 The five grounds of divorce

The five facts from which irretrievable breakdown of marriage can be inferred are set out in s9 (1) of the MCA 2007 and they are as follows:

a. ADULTERY (S9(1) (A) MCA 2007

In order to succeed on this fact the petitioner must prove that the respondent committed adultery and that there was or there must have been sexual intercourse between the respondent and another person who might be cited, and show that because of the adultery she finds it intolerable to live with the respondent. However it is not necessary that the petitioner should find the respondent's adultery intolerable. Both of these elements must be proved together and not separately. An isolated act of adultery will not be sufficient.

If one spouse knows that the other has committed adultery and has continued to live with him or her thereafter for six months or more, a divorce petition cannot be based on this fact – adultery. If they have lived together for less than six months after the adultery, the fact that they have done so is to be disregarded in determining whether the petitioner finds it intolerable to live with the respondent. The test used to determine whether or not the respondent finds it intolerable to live with the petitioner is subjective and a question of fact.

In **Sikazwe vs. Sikazwe (1983) HP/D 78**, *Caroline Sikazwe petitioned for divorce on the ground that the marriage had irretrievably broken down on account of the respondent's adultery with Jennifer Nkonde, co-respondent and she found it intolerable to live with him.*

A woman who has been raped has not committed adultery because the relationship complained of must be voluntary.

Goodrich vs. Goodrich (1971) 2 ALL ER 1340 *H petitioned for divorce on the grounds of W's adultery and was granted a decree nisi. The judge cited with approval a passage in Rayden on Divorce that it is what "the petitioner finds" intolerable that is the primary consideration. But it is not enough, he suggested, for a petitioner simply to say "I find it intolerable": some reason, explanation or justification for this assertion should be given so that the court can satisfy itself of the truth of the petition.*

b. RESPONDENT'S BEHAVIOUR – s 9(1) (b)

The petitioner must under this fact establish that the marriage has broken down irretrievably by showing that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him. The courts have refrained from any attempt to define behaviour. Each case is looked at on its own merits. The issue to be determined is not the quality of the respondents' behaviour but the effect of that conduct on the petitioner. Thus trivial issues such as forgetting the W' s birthday, wedding anniversary, failing to give her flowers on the birth of the child or refusing to take her to the cinema will be disregarded in most cases.

S9(1) (b) of the MCA 2007 states that the petitioner can ask the court to infer that there is a breakdown on proof of the fact that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him.

The question is not whether the behaviour is unreasonable but whether it is unreasonable to expect the petitioner to continue to live with the respondent in the circumstances. The test used is objective since the question to be answered is 'can the petitioner reasonably be expected' to live with the respondent. This question is answered by the court after assessing the history of the marriage and their relationship.

Livingstone-Stallard v Livingstone-Stallard [1974] 2 All ER 766 *H was 56 and W was 24 when they married; H was self-opinionated and treated W not as a wife but as a rather stupid child. He criticised her behaviour, her way of life, her friends, her cooking and even her dancing; he complained of her leaving her underclothes soaking overnight in the sink, even though he did the same himself, and he became angry when she offered sherry to a photographer who visited the house while he was out. After a violent argument, W left the home and successfully petitioned for divorce under s.1 (2) (b).*

Mahande vs. Mahande (1976) ZR 287 *The petitioner had an illegitimate child before her marriage to the respondent. The petitioner only disclosed this after two years of the marriage. The respondent forgave her and accepted the child and maintained it. The petitioner petitioned for divorce citing unreasonable behaviour of the respondent. The petitioner testified that she was once locked outside the gate, respondent was suspicious of her movements among others and the court granted a decree nisi pending a decree absolute to end the marriage.*

O'Neill v O'Neill [1975] 3 All ER 289, CA *H embarked on major do-it-yourself repairs to the matrimonial home; he removed floorboards, mixed cement in the living room, and removed the lavatory door for some eight months. W was consequently embarrassed to have visitors, and she and their 14-year-old daughter D found it embarrassing to use the lavatory. After two years, W and D moved out, and W petitioned for divorce on the grounds of H's behaviour; H's reply (to W's solicitors) contained allegations that the children were by some other man. The Court of Appeal, reversing the trial judge, granted a decree nisi; the reply alone showed how badly the marriage had broken down.*

Pheasant v Pheasant [1972] 1 All ER 587, Ormrod J *H petitioned for divorce under s.1 (2)(b). He did not seek to establish any serious criticism of W's conduct or behaviour, but claimed she had not been able to give him the spontaneous, demonstrative affection he craved and that it was impossible for him to live with W any longer. Dismissing H's petition, the judge said there was nothing in W's behaviour that could be regarded as a breach on her part of any of the obligations of the married state or as effectively contributing to the break-up of the marriage.*

For illustrations as to what has been held as constituting unreasonable behaviour, the following cases are useful; *Ash v Ash (1972) 1 All.E.R. 582* *Mulundika v Mulundika (1991) ZMHC 13*

c. DESERTION- S9 (1) (c) MCA

Desertion is one of the traditional matrimonial offences that have survived the reforms unaltered. The respondent leaves the matrimonial home voluntarily and without reasonable cause with the

intention of permanently ending cohabitation. Desertion for a continuous period of 2 years is sufficient to prove irretrievable breakdown of marriage. There are four elements that must be present:

1. De facto separation of the parties for at least 2 years.
2. The intention on the part of the spouse in desertion to remain separated permanently.
3. Absence of consent on the part of the deserted spouse.
4. Absence of any reasonable cause for withdrawing from cohabitation on the part of the deserting spouse.

Constructive desertion – respondent behaves in such a way that petitioner is compelled to leave home against his or her wishes under similar conditions. The MCA 2007 makes provision under s14. The 2 years period applies in this case.

Pizey v Pizey [1961] 2 All ER 658 *After admitting an act of adultery, W left home and went to live with her mother. H did not object to her going, but over the next two years they corresponded by letter and on several occasions H visited W and they had sex together. H subsequently petitioned for divorce on the grounds of W's desertion (having effectively condoned the adultery), but his petition failed: the frequent visits amounted to a course of conduct that showed the separation too had been condoned.*

Hopes v Hopes (1948) 2 ALL ER 920 *The husband petitioned for divorce claiming that desertion began more than 3 years before his presentation of the petition when the wife moved into a separate bedroom no marital intercourse, frequent quarrels between them and she stopped mending or washing his clothes. There was no separate cooking for him although he had meals with members of his family prepared by the wife in the dining room. Held, that there was no de facto separation and therefore no desertion of the husband by the wife. They had to maintain two separate households for petition to succeed.*

d. LIVING APART – S9 (1) (d) AND (e) MCA 2007

This involves the parties living apart for a specified period of time. The first type of living apart requires a 2 year period and the respondent must consent to the decree being granted. This is sometimes called divorce by consent. The consent may be withdrawn at any time before the

pronouncement of the decree. The other fact is that the parties have lived apart for a period of 5 years preceding the presentation of the petition –s 9(1) (e).

Living apart involves both physical and mental elements. As far as physical separation is concerned the courts have adopted the old law of desertion and have held that what is in issue is separation from a state of affairs rather than from a place. The question to be asked is whether there is any community of life between the parties. For instance if H & W share the same living room, eat at the same table, or watch TV together, they are still regarded as living in the same household. The households can be established in the same house where the parties establish individual living arrangements. It is immaterial that they do this for the sake of the children. If they are living under the same roof, they will only be said to be living apart if they maintain two separate households. They will also be regarded as living apart if consortium comes to an end.

Fuller vs. Fuller (1973) 2 ALL ER 650 *H and W separated after 22 years' marriage; W went to live with P and called herself Mrs P. Four years later H became seriously ill and went to live with P and W; W cooked H's meals and did his laundry, but continued to sleep with P; H paid £7 per week for his board and lodging. W subsequently petitioned for divorce on the basis of s.1 (2)(e), and the Court of Appeal allowed her appeal against the judge's dismissal of her petition. Lord Denning MR said H and W were not "living together as husband and wife", and that was the meaning to be ascribed to the section.*

Mouncer v Mouncer (1972) 1 ALL ER 289 *The H and W were on very bad terms and resorted to sleeping in separate rooms. However they continued to take their meals, cooked by the W, together with either one or both of the children and shared cd-leaning the house, making no distinction one part of the house and the other. A subsequent petition for divorce on account of living apart failed because a rejection of a normal physical relationship coupled with an absence of normal affection was not sufficient to amount to living apart within the law.*

Read also B vs. B (1977) ZR 159 (HC)

The other fact is that they have lived apart for a continuous period of 5 years- s9(1) (b) (e). The respondent can oppose a petition under 5 years separation and if the court is of the opinion that the dissolution of the marriage will result in grave financial difficulties or other hardship to the

respondent and that in all the circumstances including the conduct of the parties and the interests of the parties and any child or children of the marriage it would be wrong to dissolve the marriage.

The court cannot make the decree absolute until it is satisfied that the petitioner should not be required to make financial provision for the respondent or that financial provision which has been made is just and fair. It should be noted that the hardship must result from the divorce not the breakdown of the marriage.

e. There are five grounds on which a petition for judicial separation can be based. These are the same five facts that are used to show irretrievable breakdown of a marriage. There is no need to show irretrievable breakdown of the marriage. A petition for judicial separation can be made any time after the marriage. There is no restriction as to time. A finding of fact on a judicial separation can be used as proof of facts on a subsequent divorce.

In judicial separation proceedings the partner will obtain from the court a decree of judicial separation and this means a legal separation of the partners although they will still be married but not have to live together whereas in divorce the decree nisi followed by the decree absolute is required before the proceedings are final.

A decree of judicial separation will only be granted, as with a divorce, on the grounds that the marriage has irretrievably broken down. The partner must prove; adultery of the other partner; unreasonable behaviour of the other partner; desertion by the other partner after two years; separation with consent after two years; and separation without consent after five years. As with nullity, judicial separation can be granted within 12 months of the marriage.

Revision Questions

1. What are the grounds for divorce under:
 - (a) Civil law
 - (b) Customary law
 - (c) Under which law does marriage interference fall, and what is it?
2. A Judge in *Collins v Collins* (1963): held:

“Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt (**Baxter v Baxter, 1950, 2 All ER (458)**). That involves that each of the ingredients of the offence must be proved beyond reasonable doubt. First, misconduct must be proved of a grave and weight nature ... secondly, it must be that there is a real injury to the health of the complainant or a reason apprehension of such injury. In the absence of acts of violence... the law requires that there should be proved reason a real impairment of health or a reasonable apprehension of it. Thirdly, it must be proved beyond reasonable doubt that it is the misconduct of the respondent which has caused the injury to health of complainant. Fourthly, it must be proved beyond reasonable doubt that the whole of the conduct of the respondent, taking into account its repercussion on the health of the complainant, can properly be described as cruelty in the ordinary sense of that term.

Tiza wants to know whether she must suffer “grievous bodily harm” or serious physical injury for her petition for divorce based on cruelty to succeed. Advise

3. What is judicial separation and what purpose does separation serve in a marriage?
4. What is the significance of *Wroe v Wroe* (1967) ZR 54?
5. In a Kawambwa local court, a woman who sued her husband for divorce on the basis of his adultery had the petition dismissed on the ground that no customary law would ever allow a woman to divorce her husband on the ground of adultery. Instead she was awarded compensation even if she had not asked for it. Discuss.

UNIT FIVE PROPERTY AND FINANCIAL PROVISION AFTER DIVORCE

Introduction

At common law husband and wife were deemed to be one and at marriage a woman's property vested in her husband. This rule was considered unjust and feminists and lawyers in the nineteenth century advocated for change especially that more and more women were now earning income of their own and there were a number of scandalous cases of husbands impounding their wife's earnings for the benefit of their own creditors or even mistresses. A woman whose husband deserted her and took all the property with him had no relief. This led to a change of the law and the general rule that the woman would retain her separate property upon marriage was developed. The Married Women's Property Acts were also created and these were modified over a number of years. It therefore became a cardinal rule of English law that marriage had no impact on the property rights of the spouses. If it becomes necessary to ascertain the ownership of the home during marriage the parties will have to rely on the rules of property law, which apply to all persons regardless of their status. Spouses have rights to occupy the shared home but no automatic rights to a property interest in it.

Objectives

At the end of this lesson students must be able to:

1. Explain the factors that the court considers in determining the issues of finance and property settlement on divorce
2. Make reference to the relevant sections of the Matrimonial cause Act that deal with issues of finance and property settlement.
3. Make reference to the relevant cases under this chapter

In contrast to the separation of property during a marriage, the courts have the powers to reallocate property upon divorce or dissolution of marriage. In cases where the relationship ends as a result of death, the surviving spouse will subject to terms of the deceased's will be entitled to a bulk of the assets.

Knowledge of the rules relating to ownership and occupation of property is very important for a number of reasons. First and foremost the rights over family interests such as the home are determined almost solely by the application of the general principles of property law. While the couple are living in harmony it may not seem to matter who owns what, but the issue will become one of importance at time of dissolution of the marriage. The question of who should remain in the home and who should leave comes to the fore. The court can use its discretion to reallocate the resources of spouses.

5.1. Property Acquired by the Spouses

Spouses' property may be divided into 2: that intended for common use and consumption in the matrimonial home and that intended for personal use and enjoyment.

Marriage will not affect ownership of property vested in either of the spouses at the time. This will also be true of property used by them in the matrimonial home jointly.

1. **Income either from earnings or investments** will prima facie remain his or her own property. But where they pool their incomes and place them in a common fund for example a joint bank account, they both acquire a joint interest in the whole fund.
2. **Allowances for housekeeping and maintenance** – any property bought from this money was considered to be the husbands and this created an injustice which was eventually remedied by the Married Women's Property Act of 1964 which took cognisance of the fact that the savings from the allowance were as much due to the wife's skill and economy as a housewife as to her husbands' earning capacity. The Act provides that any property bought from an allowance given to a housewife for housekeeping shall be treated as belonging to both of them in equal shares unless there is an agreement to the contrary. The Act only applies if the allowance is provided by the husband and it does not apply to a husband who does the housekeeping.
3. **Property purchased by one spouse** – any property bought by one spouse with his or her own money will presumptively belong exclusively to the purchaser. This

presumption is rebuttable. If a husband buys clothes for his wife or gives her money to buy for herself, they become her property.

4. **Gifts to spouses** – whether a gift belongs to one spouse alone or to both of them depends on the donor's intention. This rule may apply to wedding gifts if the marriage breaks up because the court will have to determine whether the gift is to be given up to the spouse whose relations or friends gave them or if it is to be divided equally between them.

5.2. Matrimonial Home

The Matrimonial home is usually the most significant single asset of the parties as well as providing shelter for them. It is also the most problematic area if the marriage breaks down. Two very distinct problems have been identified: that of ownership and title and that of occupation and use. The former is concerned with the question in whom does the legal and equitable interest vest. The latter is concerned with what rights of occupation and use does one spouse have in property, beneficially owned by the other.

OWNERSHIP

The general rule was that property purchased by one spouse with his or her own money presumptively belonged to that spouse to the exclusion of the other. If a husband bought a house for example, out of his earnings, then it was his unless he transferred title to the wife.

This rule has somewhat been modified to reflect the reality that women are also earning income and they contribute towards the purchase of the matrimonial home either directly or indirectly. A wife as a wage earner makes contributions to the common expenses of running the house, her contribution and effort should not be ignored. Some English judges notable Lord Denning even took this debate further by suggesting that the wife should be given credit for services rendered in kind as housekeeper or for use of her own income or savings in such a way as to enable her husband to use his for the purchase of a house. As a consequence, the proceeds of sale were divided equally between husband and wife whenever it was determined that each contributed to its purchase. English law does not recognise community of property law nor of any special rules applicable to family assets.

Pettitt vs. Pettitt (1969) 2 All ER 385 *The W was the legal owner of the matrimonial Home and the H made some improvements to the house by building a wardrobe in it, internal decorations and built a lawn and an ornamental well and a side wall in the garden. The issue that arose was whether he was by virtue of the improvements entitled to a beneficial interest in the house from the proceeds of sale. It was held that the H was not entitled to an interest merely because he had done something in his leisure time which husbands normally do.*

Gissing vs. Gissing (1970) 2 All ER 780 *The house was purchased by the H and was financed by a mortgage. W did not contribute anything towards the loan and only bought furniture and other equipment for the house and improving the lawn. The W bought clothes for herself and her son and some extras and H paid her an allowance and paid for all the outgoings from the home. Upon divorce on a question of whether the W had acquired a beneficial interest in the house, it was held that it was not possible to draw an inference that there was any common intention that the respondent should have any beneficial interest in the matrimonial home.*

The ownership of property depends on the purchaser's intention at the time it is bought and spouses at the time of purchasing a house will rarely contemplate divorce except death. In a number of decided cases where this problem arose the courts have had to attribute intention to them which they never had in the first place. This intention is inferred from the conduct of the parties at the time of purchase. If the parties together embark upon the purchase of a house with a common intention at the time that it is bought that they should both contribute towards the purchase price, this will raise a resulting trust in the wife's favour and the precise size of her interest will depend upon the sums she actually contributes at the time of purchase or later. This contribution may be direct or indirect. It may be by labour rather than by cash and it must be a substantial one not things like furniture. (Gissing vs. Gissing).

The courts have been at pains in determining what amounts to an indirect contribution. If both spouses are working for instance, and they agree that the easiest way to manage is for the husband to service loan or mortgage and for the wife to pay household bills. The law is very uncertain in this area.

If the purchase money for a house is from a joint account, a house bought as matrimonial home for their common use will presumably be intended by both of them to represent the original fund.

A spouse may acquire a beneficial interest in property notwithstanding that the legal title is vested in the other under the following circumstances.

- **Improvements made to the matrimonial home** by a spouse will confer a share in that property. This is because the value of the property may be considerably enhanced after its purchase by extension, improvements or other work done on it.

In England the law was made more certain by the introduction of the Matrimonial Proceedings and Property Act 1970. The Act provides that where a husband or wife makes a substantial contribution towards the improvement of the house, he or she acquires a beneficial interest unless there is an agreement to the contrary.

Hosking v. Michaelides (2004) All ER 147 Death of one spouse - if marriage ends by death of one spouse and if they both had a beneficial interest in property it may be vital to decide whether they hold as tenants in common or as joint tenants. The implications of either must be appreciated. In joint tenancy the whole interest will pass to the surviving spouse whereas in the other they each hold divisible shares which can pass to a beneficiary.

5.3. Factors to be considered

5.3.1. The needs factor

The needs of the parties: the Court balances the needs of the parties and the availability of resources.

Lord Justice Thorpe in *Dart v Dart*² [1966] 2 FLR 286 said in the needs factor, there must be an objective appraisal of what the applicant subjectively requires to ensure that it is not unreasonable. But the objective appraisal must have regard to such things as:

- (a) what is available
- (b) the standard of living to which the parties are accustomed
- (c) their age and state of health

(d) and perhaps less obviously, the duration of the marriage, the contributions and pension rights of both as affected by the marriage and accrued or likely to accrue.

The “needs” factor must therefore be balanced with any others other factors such as the availability of resources, i.e. the income, the 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.

a) Income

Income means all sources of income, both earned and unearned, and includes the benefits in kind received by a spouse by virtue of employment e.g. a car, fuel allowances, payment of domestic bills etc. All should be taken into account.³ See *Peacock v Peacock* 1984 1 All ER 1069¹

b) Earning Capacity

The Court must look at the reality of the situation and take into consideration the earning capacity of the party needing support. The Court may take judicial notice of the unemployment rate ie even if one is young and with a good education, one may not be in a position to find a job or good job and earn an income or good income that would not lower the standard of living which that party is accustomed to. The Court may also consider the need to train or rehabilitate the party before the earning capacity can be actuated.

c) Property and Other financial resources

There is no definition of property in the MCA 73. However, it is usual to talk of property as real property. In the Zambian context, few families own real property, and other assets are of little value. In general terms matrimonial property includes

- real property
- chattels
- insurance policies
- shares/interest in companies
- damages (from litigation)

¹ Below at page

- inheritance
- the means of a co-habitee or new spouse.

With respect to damages in *Daubney v Daubney* [1976] 2 All ER 453², the Court of Appeal (UK) held that damages for pain and suffering and for loss of amenity are resources to be taken into account.

In C v C (1995) 2 FLR 171³, the wife applied for financial relief and in particular for a lump sum provision to be made out of the husband's damages in respect of the husband's personal injury. The total due to the husband was five million British pounds (£5m.) But taking into account all other factors, no lump sum was ordered for her.

d) Inheritance

With regard to inheritance, this means inheritance received or not yet received or likely to be received in the reasonably near future. The Court must take it into account as a resource available to a party.

“Financial obligations and responsibilities” factor

It may be that a party has dependents by a prior marriage or relationship. These must be disclosed and taken into account by Court.⁴

5.3.2. The age factor

The age of each party is relevant because it impacts upon the earning capacity of each party and or the proximity to retirement.

Examples:

- (1) A middle aged wife without an income and with children to look after will be protected by Court in so far as the resources of the husband allow

² below at page

³ below at page

⁴ See case: E C (Child maintenance) 1999 1 FLR 472; Fisher (1989) 1 FLR 423

- (2) A young spouse is likely to have a relationship with someone else or to re-marry. The Court must take this factor into account when considering financial relief.
- (3) If a party is about to retire, the level of maintenance may be fixed with reference to his existing income, with a defined decrease when he receives his pension.
- (4) Case law suggests that a very old applicant who has been married for a substantial period will have less needs than a younger applicant and therefore paradoxically an older applicant will receive less financial relief than a younger one. In the Zambian context because of absence of a guaranteed social security system, an older person may require more financial support than any younger person who has chances of finding another job or spouse.

5.3.3. Duration of the marriage factor

Short term marriages normally get short term relief. However if there are children, even a short term marriage of 2 to 3 years will attract a substantial proportion of the property, or capital, to purchase, say, a house for herself/ himself and the children.

5.3.4. Other factors

The physical or mental disability of either party to the marriage will also be considered; so will the conduct of each party if in the opinion of Court it would be inequitable to disregard it.

The conduct that has been considered by courts includes:

- Attempted murder, or inciting a third party to murder a spouse, as in *Evans v Evans*⁷ {1989} 1 FLR 351
- Reckless gambling
- Lying on oath during proceedings
- Behaving in an aggressive or oppressive manner needlessly during the litigation e.g. refusing to answer questions or disclose for instance, an income

- Financial mismanagement if it is a significant factor: fraud such as changing title deeds or selling property to get it beyond reach of the other spouse⁵
- Assault as in *H v H*⁹ (*financial provisions, conduct*) 1994 2 FLR 801 where a husband's assault affected the wife's material security to a significant degree. In a similar case *in A v A*⁰ (1995) 1 FLR 345 a judge imposed a lump sum order to be paid on the sale of the matrimonial home. He said

“in the light of the violence, it would be unwise to perpetuate a financial relationship between the husband and wife over the course of years to come”

The court held that it was better to sell the matrimonial home and pay the wife off instead of allowing the two parties to continue to be in touch because of periodical payments. All orders can be reviewed and revised upward or downward depending on the circumstances. For instance, an Order may end

- With re – marriage of the maintained party.
- With the death of either party (prayer, unless it is a secured order, or payee).
- When the period in case of periodical payments for a specific time, ends.

5.3.5. Clean break

The MCA of 2007 makes provision for a “clean break” whereby parties do not remain under long term obligation to one another after divorce. This is thought necessary to give finality to a matter, especially in a childless marriage of short duration, and where husband and wife have an income or earning capacity. Courts will therefore enforce “a clean break” wherever it is practicable and appropriate.

WHITING V WHITING [1988] 1 WLR 565 COURT APPEAL

Facts: A consent order was made on divorce in which the wife, a school teacher, was granted, *inter alia*, normal maintenance of 5p per annum. Later, after the husband's earnings had dropped significantly, he applied under s. 31(7) of the MCA 1973 to have nominal maintenance order

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discharged, with a direction that his wife should not be entitled to make any further application for maintenance. He also applied for an order under s. 15 of the Inheritance (Provision for Family and Dependents) Act 1975 that she should not be entitled on his death to apply under that Act provision against his estate. Their three children were financially independent. The wife's earnings were £10,500 per annum. The husband's were £4,358 per annum. The trial judge dismissed the husband's application on the ground that the nominal maintenance order should continue as a 'last backstop' for the wife. The husband appealed.

Held: dismissing the appeal (Balcombe LJ dissenting) that as the court had a discretion under s. 31(7) to direct that the original order continue on a nominal basis as a backstop for the payee, the judge had been entitled on the facts to take the view that the nominal maintenance order should be kept alive lest unforeseen circumstances (e.g. illness or redundancy) would deprive the wife of her ability to provide for herself. The three judges were unanimous in holding that the Court could not make an order under s. 15(1) of the 1975 Act unless it had before it some idea of the nature of the estate and details of those persons who might have a prior claim to it.

BALCOMBE LJ (dissenting):...I now turn to consider the relevant law. The policy reasons which underlie the principle of the 'clean break' were clearly stated by Lord Scarman in *Minton v Minton* [1979] AC 593, 608: *There are two principles which inform the modern legislation. One is the public interest that spouses, to the extent that their means permit, should provide for themselves and their children. But the other – of equal importance – is the principle of 'the clean break.' The law now encourages spouses to avoid bitterness after family break-down and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not over-shadowed by the relationship which has broken down.*

Under MCA 1973, s. 25(2) (g) conduct is taken into account only in exceptional circumstances, because the current trend is to move away from the fault factor.

UNIT SIX MAINTENANCE OF CHILDREN AFTER DIVORCE

Introduction

The law provides for the maintenance of children whether born in or outside marriage. Both parents are responsible for the maintenance of their children. When this is not being done an action for maintenance can lie in the subordinate court or high court. It can also be made in the local court. An application for maintenance can be made by the involved child through his or her next friend and this could be a guardian or an older sibling. The applications can be made pursuant to the Affiliation and Maintenance of children Act discussed hereunder.

Objectives

At the end of the topic a student must be able to:

- 1.Explain the meaning of adoption
- 2.The procedure to be followed when adopting a child
- 3.Define the common terms used under this topic
- 4.Explain the consequences of adopting child

Applications for maintenance can also be made by a divorced woman not only for her children but also for herself. This is done when no order for maintenance has been made by the court at the time of granting a decree of divorce. Women who are on separation from their husbands can also apply. Maintenance orders once made by the court can be varied especially if the parties' circumstances have changed. The court has powers to order that earning be attached and collected to meet the maintenance order.

6.1. AFFILIATION

The single mother of a non-marital child can apply to the court for an order declaring a named person as the father of that child and the order is called an affiliation order.

The application must be made within 12 months of the birth of the child, or within 12 months of the father paying maintenance for the child. If the father was out of the country, within 12 months of his return to Zambia – s3 of the Affiliation and maintenance of children Act. It can also be made when a marriage is declared void – s4.

The man alleged to be the father of a non-marital child is known as the putative father. The application can also be made by any other person other than the mother of the child. Such a person is known as the next friend. This is a guardian of the child or some other relation who is knowledgeable of the facts leading to the birth of the child –s5.

6.2. Maintenance orders

At the time of making an affiliation order, or upon subsequent application, the court may make a maintenance order with respect to the child concerned – s7.

In terms of s8 either party to the marriage may make an application to the court for maintenance on the ground that the other has failed to provide or to make a proper contribution towards, reasonable maintenance for a marital child. A maintenance order may be made following the granting of a decree absolute, decree of nullity or judicial separation with respect to a marital child or at any time thereafter – s9.

6.2.1. Types of Maintenance orders and their Duration

Under the provisions of s10, a maintenance order may take any of the following forms:

- a. Periodic payments for a specified term made to a specified child or a specified person.
- b. Lump sum payments
- c. Secured periodic payments –defendant shall secure to the satisfaction of the court the making of specified periodic payments of a specified term.

If the amount to be paid is deferred or it is to be paid in instalments, then the court may order that it shall carry interest at a specified rate.

The court shall not make a maintenance order for a child who has reached age of 18. The periodic payment or secured periodic payments may begin with the date of making the application and will not go beyond the child's 18th birthday - s12. The exception is if the child is receiving some instructions in a profession or vocation. Also if there are special circumstances justifying the making of the order.

6.3. FINANCIAL RELIEF FOR MEMBERS OF THE FAMILY ON DIVORCE

6.3.1. Court orders on Divorce, Nullity and Judicial Separation

Prior to the passing of the matrimonial Causes Act of 2007, the courts had very limited powers with regard to the orders they could make after divorce. Their orders were largely confined to cash payments. This was changed by the enactment of the Matrimonial Proceedings and Property Act incorporated in the MCA 1973. The aim of the reforms was to ensure adequate provision for wives unwillingly divorced by economically dominant husbands. This Act greatly extended the courts powers and the parties strict legal entitlements to particular assets are now of only limited relevance.

The orders that a court may make upon divorce, nullity or judicial separation can be divided into financial provision and property adjustment orders. The court may also make an order for maintenance pending suit pursuant to s52 MCA 2007. These orders will only be made after a decree nisi has been made except maintenance pending suit or orders with regard to children.

6.3.2. Financial Provision Orders – s54 MCA 2007

- a) Periodic payments which may be weekly, monthly or annually.
- b) Secured periodic payments order – the payer is required to set aside a fund of capital to which recourse can be had to make good any default in making stipulated payments. It may be enforced if the debtor dies, disappears, disposes of other property, or ceases to earn.

Both these orders may be made for a specified term and the factors will be decided by the court. All periodic payment orders come to an end if the payee remarries. It does not automatically terminate if the payee simply cohabits. The payer can however apply to court to extinguish or have the order reduced. The court may exercise this power if the new partner can provide financially for the couple.

- C) Lump Sum payment – court may order payment by instalments and this may be secured. Advantages of lump sum payments are set out in **R v R (2003) EWHC 3197**. A lump sum order endures beyond a wife's remarriage.

D) The same type of orders can be made in relation to a child of the family or to such child as specified in the order. These orders shall not be made in relation to a child who has attained the age of 21 years unless there are special circumstances that justify the payment. (Compare with Maintenance of Children Act).

Miller v Miller (2005) EWCA 984;

McFarlane v McFarlane (2006) UKHL 24 *The wife to the respondent gave up her practice as a solicitor so that she could look after her family. The marriage was ended by divorce and the issue of property sharing and maintenance was considered. The W was awarded maintenance and the court ordered that property be shared because she had given up her career as a Solicitor. A new element of compensation was also introduced by the court.*

6.3.3. Property Adjustment orders

The other type of orders that the court can make are as follows;

- a) Transfer of property to the other party or for the benefit of the any child of the family;
- b) Settlement of property for the benefit of the other spouse or any child of the family;
- c) Variation of any ante-nuptial or post nuptial settlement.

The court can order transfer and settlement of property to ensure that it is available for dependent children whilst preserving both parties' financial interests in it. The order might state that the house be transferred to the primary carer for the duration of the children's' minority. The order can be varied to allow the wife to retain the house until she dies or remarries or becomes dependent on another man. These are final orders made only when the marriage has terminated permanently.

Clutton v Clutton (1991) 1 F.L.R 242.

6.3.4. MAINTENANCE AGREEMENTS BY SPOUSES

There is no provision in the law which stops parties to a marriage from making their own arrangements or agreements upon the legal termination of their relationship. Parties are encouraged to resolve matters for themselves rather than resorting to adversarial litigation that may engender further bitterness and hostility. Mediation is encouraged by the courts. The parties may therefore make private agreements and any provision in such an agreement which restricts the parties' right to apply to the court for maintenance is void.

6.3.5.Pre-nuptial Agreements

English law does not recognise pre-nuptial agreements and they have been held to be contrary to public policy and also that it anticipated the end of marriage before it even began. The objection to pre-nuptial agreements has now changed since divorce is so commonplace. The current position is that a pre-nuptial agreement is not binding on the court but may be taken into account as part of the circumstances of the case. The issue is how much weight should be attached to it.

6.3.6. Separation Agreements

The parties are encouraged to reach their own agreements upon divorce. The courts are expected to uphold the agreements unless there are compelling reasons not to do so. If both parties are legally represented then the court shall not interfere with the ex-curia agreements.

6.3.7. Consent Orders

The parties themselves may agree on the sum to be paid and the agreement will be thoroughly scrutinised by the court, and if it is unobjectionable it shall be incorporated in the court order. But if the term of the agreement is unjust the court will not embody the agreement in its order.

6.3.8. ASSESSMENT OF FINANCIAL PROVISION

The court has been given almost unfettered discretion when it to exercise of its powers over the assessment of income and assets of divorcing spouses. The court has to perform 3 roles: It is the duty of the court in deciding whether to exercise its powers, and if so, in what manner to have regard to all the circumstances of the case, first consideration being given to the welfare of a child who is still a minor. The court is to have regard to certain specified matters and it is

required to go through a complex decision making process designed to facilitate in certain cases, the making of a ‘clean break’ between the parties.

6.3.7Welfare of children

In consideration of the welfare of children who have not attained the age of 21 years, the court will in most cases give the house to the parent with whom the children are to live. The court has to consider first the welfare of the child but this is not of paramount importance. It has to be widened in light of the parents’ rights. This means it has to consider all the circumstances, always bearing the welfare of the children in mind and then try to make a just financial settlement between the adult parties. This only applies to children of the family and may include any child who has been treated by both of the parties as a child of the family and also step-children who have lived in the spouses’ house.

6.3.9 CONSIDER ALL THE CIRCUMSTANCES

The MCA 2007 s 56 lists a number of factors to which the courts is directed to have regard. The following discussion seeks to demonstrate how the courts have interpreted these provisions in assessing financial provisions. It should be noted that no one factor prevails over the others. The court is required to have regard to “all the circumstances of the case”. This means that it must not confine its attention to specified matters, it must also investigate all other circumstances, past, present, and future which are relevant to a decision of any particular case.

The first step to take is to gain an idea of the value of the parties’ assets. This means that the parties must disclose all their assets so that their value can be ascertained. This does not however require a lengthy financial inquiry. The next step is to determine what assets are relevant. Any and all assets acquired before or during marriage and even after the legal termination may be taken into account by the courts, as may expectations of future assets. Another factor that has caused problems is the extent to which a new partner’s earning capacity and earnings should be taken into account.

Earning Capacity

This is usually a source of dispute. The court is concerned with what each party could reasonably earn. In this vein 2 separate issues will be looked at. The first is that, has the spouse in fact any earning potential. Secondly what would it be reasonable to expect? On this second point the recurring theme is the issue of a middle- aged woman who has not worked during the marriage. It will not be considered reasonable to expect her to work after a long absence from the market. A different approach will be taken if the wife is younger and the absence from work shorter. In the wake of Miller and McFarlane, it will be relevant to investigate whether the weaker spouse gave up a career to support the other, in which case an element of compensation may be appropriate.

a) The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future – s56(1) (b)

The division of the assets should be such as to secure the basic needs of the parties and their children. Although the parent caring for the child will have greater needs for housing the children, the court will not ignore the fact that both parents need housing.

I. Financial needs or reasonable requirements

The courts used to focus on “reasonable requirements” of the spouse claiming provision before the decision in **White v White (2000) 2 F.L.R 981** (Reasonable requirements of the rich may seem like luxuries to others). Such an approach tended to leave the spouse with a relatively small proportion of the assets. In the White case Lord Nicholls stressed that there was nothing in the MCA 1973 in s25, to indicate that reasonable requirement should limit the amount awarded to the spouse. The justifications for focusing on the reasonable requirements of the wife have varied from case to case.

II. Obligations and Responsibilities

The impact of child care obligations has already been discussed under earning capacity and is also important in the context of contributions that the carer has made in the past and will make in the future. The child to whom such obligations arise need not be the child of the family. The

issue to be resolved is the question, how far should obligations of one the parties justify a departure from equal division? There is no consensus on this yet.

b) The standard of living enjoyed by the family before the breakdown of the marriage – s 56(1)(c);

There is no automatic entitlement for either or both parties to keep the same standard of living as had been enjoyed during the relationship. The standard of living will be relevant in determining the “reasonable requirements” of the applicant.

If the resources of the parties have diminished since the marriage, it may not be reasonable for the same standard of living to be maintained.

White and McFarlane cases.

c) The age of each party to the marriage and the duration of the marriage – s56(1)(d);

The age of the parties will be relevant to the courts’ assessment of their needs and resources. If a spouse is young and healthy he or she will be able to work and the need for support will be much less while an elderly and infirm spouse’s needs will be much greater. However the presence of children may mean that even a young spouse will not be able to work for a time. The duration of the relationship is also vital. There is a preliminary question as to how duration is to be assessed. If the relationship has been a lengthy one, equal division of property will be appropriate.

d) Any physical or mental disability of either of the parties to the marriage – s56(1)(e);

Disability may invite considerable sympathy, it should however be remembered that it is one the factors to be taken into account. Any disability will of course influence other factors such as the earning capacity and needs of the parties in question.

e) The contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family – s56(1)(f);

The law is not very certain on the aspect of contributions towards the acquisition of family assets. The views on this very complex issue have been divergent. One side of the argument is

that there should be equal division of the family assets. On the other hand the view is that there should be an assessment of the actual contributions.

White v White (2000) 2 F.L.R 981

Lambert v Lambert (2002) EWHC 1685.

f) In the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit, such as a pension, which as a result of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

The court may order a pension fund manager to divert payments from the pensioner's retirement pension to be paid over to the other spouse.

Financial support and maintenance for children has already been covered. It should be noted however that under the MCA 2007, a child is considered as someone who has not attained the age of 21. So it would be advantageous to bring an application under MCA rather than the Affiliation and Maintenance of Children Act.

6.11. Seeking a “clean break”

The law now encourages spouses to avoid bitterness after family breakdown and to settle their money and property problems outside court. Each party is encouraged to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down. A spouse may opt for no financial settlement at all from the other spouse especially in a relationship where there are no children of the family.

6.11. ENFORCEMENT OF COURT ORDERS

The question of enforcement does not arise for secured periodic orders. The problem only arises for unsecured periodic orders or for lump sum payments. If the decides not to comply with the courts' orders what remedies are available to the applicant. The court may make an attachment or sequestration order for payment of maintenance or costs of the custody of, or access to, children.

Maintenance order may be enforced in like manner as if the order were made for payment of a civil debt recoverable summarily – s7 Maintenance Orders (Enforcement) Act.

The court has powers to make an order to have the defendant's earnings attached to a court order for payment of maintenance to a child or a spouse – s8 Maintenance Orders Act. The order shall not be made if it appears to the court that the defendant's failure to pay was not due to wilful refusal or culpable neglect.

Revision Question

Explain the concept of the "Best Interests of the child" as paramount.

Recommended Texts

Family Law and Family Values, edited by Mavis Maclean. Portland, OR: Hart Publishing, 2005.

Choudhry S and Herring J, *European Human Rights and Family Law* (OUP 2010)

Freeman MDA, *Family Values and Family Justice* (Ashgate 2010)

UNIT SEVEN CUSTODY OF CHILDREN AFTER DIVORCE

Introduction

The Court which hears an application for maintenance has jurisdiction also to make orders with respect to the custody of the children of the family. Parties usually disagree on issues of custody. The duty of court is to disregard this and concern itself with the child's welfare "whether the father's claim is superior to the mother's or vice versa".⁶ Their conduct is relevant, but its significance is variable. Guilt or innocence is rarely a determinant as to custody of children⁷ unless the conduct is of such gravity as in *Re L (infants)*.⁸ In that case an adulterous mother deserted the matrimonial home to live near her lover, leaving behind her husband and two children aged 4 and 6. She refused to come back in spite of the husband being ready to forgive her. The Court ruled that the father should have the care and control of the children.

Objectives:

At the end of the study a student must be able to:

1. Have knowledge on issues surrounding issues of child custody
2. Be familiar with the regulating custody of children

7.1. Considerations by the court

The Court will also consider the risk of future corruption of the child. It has to decide for instance, whether one act of adultery can make a mother a non-fit person to look after a child; *aliter* she is promiscuous⁹Courts also consider the age of the child, its sex and health. Courts do not ignore the reality that where children are very young the mother is often better placed to bring them up.

⁶ Law Relating to children: Bevan HK, 1973 p260

⁷ *ibid*, p260 note 11

⁸ (1962) 3 All ER 1

⁹ No or little access to martial property – *Mwiya v Mwiya*; no right to maintenance: *Mwiya (Supra)* ; no right to custody of children on account of no means to provide for the children: *Jenala Phiri*

Another consideration that the Court will take into account is the effect of separating young children if both are young, and refuse to give custody of the girl to the mother and that of the boy to the father. There is no law that governs these matters, the only consideration being the welfare of the children, whether or not they would be happier with one parent or the other. In *Re L (infants)* one of the reasons for the decision to give care and control to the father was hope, albeit faint, that the mother might return to the father for the sake of the children.

The Courts in Zambia usually give one parent care and control of the infant while the other is given reasonable access and a say in the up-bringing of the child. There is also a practice by courts to order a social welfare report on the suitability of the residence of the parties, and the ability to provide for the children, as basis for giving custody to one parent or the other.¹⁰ This practice overshadows the “best interest of the child” factor, as the mother may be the innocent party, who leaves the matrimonial home, without any adequate means to provide for herself and the children. The “best interest of the child” factor must compel courts to order the parent with the means, usually the husband, to provide the other (the wife) and children with adequate accommodation, as well as maintain them.

The courts must counsel the parties at the time of making the custody order and if cooperation between them is possible, grant joint custody. This is possible to achieve if both parties have the welfare of the children at heart. The Court does not usually do this particularly when it reserves its ruling, for the ruling is simply distributed to counsel for the parties by Court marshals or posted into their pigeon – holes in the Registry. In the same vein, Court should see the parties to the proceedings and not rely solely on affidavits and welfare reports. The parties should give oral evidence. This would also provide early opportunity to the Court to counsel the parties than at the stage of making the order. There is general bias against women entrenched in a society which is highly traditional such that once a woman is divorced, all connection between the parties must cease and the woman be made to suffer the separation, even when she was the innocent party. In particular she is touched where it hurts most – refusal of access to her children, some of them who may be of tender age, and without due regard to the child’s sex. It

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would be better if a child had its own lawyer who would independently safe-guard the interests of the child.

The law that governs custody of children is the Affiliation and Maintenance of Children Act Cap 64. This law is embodied in the Act because a custody order is granted only for the duration of the maintenance order. The point that one party may have custody while the other pays for the maintenance if that is in the best interest of the child, rather than that of the parties, is completely missed, and this is quite unfortunate and unjust .Part IV of the Affiliation and Maintenance of Children Act provides as follows:

The Act provides as follows in its Part IV.

Section 15. (1) Where the court makes a maintenance order in respect of a child, the court shall also have power to make whatever order it thinks fit with respect to the custody of the child, and the right of access thereto of either parent, but the power conferred by this subsection and any order made in exercise of that power shall have effect only during any period while the maintenance order is in force.

(2) In making any order as to custody or access, the court shall regard the welfare of the child as the paramount consideration, and shall not take into account whether from any other point of view the claim of the father in respect of custody is superior to that of the mother, or vice versa.

(3) If the court is satisfied that-

- (a) the mother or father of a child is not a fit and proper person to have custody of the child;
- (b) the mother or father of a child has died or become of unsound mind or is serving a term of imprisonment of more than six months; or
- (c) there are exceptional circumstances making it impracticable for the child to be entrusted to the custody of either of its parents; the court may, at the time of making a maintenance order or at any time thereafter, appoint any other person as custodian of the child.

(4) The appointment of a custodian under this section may be made on the application of-

(a) The Minister responsible for community development and social either

welfare, or of any person authorised in that behalf by the Minister in writing generally or specially; or

(b) the father or mother; and such an appointment may be revoked and another person appointed as custodian.

16. (1) Where the court makes an affiliation order, or grants or makes of absolute a decree of divorce, or grants a decree of judicial separation, it may include in the order or decree a declaration that either party to the proceedings

is unfit to have the custody of a child.

(2) Where such a declaration is made, then, if the party to whom the declaration relates is a parent of any child, that party shall not, on the death of the other parent, be entitled as of right to the custody or the guardianship of that child.

(3) Where an order in respect of a marital child is made under this section, the order shall not affect the rights over or with respect to the child of any person, other than a party to the marriage in question, unless the child is the child of one or both of the parties to that marriage and that person was a party to the proceedings on the application for an order under this section.

- (4) The court shall have power to vary or discharge an order made under this section or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.

MARY LOUISE KAKOMA v BENSON CHITONDU KAKOMA (1979) Z.R. 17 (H.C.)

This was an application by the respondent to vary an order of custody. The parties were married in New Zealand, subsequently they came to Zambia where the child was born. The Petitioner was granted a decree nisi of divorce and custody of the child. An application by the respondent to vary custody was dismissed. The Petitioner without leave of court took the child out of the jurisdiction to New Zealand, hence this application. The court considered the issues if whether it had jurisdiction in the matter and whether the order it might make would have any effect.

Held:

- (i) The Court has inherent jurisdiction to deal with the custody of the child whose parent is a citizen of Zambia and who was born within its jurisdiction. The Order made by this court could be incapable of having any effect unless the court in New Zealand takes a similar view.
- (ii) The Proper course is to give the husband legal custody to enable him if he wishes to present his case in a New Zealand court on equal terms with the Petitioner.
- (iii) The Court can act irrespective of the fact that the courts of the country where the child is located may also have jurisdiction to make an order. It assumes that the other court will act in a reasonable manner both as to whether or not it chooses to make an order and as to what order it should make; and every effort is put forth on all sides to ensure that there should be no divergence between the line taken by this court and that taken or likely to be taken by the other court.
- (iv) Custody of the child granted to the respondent without prejudice to any question of care or control.

ELIZABETH NADINE SMITH WESSON V BRIAN SYDNEY STROUD SCJ NO. 35 of
1998 Chirwa, Lewanika, Chibesakunda, JJS

Custody – Child of Tender age

The lower court had ordered joint custody of child to both parents, that is, the appellant and respondent herein. The appellant, appealed against the joint custody order given by court. Lewanika JS delivered the judgment of the court. We have considered the arguments advanced by counsel for the appellant and also the respondent's heads of arguments which we had a chance to peruse prior to the date of hearing this appeal. We are satisfied that in the best interests of the child and considering that the child is of a tender age we will allow this appeal and set aside the order of joint custody and we award custody and care and control to the mother the appellant, with access to the respondent on terms to be agreed by the parties failure to which terms will be ordered by the court. We will make no order as the costs.

VIRGINIA JANE SASSE EVANS v MARIC STEPHEN EVANS 1999/HP/D20

Custody, Contact and resident Order for Child

The applicant applied for contact and resident order for the two children of the family LUKE DANIEL EVANS born on 11 January, 1982 and TRISTAN DRAKE EVANS born on 11th April 1988. The application followed the grant of – decree nisi for the dissolution of marriage between the applicant and the respondent. The applicant live in Zambia while the respondent lived in Ireland with said children. The applicant had been denied reasonable access to the said children.

Held:

- i) The said children to continue residing with the respondent in Ireland during school terms but shall be allowed to visit the applicant during school holidays.
- ii) The applicant to have free access to the children at reasonable times including communication by telephone and correspondence.

- iii) The respondent to be responsible for children's education requirements and maintenance in Ireland whilst the applicant to maintain them on holiday and shall pay for the travel expenses.

This is an application for contract and Resident order under Section 8 of the Children's Act 1989. This application follows the grant of a decree nisi for the dissolution of the marriage of the applicant to the respondent granted on 5th October 1999. The summons is supported by an Affidavit deposed to by the applicant. No Affidavit in Opposition of the application was filed by the respondent and the respondent did not appear at the hearing of the application either in person or by counsel and his advocates in Zambia indicated that he did not wish to be represented by any counsel during the hearing of this application. The respondent is resident in Ireland.

Held

Having heard the evidence of the applicant and having read the Affidavit in Support filed in support of this application and there being no objection to this application and nothing that the interest of the child whenever considering such applications, I wish to state that each parent has parental responsibility over the children of the family. This is on line with the Children's Act 1989 under which this application has been brought. Further, it is settled law that every parent is entitled to contact (access) with the children of the family. Article 9 of the United national Convention on the Rights of the Child provides that a child who is separated from one parent or both has the right to personal relations and direct contact with both parents on regular basis except if it is contrary to the child's best interest. It must be noted here that what is in issue is the best interest of the child and not the rights or interest of the parents.

Having regard to the evidence before me, I find no reason to refuse the orders sought by the applicant. Accordingly, the application is granted and it is hereby ordered that:

- i) the said children shall continue residing with the respondent in Ireland during school terms but shall be allowed to visit the applicant during school holidays.
- ii) The applicant shall have free access to the children of the family at reasonable times including communication by telephone and correspondence.

- iii) The respondent shall be responsible for the children's educational requirements and maintenance in Ireland and the applicant shall be responsible for the children's maintenance whilst with her in Zambia and she will be responsible for all travel expenses and incidentals to their visits.
- iv) The respondent shall inform the applicant of the children's welfare and school progress from time to time and immediately in the event of all health or accident.
- v) The above arrangement is subject to the respondent continuing residing in Ireland and in the event of the respondent's return to Zambia the second child, Tristan Drake Evans shall return to Zambia to live with the applicant. In the event of the respondent leaving Ireland to reside elsewhere, either party may apply for variation of this Order concerning Tristan Drake Evans.

Revision Questions

1. What does the Court consider before custody to a party?
2. Can the Court grant custody of a child to a non-parent during the life of both biological parents?
3. Kuseya aged 24 and Momba, 30, married in 2001. Last year (2003) unknown to Momba, Kuseya started having an affair with Ponga and is still seeing him. In January 2004 Kuseya petitioned for divorce on the basis of unreasonable behaviour alleging that Momba does not provide her with reasonable maintenance and food and other home requirements and that she has lost all affection for him. The hearing has been set down for next week. Kuseya is seeking maintenance orders and a share of the K350 million bungalow which is the matrimonial home. Ponga, a former Zambian Airways employee, owns a two bedroomed flat at a QZ Compound, valued at K80, million. He earns K12 million per annum whereas Momba, a consultant earns K25 million. There are no children of the family although Ponga has a child from a previous relationship.

Advise Momba on the following:

- (a) whether it is likely that Kuseya will obtain a divorce
- (b) whether in ancillary proceedings this is a case for a "clean break"
- (c) whether maintenance will be reduced if Kuseya cohabits with Ponga in Ponga's flat and Momba sells the former matrimonial home.

UNIT EIGHT LEGITIMACY AND CHILD ADOPTION

Introduction

Legitimacy in Zambia is governed by the Legitimacy Act, Chapter 52 of the Laws of Zambia. Legitimacy refers to the status of a child at birth. If a child is born in lawful wedlock, that is, to parents who are married to each other he or she is legitimate. The child is illegitimate if born to parents not married to each other. There is a presumption of law that a child born in marriage is legitimate, that is, the husband is deemed to be the father of a child who is conceived by or born to his wife during their marriage.¹² The presumption is rebuttable if the husband can show that he is not the father. Proof of paternity is now possible through a DNA test if the parties consent. Paternity is also rebuttable if the child is of a questionable physical appearance, for instance if born a mulatto, that is, of mixed black and white parentage when both parents are black or white. However in the New Zealand case of *Ah Chuck v Needham*¹³ Physical appearance was not admitted in evidence to rebut the presumption of legitimacy notwithstanding the Chinese features in the child born to European parents and the mother had previously had a love affair with a Chinese gardener. The court said that “there was no accounting for the vagaries of nature.”

Paternity may be rebuttable if the child is born at full term (nine months) when the relationship of the parties is of a shorter duration; or if intercourse was not possible during the period the child was born, for instance, for the reason that the father was away, unless the conception was a result of artificial insemination using the husband’s sperm. The presumption of legitimacy extends to children born in a voidable marriage if conception took place before the marriage was nullified. The Legitimacy Act in the preamble states as follows:

“ An Act to amend the law relating to children born out of wedlock ; and to provide for matters incidental thereto. ”

In Section 2 (a) of the Legitimacy Act provided for a person whose father or mother was married to a third person when he was born.

Section 3 provides as follows

(1) Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another..... the marriage shall, if the father of the illegitimate person was or is domiciled in the Republic, render the person, if living, legitimate-

¹¹ Deoxyribonucleic acid is the test used to establish parentage using the blood, semen, hair roots etc. of a person who disputes parentage see SM Cretny and J.M Masson: Principles of Family Law 6th ed at 631

¹² Anthony Dickey Family Law 3rd LBC Information Services 1997

¹³ 1931 NZLR 559, Anthony Dickey Family Law Op cit. 132

(a) in the of a legitimated person whose father or mother was married to a third person when he was born the date of the marriage leading to legitimating where the marriage occurred before the appointed date,¹⁴ the appointed date,¹⁵ or person whose father or mother was married to a third person when he was born, from the appointed date (1st January 9166) or from date of marriage, whichever last happens; or

(b) in any other case, from the commencement of this Act, or from the date of the marriage, whichever happens last..

8.1.Extra Marital Children

These are children born to a man or woman who is married to someone else, or to an unmarried woman and man married to another woman. Paternity may be established by a blood test or by the child's birth register if the father acknowledged in writing that he was the father at the time of registering the birth. Section 15 of the Act provides as follows:

“No person shall be bound as father to give notice of an illegitimate child and no person shall be registered as the father of such child except on the joint request of the mother and himself and upon his acknowledging himself in writing to be the father of the child in the presence of the Registrar.”

Where a person required to write or append his/her signature is illiterate, he or she shall affix a mark. By Section 21 (2) where a person acknowledges himself to be a father of an illegitimate person, the Registrar shall require him to sign the register first, before the mother. If they cannot sign, they are required to affix mark in the register.¹⁶ The Births and Deaths Registration Act Chapter 51 of the Laws of Zambia requires the birth of every child to be registered within one month, or in exceptional circumstances within twelve (12) months of the date of the birth of the child.¹⁷ If a birth of a child is not registered as aforesaid, it can only be registered upon a satisfactory report being made to the Registrar-General¹⁸ and complying with the appropriate requirements of the law. The Births and Registration Act applies to all children, whether born of a civil or customary marriage; to an unmarried woman and man, or to an unmarried woman and man is married to someone else. It is not a requirement that a child should be registered in the names of a particular parent. Hence the child may be registered in the name of the mother or of the father. In practice however, children are generally registered in the father's name as their surname. It is also not unusual to find children of the same parentage registered in different

¹⁴ “The appointment date” means the 1st January 1966 per section 2 of the Act

¹⁵ Rule 21, Births and Deaths Registration Rules

¹⁶ Rule 23, Births and Deaths Registration Rules

¹⁷ Rule 24, Births and Deaths Registration Rules

¹⁸ 2000/HPA?46

names as traditionally, a child may be named after an important person or event of significant at the time of the child's birth. (E.g. hunger, as a result of drought, flood, a death, locusts, mice, etc).

The prescribed form for registration of births provides for particulars of the mother and father of the child and also details of their marriage. Where the form is blank with respect to particulars of marriage of the parents, it can be presumed that the child is illegitimate. Paternity can also be presumed where there is a maintenance agreement between the mother and father of the child as in *Rita Mwalubanga v Jeep Juul Nielse*,¹⁹ or where a man acknowledges that he is the father of a child by executing some formal instrument to that effect, as held by court in *Charity Oparaocha v Winnie Murambiwa*.²⁰ In this case the man a Nigerian resident in Zambia registered two children at the Nigerian High Commission and obtained passports for them in his name. It would appear that a child born to a Zambian man and woman in an extramarital relationship however, would still be required to be registered under the Registration of Births and Deaths Act as already discussed.

8.1.2 Rights of Illegitimate Children

Generally children born outside marriage have the same rights as those born in marriage. The mother, and the father where paternity is not denied, have a duty to maintain the child.

8.1.3 Right to Succession

The Legitimacy Act has not been reviewed since 1965 when it was amended by way of Statutory Instrument 152 (of 1965) soon after independence. It has not therefore been harmonized with recent developments and amendments in other laws that apply to children. For instance, Section 3(2) provides that:

“The legitimation of a person under this Act does not enable him or his spouse, children or remoter issue to take any interest in real or personal property save as is hereinafter in this Act expressly provided.”

The Intestate Succession and the Wills and Administration of Testate Estate Acts²¹ both

¹⁹ SCZ Judgment No. 15/2004, Supra, page

²⁰ At customary law generally all children have the same rights. Having a child outside marriage is however a moral issue and it is associated with meeting in “dark corners” or the bush resulting in conception and birth as it is generally assumed that the “Chigololo” (Immoral Sexual act) took place without anyone else’s knowledge parties having met in the “bush” or roadside outside the village, most likely, at night. In modern times although the sexual act is still considered immoral, parties can have it in descent structures.

²¹ Anthony Dickey Family Law Op cit, page 272

provide that a child born in or out of marriage is entitled to inherit from a parent, as long as percentage is not in dispute. Section 7(1) of the Legitimacy Act provides that “a legitimated person and his spouse, children or more remote issue shall be entitled to take any interest in the estate of an intestate dying after the date of legitimation under any disposition coming into operation after the date of legitimation.

(a) by descent under an entitled interest created after the date of legitimation;

In other words, all these rights to property accrue to the person born out of marriage only if the person has been legitimated by subsequent marriage of the person’s parents. By Section 7(2) “where the right to any property, real or personal, depends on the relative seniority of the children of any person, and those children include one or more legitimated persons, the legitimated person or persons shall rank as if he or they had been born on the day when he or they became legitimated by virtue of this Act, and if more than one such legitimated person became legitimated at the same time, they shall rank as between themselves in order of seniority.”²²

Section 13 provides for the right to succession:

(1) Where, after the commencement of this Act, the mother of an illegitimate child, such child not being a legitimated person, dies intestate as respects all any of her real or personal property, and does not leave any legitimate issue her surviving, the illegitimate child, or, if he is dead, his issue, shall be entitled to take any interest therein to which he or such issue would have been entitled if he had been born legitimate.

(2) Where, after the commencement of this Act, an illegitimate child, not being a legitimated person, dies intestate in respect of all or any of his real or personal property, his mother if surviving shall be entitled to take any interest therein to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent.

8.1.4. Rights of children of void and voidable marriages

In the case of children of void marriages, Section 4 provides as follows:

(1) Subject to the provisions of this section, the child of a void marriage, whether born before or after the appointed date, shall be treated as the legitimate child of his parents if at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage if later) both or either of the parties reasonably believed that marriage was valid.

(2) This Section shall apply, where the father of the child was domiciled in the Republic at the time of the birth or, if he died before the birth, was so domiciled immediately before his death.

(3) The provisions of this section shall not affect-

(a) any rights under the intestacy of a person who died before the appointed date;

(b) the operation or construction of any disposition coming into operation before the

²² Anthony Dickey Family Law Op cit, page 272

appointed date;

(4) In this section, “void marriage” means a marriage, not being voidable only, in respect of which the High Court has or had jurisdiction to grant a decree of nullity, or would have had such jurisdiction if the parties were domiciled in the Republic.

Section 5 provides for the legitimacy of children of voidable marriages

“Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of being annulled, at the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.”

Section 10 provides that a legitimate person has the same rights as a person born legitimate. It provides as follows:

A legitimated person shall have the same rights, and shall be under the same obligations in respect of the maintenance and support of himself or of any other person as if he had been born legitimate, and, subject to the provisions of this Act, the provisions of any Act relating to claims for damages, compensation, allowance, benefit, or otherwise by or in respect of a legitimate child shall apply in like manner in the case of a legitimated person.

By Section 13(1)

Where, after the commencement of this Act, the mother of an illegitimate child, such child not being a legitimated person, dies intestate as respects all or any of her real or personal property, and does not leave any legitimate issue her surviving, the illegitimate child, or, if he is dead, his issue, shall be entitled to take any interest therein to which he or such issue would have been entitled if he had been born legitimate.

The emphasis is therefore made, that this Act needs to be harmonized with the laws of maintenance and inheritance to remove any doubt or conflict as to the status of children born out of wedlock. Illegitimate children no longer suffer any legal disadvantages and such terms as ‘bastards’, ‘bush’ or ‘roadside’ children or “*filius nullius*” (child of nobody) are no longer used to describe them. At common law in the Eighteenth century, an illegitimate child was referred to as a bastard and as such the child had no heritable blood. He or she had no legal right to maintenance nor could he/she inherit property and no one could inherit through him or her.¹² Law reform has changed this and in England the family Law Reform Act of 1987 ended the distinction between children based on the marriage status of their parents.²⁴

At international law the 1989 United Nations Convention on the Rights of the Child brought a new and important perspective to children’s rights.²⁵ It applies to all children without discrimination and lists children’s basic human rights as including rights to name, nationality, identity, privacy and liberty; civil and political rights—freedom of expression, thought, conscience, religion and assembly; economic and social rights –

²³ Anthony Dickey Family Law Op cit, page 272

²⁴ SM Cretney and J M Masson Op cit, page 603

²⁵ See the Summary of the provisions of the UNCR in Chapter 11, Supra

health care, standard of living and social security, and cultural rights, among other rights.

8.2 CHILD ADOPTION

Introduction

Ordinarily, the rights and duties of parents over their children are inalienable. Parents have been defined to include legal guardians; and under customary law and concept of extended family the term parent¹ includes any person for the time being with custody of a child and providing the child parental care.

Objectives:

By the end of this topic, a student must be able to:

- 1.Explain the nature of adoption
- 2.Show knowledge of the law of adoption

Adoption in Zambia is governed by the Adoption Act Cap 54 of the Laws of Zambia. It is therefore a creation of statute. Under customary law on the other hand a child belongs to everybody in the extended family and does not have to be formally adopted through the Court system. The physical move of a child from its natural parents to any member of the extended family is simply by agreement between the “parents”, and whosoever is in physical custody of the child exercises parental rights over the child. The concept of inalienability of rights does not exist.

8.2.1. Definitions

Adoption is a process whereby parental responsibility is by Court order taken from the natural parents to the adopters. The child is treated in law as if it were a natural child of the adopters and the parental connection with the child’s natural parents is extinguished. The adopters are usually a married couple and the adopted child is treated as a child of the marriage. She/he is treated as if she/he was born in wedlock.

By section 3(2) an adoption order may be made on the application of two spouses authorizing them jointly to adopt the infant.

By section 3 (3) a mother or father may also adopt her /his child alone or jointly with her /his spouse. This provision covers cases of step – parents (mother or father)

By section 4 (a) only a person who has attained the age of 25 and is at least 21 years older than the infant may adopt a child

Or by section 4 (b) if the adopter is a relative of the child she /he must have attained the age of 21 unless, by Section 4 (c) the applicant is the mother or father of the infant.

Infant is defined in Section 2 as a person who has not attained the age of 21.

A relative is also defined in S.2 as meaning grand – parent, brother, sister, aunt, uncle, whether of full blood, of half-blood or by affinity, and includes, where the infant is illegitimate, the father of the infant and any person who would be a relative of the infant if the infant was the legitimate child of his / her natural mother and father.

A sole applicant who is male may not adopt a female infant unless there are special circumstances to the satisfaction of a court of competent jurisdiction, that is, the High Court or Subordinate Court as provided by section 10.

By Section 4(4) an adoption Order shall not be made

- (a) Without the consent of parent or guardian, or body with parental responsibility of the infant e.g. orphanage, welfare office, adoption society
- (b) unless both parties, or the other party (would-be step mother or father) consents.

Section 4 (5) requires that the infant must be resident in Zambia and she/he must have continually been in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order; and the applicant must have notified the Commissioner for Juvenile Welfare of his/her intention to adopt the infant. Consent will be dispensed with where a parent or guardian has abandoned, neglected or ill-treated the infant, or persistently neglected to maintain or contribute to the maintenance of the infant.

If a person whose consent is required cannot be found on account of death or being outside the country; or is otherwise incapable of giving consent for instance on account of ill health or unsoundness of mind; or the person unreasonably withholds consent, the Court may dispense with the consent.

Section 5 (1) of the Adoption Act Cap 54 provides that the Court may dispense with any consent required by section 4 (4)(a) if it is satisfied

- (a) in the case of a parent or guardian of the infant, that he has abandoned, neglected, or persistently ill – treated the infant
- (b) in the case of a person liable by virtue of an order or agreement to contribute to the maintenance of the infant, that he has persistently neglected or refused so to contribute;
- (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld

By Section 5 (2) the court may dispense with the consent of the spouse of an applicant for an adoption order if satisfied that the person whose consent is to be dispensed with cannot be found or is incapable of giving his consent or that the spouses are separated and are living apart and that the separation is likely to be permanent

The requisite consent is generally given unconditionally or subject to conditions regarding the religious persuasion in which the infant is to be brought up. The consent may be given in writing before the hearing of the application, thereby making it unnecessary for the person whose consent is required to attend the adoption. It may also be given in testimony during the hearing. The Act also gives special consideration to the consent by mothers of very young children.

By section 6 (5) (a) and (b) a mother may not give an effective consent to the adoption of her infant until it is at least, six weeks old, and unless the document purporting to be her consent is attested on that date in the prescribed manner. The rationale for this would appear to be to give mothers sufficient time to be certain about giving away their infant children. The balance of the mind of the mother may be disturbed as an effect of giving birth, or by lactation consequent on the birth of child. Some mothers get so disturbed by a birth as for instance to commit the offence of infanticide i.e. killing of the infant.

It also gives the mother time to be prepared for court proceedings in case their presence is necessary in order to answer questions from Court about the nature and effect of having the infant adopted. The Court is required to ensure that both parties understand the full implications of an adoption order.

Further, if a child is old enough to understand, the Court is expected to ensure that the child is made fully aware of the effect of the adoption order, and will grant it only if it is in the best interest of the child. This is in compliance with the United Nations Convention on the Rights of the Child (UNCRC) 1989

The United Nations Convention on the Rights of the Child (UNCRC) 1989, provides in Article 21 that:

“States Parties that recognize and / or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration”...

The Court is assisted by the Commissioner of Juveniles who, upon receiving notice of an application for adoption, instructs a social welfare officer to carry out an investigation into the suitability of the adoptive parents, having regard to their living conditions, standard of living (ability to adequately feed, clothe, educate and medically cover the child). The Court examines the sources of income of the adoptive parents, including any real property, shares, annuities, bonds, stability of a job, directorship of a company, and the like.

Once an adoption order has been granted by a Court of competent jurisdiction, it is a requirement under, section 11(1) to be registered in the Adopted Children’s Register by the Registrar General. By section 11(2) a Certified Children’s Register shall be proof of the adoption to which it relates, with all the particulars therein such as those relating to date of birth or country of birth of the child. The Registrar General is also required to keep an index of the Adopted Children’s Register, and every person shall be entitled to search the index and have a certified copy of any entry in the Register in all respects subject to the same terms conditions and regulations applicable under the provisions of the Births and Deaths Registration Act, Cap 51. This is provided for in section 11(3)

Section 11(4) provides that the Registrar General shall, in addition to the Adopted Children's Register and the index thereof, keep other registers and books, and make such entries therein, as may be necessary to record and make traceable connection between any entry in the Register of Births which has been marked "Adopted" and any corresponding entry in the Adopted Children Register, but such other registers and books and indices thereof shall not be open to the public nor may any search be conducted therein except by order of the High Court.

The provisions of the Adoption Act enable a curious child to trace his or her natural parents, and to be in contact with them. This is more usual with adult children. However, a safe-guard is placed by section 11(4) in case of children who may have been unwanted, or dumped, as it would clearly not be in their best interest to know that their natural parent or parents did not want them. The secrecy or concealment of such information may in other cases have devastating effect on the self-identity of the child and may adversely affect relations with the adoptive parents.

8.2.2 Status conferred by Adoption

Section 14 (1) of the Adoption Act provides that:

"Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a guardian and to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock, and in respect of the matters aforesaid the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock."

By Section 14(2) matters relating to custody²⁶, maintenance²⁷ and access to children shall apply to adoptive parents as if the infant was their natural child and the child shall be in likewise standing with respect to the adoptive parents as if they were his or her natural parents.

In the case of an adoptive parent or adopted child dying intestate, property shall devolve to the parent or the child in all respects as if the adoptive parent or the adopted person were natural

²⁶ See Unit 9

²⁷ See Unit 8

parents and child. The Intestate Succession Act Cap 59 and the Wills and Administration of Testate Estates Act, Cap 60, both define a child as “*a child born in or out of marriage, an adopted child, a child who is conceived but not yet born*”.³

However, succession to an estate regarding property, real or personal which devolves on a specified line of beneficiaries would not however, include an adopted child.

A summary of the status conferred by adoption is given below:

1. the parental responsibility which any person had immediately before the making of the order, ceases
2. the child is treated as that of the adopters
3. the child is treated at law as if she/he had been born in wedlock
4. the child is treated as if she/he were not the child of any person other than the adopters
5. the child who was illegitimate at birth becomes a legitimate child of the adopters from the date of the adoption order
6. that child assumes the name of the adopters and has a right to the nationality of the adopters. Right to the nationality of the adoptive parents is not automatic. This depends on the laws governing the adopters. In the United Kingdom, a child adopted by a British citizen under the British Nationality Act 1981, becomes a British citizen from the date of the order. However adoption overseas, e.g. in Zambia, by a British citizen does not confer automatic British citizenship on the child or infant with respect to the names of the adopted child
7. the child has a right to inherit from the adoptive parents as if they were his or her natural parents unless a contrary intention appears in terms of S.15 (2); though this defeats the “paramountcy” principle
8. the child has a right to the name of the adopters. The requirement for the name by which the child shall be known is to be found in the prescribed “form 5” used to make the

adoption Order. The adopters indicate therein, the child's new names, but this is not category as the Act does not specifically provide that the child shall assume the surname of the adopters

9. extinction of natural parental rights and vesting them in the adopters parents means all rights to consent to marriage are of the adopters.
10. maintenance orders and orders as to custody of the child will be made to a spouse as if the child was the natural child of the adopters
11. the law of prohibited degrees of consanguinity apply with regard to marriage, notwithstanding that the child may or has since been adopted by other parents(s)
12. any affiliation orders in respect of an illegitimate child for the benefit of the child (by the natural father) cease, but any sums unpaid on the day of the order ie arrears, remain payable
13. Article 21 of the UNCRC provides that a *system of adoption shall ensure that the best interests of the child shall be paramount*. The Bill of Rights in the Constitution of Zambia has anti – discriminatory provisions, but these are not guaranteed as S.23 (4) allows discrimination in the area of personal laws with respect to adoption, marriage, divorce, burial, devolution of property and other rights.

The UNCRC expects certain requirements to be met by State-Parties, including the right of participation by a child, in matters affecting his or her life, and the right of participation includes the right of expression. There is otherwise no domestic law which requires parents or the State to take into consideration the views of a child.

In the African tradition, children do not ordinarily participate in the negotiations that take place among family members concerning their marriage. Girls may be asked a question or two just as a formality, as to whether they know the suitor, or the people who have come on his behalf to ask for her hand in marriage.

In Part V, the Act provides for the registration and operation of adoption societies. People who wish to adopt a child may make arrangements for adoption through an adoption society which is lawfully established and registered.

8.2.3 Guardianship

Guardianship is a legal term or concept that confers duties and responsibilities over children during their minority. A *guardian ad litem* is an individual qualified or trained in social work. He/she usually stands in for the child in a law suit, since a minor has no capacity to bring the action on his or her own behalf. The *guardian ad litem* has to be independent of the parties and great importance is placed on this independence and cannot be compromised by any restriction directly or indirectly with respect to his / her duties. See the case of *R v Cornwall County Council [1992]*, *All ER 471*. *R v Birmingham Juvenile Court exp G [1990] 2 QB 573 & [1989] 3 AER 336* on the guardian's general duties to safeguard the interest of the child

- (a) the child's ability to understand sufficiently any matters relating to procedures for adoption, including submitting to medical examinations
- (b) matters relevant to the proceedings including attending court
- (c) any other matter which he / she considers relevant for the Court to know in deciding whether or not to grant the order.

Foster parent

Foster parent, on the other hand, need not have legal guardianship if a parent is dead or is unfit to exercise his / her responsibilities. It is clearly essential that someone else stands in their place as *loco parentis* to the child. This gives them only *de facto* care of the child but they can eventually apply for guardianship if they wish. The fact that they are foster parents does not exempt them from public scrutiny and regulation. The foster parents are as cares are expected to ensure that the child's welfare is satisfactory and a welfare officer may be charged with a duty to oversee the parents and give them advice.

Foster parents are granted an order as such, to live with the child and may adopt if they decide to. The act of adoption gives parental responsibility. Mere guardianship or foster parenthood does not. There is a common law on the, however, to afford protection, and willful neglect may result in criminal liability. *Michael Andrew Macgarry v Eric Victor Macgarry (Adoptees)* 1999/HP/374

Revision Questions

1. What is the law that governs the status of children born out of wedlock?
2. Has the Legitimacy Act got a useful place in the statutes of Zambia?
3. What is the effect of an adoption order with respect to the:
 - (i) rights of the biological parents
 - (ii) rights of the adoptive parents
 - (iii) can an adoptive order be revoked

Recommended Texts

Rutkin, Arnold H. (gen. editor). Family Law and Practice. New York: Matthew Bender, 1985-KF504.R881985

Starting Points: the Fundamentals of Practice in Illinois. Springfield, IL: Illinois Institute for Continuing Legal Education, 2001. [IICLE]KFI1280.S73 2001

Summaries of Twenty-five State Court Improvement Assessment Reports. Reno, NV: Permanency Planning for Children Project, National Council of Juvenile and Family Court Judges, 1998. KF9323.B351998

UNIT NINE INTESTATE SUCCESSION

Introduction

Part II of the Intestate Succession Act deals with the distribution of the estate. By section 4 of the Intestate Succession Act a person dies intestate when she/ he has not left a will on all or part of her or his estate. She/he is intestate only to the part uncovered by the will and in that case the Intestate Succession Act applies. All people have experienced death in one way or another. Most have experienced the way the deceased's estate is shared among relatives traditionally. The question is whose tradition? What of intermarriages, whose tradition should be followed. Does this practice apply to statutory marriages as well? The civic organisation of the 1970s identified a serious problem in the various traditional practices of inheritance / succession which left out many women who by then had become educated and able to buy household goods or contribute to mortgage repayments of houses. By 1972 the Government set up a Commission of inquiry headed by Professor M.P. Mvunga, then Director of the Law Development Commission and it took evidence from members of the public. Its recommendations did not become law until 1989 when, without further debate and shelving, the President then decided it was time to answer the property grabbing outcry. Meantime, quite a few changes had been made to the recommendations.

Objectives

By the end of the topic a student must be able to:

1. Show knowledge of issues of intestate succession
2. Familiar with the law regulating intestate succession in Zambia
3. Explain the distribution of estates

11.1. Distribution of the estate-s5

- 20% goes to the surviving spouse
- 50% devolve upon the children in such proportions as are commensurate with the child's age or educational needs.
- 20% upon parents of the deceased
- 10% dependents in equal shares.

Where the property left is a house the spouse and children shall both hold the house as tenants in common and the surviving spouse shall have a life interest in the house which shall cease upon remarriage – s9.

Revision Questions

Discuss the beneficial interest of:

- (a) a widow in a civil marriage
- (b) a widow or widows in a polygamous or potential polygamous marriage
- (c) a mistress or girl-friend
- (d) children of the deceased

Recommended Texts

Thinking about Program Evaluation: What Is It and Why Should You Do It? Reno, NV: National Council of Juvenile and Family Court Judges, 1998. KF505.5.D631998

Weyrauch, Walter O. and Katz, Sanford N. American Family Law in Transition. Washington, DC: Bureau of National Affairs, 1983. KF505.W491983

Wiley Family Law Update 1995. New York: John Wiley & Sons, Inc., 1995. KF505.W551995

UNIT TEN TESTATE SUCCESSION (WILLS)

INTRODUCTION

Any adult of sound mind may make a will disposing of his or her property. The formalities set out in the Wills and Administration of Testate Estates Act, cap 60 of the Laws must be observed. The Will determines how a person's property may be distributed to the beneficiaries. There is a firm belief under English Law which gives the testator freedom to make a Will in whatever terms one chooses. This freedom can only be challenged in very limited circumstances such as where children are left out of the Will. Making a Will allows an individual to give effect to his or her views about family life and family obligations, to reward (or punish) family members.

Objectives

Students must be able to:

1. Define a will
2. Explain the elements of a valid will
3. Display knowledge on the variation of a will
4. Be familiar with the law regulating wills in Zambia

10.1. Powers Exercisable by Will –s5

A testator may:

- Dispose of any property which is his or which he is entitled at the time of his death or to which he may be entitled thereafter.
- Appoint one or more persons to be his executor(s).
- Attach any terms and conditions in relation to the disposition of any part of his estate subject to the Trust Restriction Act
- Appoint a guardian for his minor child where surviving parent is unable to do so.

10.2. Unreasonable Provisions in a Will

If the court upon application of or on behalf of a dependent is of the view that a testator has not made reasonable provision during his lifetime or by his Will, for the maintenance of the

dependent, and that hardship will be caused, it may order taking into consideration all circumstances and subject to such conditions and restrictions as the court may impose, notwithstanding the provisions of the Will, order that such reasonable provision as the court thinks fit be made out of the testator's estate for the maintenance of the dependent – s20.

10.3. Variation of Court order –s21

The court may vary the terms of a will if it contains unreasonable provisions.

10.4. Executors

Any person eligible to make a contract, of or above the age of 21 years may be appointed an executor of the Will – s25. An executor may renounce the appointment.

10.5. ADMINISTRATION OF ESTATE

The court shall grant letters of administration to any interested person where the deceased has died intestate. Where no application is made the administrator general or the deceased's creditor may be appointed administrator – s15.

Duties and Powers – s19

1. Pay debts and funeral expenses of the deceased and pay estate duty if payable;
2. To effect distribution in accordance with the rights of interested persons;
3. To produce an inventory or render an account of the administration of the estate either on his own motion or by court order.

Removal- s29

An administrator may be relieved of his duties if

- he misappropriates the assets of the estate;
- the proceedings to obtain letters of administration were defective;
- letters were obtained fraudulently.

10.6. GUARDIAN AND HIS APPOINTMENT

A court may appoint any person to be guardian of a minor. A guardian appointed under the Act is entitled to represent the interests of the minor in any proceedings in court relating to the administration of the estate in which the minor has an interest – s32.

Jurisdiction of the Courts

The High court shall have jurisdiction in matters relating to succession- s 43.

A local court shall have jurisdiction if the value of the estate does not exceed K 50 000, and a subordinate court K 100 000.

If a person decides to distribute or share among relatives and friends his or her property to or before he or she dies, he or she writes a will. This is done by a legal document known as a will. Before 1989, Zambians could not make wills under the Wills Act of England of 1837. In the pre-independence period, however, Africans did not qualify to make wills as they had an established customary practice of dealing with the estate of the deceased, as well as with the widow and children of a person. The new law enacted at the same time as the Intestate Succession Act in 1989 was passed in order to localize and simplify the making of wills.

The Wills and Administration of Testate Estates Act Cap 60 applies to all people, Africans and non-Africans, who choose to write a will. Cap 60 replaced the 1837 Wills Act of England which applied only to non-Africans in Zambia prior to 1989. Section 70 of the Act provides that

“From the commencement of this Act, the Wills Act, 1837, of the United Kingdom shall cease to apply to Zambia.”

Cap 60 in consonance with Cap 59, does not apply to:

- (a) land which at the death of a testator had been acquired and was held under customary law and which under that law could not be disposed of by will
- (b) property which at the death of the testator was institutionalized property of a chieftainship and had been acquired and was being held as part of chieftainship property.

A person who dies without leaving a will has no say as to who might administer his estate. It could be a person or persons he or she might not have approved of. A person may wish to widen the category of people who may benefit from his / her estate upon death, to include, for instance brothers, sisters, nieces, nephews uncles and aunties and other members of the extended family. One may simply wish to give his / her spouse and children more than what the Intestate Succession Act entitles them to. With a will, one appoints a person who will be the guardian for his / her minor children should there be no surviving spouse.

The law governing wills is the Wills and Administration of Testate Estates Act Cap 60 of the Laws of Zambia. It came into effect on the 20th July 1989, together with the Intestate Succession Act.

The Act was passed “to simplify the law governing the making of wills to provide for adequate financial and other provisions to be made for dependants in a will; to provide for the administration of estates of persons dying having made a will; and to provide for matters connected with or incidental to the foregoing.

Therefore, the Act provides for the making of a valid will, and for the distribution of property of a deceased person according to that dead.

10.7. Definitions

A few of the terms defined by Section 3 of the Act are as follows:

Administrator is the person given letters of administration to distribute the estate according to the wishes of the deceased person

Child means a child born inside or outside marriage, an adopted child or a child who is conceived but not yet born

Codicil is a document supplementing the will, either by adding, explaining or canceling something in the will

“*Court of probate*” is the court which deals with wills

Dependant includes wife, husband, child or parent

Executor is the person named in the will to distribute the estate according to the will

Marriage means a union of one man and one wife under the marriage Act, a polygynous marriage under customary law, and a common law marriage*

Minor means a person below the age of eighteen (18) years
Signature includes a thumb print

Testator means the person who made a valid will

Will includes a codicil.

10.8. Capacity to Make a Will

Every person who is eighteen years and above who is of sound mind may make a will. A blind or illiterate person may make a will if he or she is of sound mind.

10.9. Requirements of a valid will

To be valid, the Act provides that it must be in writing, and must be signed at the foot by the testator or by some other person in the presence and at the direction of the testator in the presence of two witnesses, the two witness must present together with the testator and must also sign the will in the presence of the testator and of each other. A person who is blind or of unsound may not be a witness to a will.

A blind or illiterate testator

In the case of a blind or illiterate testator making a will, the will must be read by a competent person who did not participate in the making of the will. Such person shall explain the contents of the will before it is signed, and shall also declare in writing that he/she read over and explained the contents of the will to the testator, and that the testator appeared to have perfectly understood it before signing as stated above.

Soldiers other security staff and ill or physically injured persons

Soldiers, other security staff, and ill or physically injured persons who have lost hope of recovery and who eventually die because of that illness or injury can

- (a) write a will which is not witnessed, provided it is in the handwriting of that testator

- (b) write or have a will written by another person provided it is witnessed by one person
- (c) make an oral will in the presence of at least two witnesses.

10.10. Witness to a will

A person who witnesses a will shall not be allowed to be a beneficiary under that will although the witnessing itself by that person shall be valid.

Such person can be called upon to prove the validity of the will.

However, such person shall not lose the gift if she / he witnesses a codicil which is another document which confirms the will.

Neither shall she / he lose the gift if the will was also witnessed by two other people who are not themselves beneficiaries.

10.11. Revocation (cancelling the will)

A will or part of it can be cancelled or altered by

- (a) Another will afterwards or by a codicil, i.e. another document which says it is changing the will.
A codicil must be signed and witnessed just like a will;
- (b) Written intention to change the will, similarly signed and witnessed;
- (d) Burning, tearing or other ways of destroying done by the maker of the will (testator) or by someone so ordered or instructed by the maker.

10.12. More than one will

Where a dead person leaves more than one will, the latest (or later) shall prevail.

Thus a later will cancels an earlier will. And once a will has been cancelled, it cannot be revived by the cancellation of that later (subsequent) will. It can only be received by:

- (a) being signed and witnessed again or
- (b) by a codicil (another document duly signed and witnessed) reviving it.

In either case, the effective date will be the date of the revival.

Fraud or pressure etc.

If the will maker (testator) destroys a will

- (a) under threat or pressure
- (b) by accident, or
- (c) by mistake

The destruction shall not revoke or cancel the will.

Other documents

The will shall not refer to another document unless that other document is clearly identifiable, and also signed and witnessed like the will itself.

Oral evidence can be allowed in order to identify that other document.

Interpreting a will

The will shall be interpreted as far as possible, and will not be set aside simply because it cannot be applied in full. Every will shall be interpreted as applying to all the property as though the will was made immediately before the will maker's death.

Land, buildings, etc.

In the case of property which cannot be moved, such as land, buildings and things fixed to land or buildings, these shall be treated as one whole when giving it (the property) to the beneficiary if there is no limitation.

And if property such as land is given in general terms even if it is occupied by a different person, it shall include all lands owned by the will maker (testator) when giving it to the beneficiary, unless a contrary intention is established.

Death of beneficiary

If a beneficiary dies before the will maker (testator), her / his gift shall lapse. If she/he has children the gift shall go to the children as if the beneficiary had died soon after the testator.

If there is any doubt as to who died first, the testator or the beneficiary, it shall be deemed that the testator died first, except in the case of a contrary intention.

Safe-keeping of a will

A will can be kept in any safe, including at the High Court of Zambia in a sealed up envelope stamped with a High Court Seal.

Unreasonable provision in a Will [Section 20]

If any person, such as the husband wife or child or parent of the testator, feel that she/he has not been given enough, she/he may apply to court within six (6) month, and the court will give her/him more if it thinks that hardship will be caused if that is not done.

What the court can do

In that event the court shall order either:

- (a) a lump sum or periodic sums to be paid; or
- (b) part of immovable property e.g. land, buildings, to be given to such person to be used during that person's life or for a shorter period of time
- (c) in the case of periodic payments, the court shall direct the time to stop the payments.

And in any case:

- (d) the payments shall stop upon re-marriage of the widow/er or
- (e) upon attaining the age of 18 in the case of a child; or upon the child's leaving school or university or collage, whichever is the case; or
- (f) If the child is under disability, at the end of that disability or
- (g) At the death of that person i.e. child, husband, wife, or parent.

Factors which the court will consider

In making its decision about maintenance, when and how soon it may start, the court will consider the nature of the property and the interests of the wife or husband or parents or children including other beneficiaries.

The court will also consider the reasons why the testator did not give (or sufficiently give) anything to the applicant;

It will also consider the behaviour (conduct) of that person in relation to the testator.

The Court may also take into account any other circumstance that is reasonable and relevant in determining the accuracy of the oral evidence.

A person who makes an application to court under this part shall not be allowed to distribute the property and she/he will not be given letters of administration.

Furthermore, any variation shall date back to the time of the testator's death (i.e. will be paid in arrears, in case of money), but the variation shall not affect a larger part of the property.

Change of orders

The court can change its orders if it finds that, for instance, some important facts were not disclosed, or circumstances of the applicant have changed a great deal.

Appointment of an executor

A person above the age of 21 and who is not insane or otherwise incapacitated may be appointed executor of a will.

Stepping down

An executor may step down from executorships either by oral application (i.e. by saying so) to court or by writing supported by an affidavit.

An executor may also cease to be an executor if a person owed money (a creditor) applies to court. This extends also to any other person who may have other interest in the property. The executorships will end even if the executor does not defend her/his status.

However, the executor may be reinstated later if the court is satisfied that it is in the interest of the estate to do so.

Part V – Grant of probate and Letters of Administration

Authorization to distribute property is through letters of probate given by court to a person(s) named in the will as executor, provided she/he is not below 21 years of age, mentally unsound, or otherwise incapacitated.

Letters of probate may also be given to a Trust Company on behalf of a person below 21.

Several executors

If several executors are named, letters may be given to each of them at the same time, or at different times.

Specific duty

An executor may be appointed to perform a specific duty. Letters of probate will also be given for that specific duty only.

Loss or destruction of a Will

If a will is lost, mislaid or destroyed by accident and not by any intention act of the testator, a copy or draft of the will if available will be accepted until the original is found or until the copy or draft is proved to be true.

If the will is with a person who is outside the country who does not bring it, but an executor gets a copy, that copy shall be accepted.

A codicil may be produced after letters of probate (permission given to executors) has already been given. Letters will also be given with regard to the codicil.

If the codicil cancels the executorships, letters given to such executors will be withdrawn and fresh letters given to the person(s) named in the codicil.

Where

- (a) No executor is appointed by a will; or
- (b) All executors step down or do not qualify (e.g. for being below 21 or unsound mind;
or
- (c) All executors die before the testator; or
- (d) All executors die before obtaining letters of probate or before finishing distribution of
the property
- (e) Or the executors do not come forward to obtain the letters of probate

permission will be given to such person(s) as the court considers most suitable to administer the property. Such people not named in the will are called administrators, and they obtain letters of administration.

Any payments to executors or administrators before cancellation of their office shall be legal and they may remunerate themselves for work done before the cancellation.

An executor or administrator who does not give up his office after cancellation commits a crime punishable by a fine up to K500.00 or 3 months imprisonment or both.

A foreign will

- (a) a will executed in a foreign country according to the laws of that country will be valid including:-

- (b) a will executed aboard a ship or areophane of any description according to the relevant territorial laws
- (c) a will which disposes of immovable property which is situated in a foreign country
- (d) a will which revokes another will.
- (e) a will which exercises a power of appointment provided its execution conformed to the laws.

A law which applies outside Zambia may be applied to a will in Zambia even if it places

- (a) Special formalities on testators
- (b) Certain qualifications on witnesses to the will.

This will be treated as a formal requirement only, regardless of any rule of law to the country.

Where a will is affected by foreign law in a country which has two or more systems of law affecting wills, the system to be followed shall be chosen as follows:

- (a) By adopting a rule indicating which of these systems can properly be applied;
- (b) If there is no rule, the law with which the testator was most closely connected by the time of death or at the time of execution of the will, whichever is appropriate, shall be applied.

In determining whether a will conformed to any particular foreign law, regard shall be had to any changes that may have taken place in the foreign country since the execution of the will.

Part VII - General

Letters of probate may be given by a foreign court on property situated in Zambia, and will be accepted in Zambia if the letters, or the duplicate copy of the letters sealed by that court, or a copy certified as a true copy by the court provided it is produced and deposited with the High Court of Zambia. The High Court will seal any of the documents and they will be of the same applications as if they were made in Zambia.

Children and Guardians

If a will names a person as a guardian of a child (a person below 18) the court will recognize that person only unless such guardian acts improperly.

The court can direct that property meant for the minor be transferred to the guardian or even be sold; and the guardian shall be entitled to represent the child in any court proceedings relating to the property in which the child has a share.

A guardian or other personal representative may incur expenses in representing the interests of the child (minor) e.g. with regard to the proper care and management of property or of the child's share in the property.

But she / he shall not have any monetary interest or other benefit because of the guardianship except where the will expressly say so.

Thus a guardian may not buy any part of the property in which the child has a share. Such a sale would be nullified upon the application of any person interested in the matter within a reasonable time (i.e. one must not wait until it is too late to nullify the sale).

Crimes of guardian

A guardian who deprives a child of its share of the property commits a crime punishable conviction upon by a fine not exceeding five hundred penalty units or imprisonment not exceeding one year, or both.

If the property can no longer be returned or found, the convicted guardian may compensate the child according to the court's assessment of the value of the property.

Beneficiary causing death of deceased

A beneficiary who intentionally causes the death of the testator shall forfeit the right to inherit any part of the estate of the deceased.

Unauthorized intermeddling

Any person who intermeddles, by taking possession of, without authority, or causes to be moved, except as may be urgently necessary for its preservation, shall commit an offence and shall be liable on conviction to a fine not exceeding seven hundred and fifty penalty units or imprisonment not exceeding two years or both.

Revision Questions

1. Discuss the relevance of a will to a Zambian.
2. What are the requirements for a valid will?
3. What are the rights of an executor of a will?
4. What is the status of a foreign will in Zambia?

Recommended Texts

National Law Review Reporter: Matrimonial Law Annual 1982. New York: National Law Review Reporter, Inc., 1982. KF508M37M31982

O'Donnell, William J. *The Law of Marriage and Marital Alternatives*. Lexington, MA: D.C. Heath and Company, 1982. KF508.O361982

Main Text:

Lillian Mushota, *Family in Zambia: Cases and Materials*: Lusaka: UNZA Press for the School of Law, the University of Zambia, 2005