

SITUATION ANALYSIS OF THE
INTESTATE SUCCESSION AND
PROPERTY RIGHTS OF
SPOUSES LEGISLATION IN
GHANA

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Foreword

The ownership of, and control over assets represent key avenues by which individuals and households shape their livelihoods. Research funded by the MDG3 Fund of the Dutch Ministry of Foreign Affairs has provided empirical evidence on the extent of the inequality in asset ownership between women and men in Ghana. Women in Ghana own about 30% of total gross physical wealth. The proportion of men who own agricultural land, the place of residence or other real estate is much higher than the proportion of women who own each of these assets. A higher proportion of women compared to men own businesses. However, on average the value of women's businesses is smaller than that of men's. The inequality between the sexes in the ownership of assets can be attributed to unequal income-earning opportunities and inherent biases against women in the marital and inheritance regimes.

Disputes over asset ownership are prevalent across the country. These controversies often arise from ignorance of the Law(s) regarding the assignment of property rights following the death of an individual or the dissolution of a marriage. Furthermore, in many instances it is women who tend to suffer most from these disputes over assets. In view of the dynamics of family relations vis-a-vis the influence of cultural norms in typical developing counties such as Ghana, the importance of knowledge regarding property rights can hardly be overemphasised.

In Ghana, an important law that attempts to address problems that arise when people die intestate (i.e., without making a will for the distribution of their self-acquired property) is the Intestate Succession Law (PNDC Law 111). This law has generally been regarded as useful in lessening the tension and confusion associated with conflicts over assets following death. After being in force for a couple of decades, several deficiencies of PNDC Law 111 have become evident, as a result of which a Bill has been drafted to rectify them when it is passed into Law. On a related development, another Bill (the Property Rights of Spouses Bill) has been drafted to deal with the distribution of rights to jointly acquired property following the dissolution of a marriage or a similar relationship.

Given the importance of the above Bills, it is gratifying that Estelle Matilda Appiah, an expert in the drafting of legislation and the Gender Asset Gap Project in Ghana, have authored this handy document that provides a situation analysis of the intestate succession and property rights of spouses legislation in Ghana. This publication is essentially a dissemination tool and a reference material on the above Bills. It is hoped that not only will it enlighten citizens and residents of Ghana on the Bills, but that it would stimulate lobbying and debate by advocacy groups, politicians, religious organisations, and ordinary citizens. Such debates

and lobbying should eventually help refine the Bills and result in the enactment of Laws that would enhance wellbeing and reduce gender inequality in the distribution of assets in Ghana. This document is a highly useful complement to the research output of the Gender Asset Gap Project in Ghana.

The Ghana Team

The Gender Asset Gap Project

December,

2011

Introduction

Social policy legislation affords a good example of law as a tool for social change. Evidence of this is to be found in two emerging laws in Ghana that address the issue of the property rights of persons in a marital relationship. These are the legislation on intestate succession and the law on the property rights of spouses and cohabitants. Cohabitants is the term used when people live together and are not married. Intestate succession is where a person dies without leaving a will to determine how the person's property should be shared after the person dies.

The genesis of these laws can be found in international law, the African Charter on Human and Peoples Rights and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The Convention was adopted by the United Nations on 18th December 1979 and entered into force as an international treaty on 3rd September, 1981. It was the culmination of more than thirty years of work by the United Nations Commission on the status of women, a body established in 1946 to monitor the situation of women and promote women's rights. The spirit of the Convention is rooted in the goals of the United Nations, fundamental human rights and equal rights for men and women. Article 2 of the Convention requires that the principle of equality of women and men is incorporated in national constitutions and that there is relevant legislation that prohibits discrimination against women. The elimination of discrimination against women in matters relating to marriage and family relations is addressed in Article 16.

The CEDAW was domesticated in the 1992 4th Republican Constitution of Ghana. Article 22 in the Chapter on Fundamental Human Rights provides that a spouse should not be deprived of a reasonable provision out of the estate of his or her spouse. Spouses should have equal access to property jointly acquired during marriage and the property should be distributed equitably on dissolution of the marriage. It also states that Parliament should enact legislation to regulate the property rights of spouses.

Other articles in the Constitution that add credence to article 22, are article 17 that provides for equality and freedom from discrimination and article 36 on economic objectives. Article 17(2) states that a person is not to face discrimination on the grounds of gender, race, ethnic origin, social or economic status amongst others. Article 17(3) enjoins Parliament to enact laws reasonably necessary to provide for matters related to marriage, divorce, burial, devolution of property on death or other matters of personal law.

Article 36 in the chapter on the Directive Principles of State Policy provides that the State is to assure the basic necessities of life for its people as a fundamental duty and is to guarantee the ownership of property and the right of inheritance. Although these directives are not actionable in a court of law, they provide the standard that government is expected to attain.

Article 11 of the Constitution lists the sources of law in Ghana. It includes the common law. This is defined as comprising the rules of law generally known as the common law, the doctrines of equity, fairness and the rules of customary law. Customary law means the rules of law that are applicable to certain communities in Ghana. These laws are determined by ethnicity or locality and apply to the population concerned. The pluralistic legal system that consists of the Constitution, statute law, the common law, an imported system of law and various customary laws has posed challenges in the preparation of comprehensive legislation for intestacy and property rights in marriage.

Intestate Succession

The Intestate Succession Act PNDC Law 111 enacted in 1985 was a breakthrough at the time. It provided relief for spouses and children who were often victims of ejection and other forms of persecution when the breadwinner, usually the husband, died intestate.

The reason for the law was the fact that in matrilineal societies where the definition of the traditional family is through a common female ancestor, the wife and children of the deceased husband are excluded. In patrilineal systems where the family roots are traced through a male ancestor, there is better assurance of rights on intestacy for the children of the deceased father. However the wife does not have direct rights of inheritance. Under both systems, the customary successor has a duty to support the wife and children and allow them to remain in the matrimonial home.

In a matrilineal system the customary successor has a duty to permit the children of the deceased to reside in their deceased father's home subject to good behaviour. In a patrilineal system, the eldest son of the deceased inherits on behalf of his brothers and sisters who are sometimes denied their inheritance. Though laudable in theory, with the changing dynamics of family life and greater involvement of the wife in the husband's economic activity, as well as other factors

such as rural urban migration, the system did not, most oftentimes, work well. It sometimes operated to the detriment of the widow and children.

PNDC Law 111 sought to confer inheritance rights on widows and amongst others, provide the widow and children with one house and the household chattels, the personal property of the deceased, such as clothing, furniture, refrigerator, kitchen equipment, agricultural implements and motor vehicles. The legislation was intended to prevent members of the extended family taking over the assets of the deceased for their own use to the detriment of the surviving spouse and children of the deceased. The law provided for the fractional distribution of the estate of the deceased, taking into account the spouse, children, traditional family and the parents of the deceased.

Weaknesses in the law

The weaknesses in the law are that some of the provisions have not been in the best interest of the immediate family.

The specific portion of the estate to pass onto the spouse irrespective of the number of spouses involved has created a problem where the intestate leaves more than one wife and more than one set of children. The entitlement of the wife and children to “one house and all household chattels”, that is to share the same fraction the law stipulated for the surviving spouse, has been strictly interpreted by the courts to mean that all the wives and children of the deceased should share the one house and chattels equally even where the intestate left several houses serving as matrimonial homes for the many spouses. The result has usually been that the matrimonial home has been sold and the shelter the law intended to provide for the immediate family has been lost.

PNDC Law 111 is silent on the issue of jointly acquired property, that is where the property is acquired by both spouses and how this should affect the fraction of the estate the surviving spouse is entitled to. Instances where it has been difficult to determine self-acquired property are where the matrimonial home was built on family land or where the resources of the deceased are traceable to the substantial investment of the family in the education and professional training of the intestate. Another example is where the property was acquired through the joint effort of the deceased and a particular spouse. These situations detract from the equality and freedom from discrimination provisions in article 17 of the Constitution. Statistics from the Ghana Household Asset Survey, 2010, that show the percentage reporting loss of property when widowed, clearly reveal the

vulnerability of widows at the national, urban and rural level and show the gender dynamics of women who lose jointly acquired property on widowhood¹.

The law also did not make provision for dependent parents and neither did it make provision for children of the deceased who are still in school. Finally, the fractional distribution formula has been difficult to implement.

PNDC Law 111 has recently been reviewed to deal with the anomalies that have become apparent after more than twenty six years, partly because of changes in family life in Ghana, the shift in focus to the immediate family from the traditional extended family system and the identified shortcomings of PNDC Law 111. Uniformity of application in this plural legal system where there are customary marriages, Muslim marriages and civil marriages has presented challenges, particularly with reference to succession by Islamic law. Section 28 of the Marriages Act 1884-1985 CAP 127 provides that the distribution of property of a deceased Muslim whose marriage is registered is to be regulated by Mohammedan Law.

Effectively, this removes the operation of PNDC Law 111. This provision is hardly enforced according to the Law Reform Commission, firstly because the marriage has to be registered under the law and secondly, because the provisions on the registration of a Muslim marriage are hardly known to Muslims or to members of the legal profession.

This position can be contrasted with the situation at customary law. It is not necessary for a customary marriage to be registered under the Customary Marriage and Divorce (Registration) Act 1985 (PNDC Law 112) for PNDC Law 111 to apply. This is appropriate since the majority of marriages in the Ghana Household Asset Survey 2010 are customary as determined from the data gathered from 2170 households.

The Ghana Household Asset Survey 2010 statistics on knowledge of PNDC Law 111 reveal that in the ten regions of Ghana, males consistently have more knowledge of the intestate succession law than women.

The findings also reveal that males and females in the urban areas have more knowledge of PNDC Law 111 than do males and females in the rural areas. In both cases however, males have more knowledge about the law than females.

¹ The Ghana Household Asset Survey is a nationally representative survey of 2,170 households that collected data on physical and financial assets owned by individuals in the household, ownership rights, decision-making, knowledge of the marital regime, shocks and coping strategies.

Highlights of the Intestate Succession Bill 2009

What does the Bill do?

The Bill determines the distribution of the estate of a person who dies without making a will. It will apply to property excluded by a will even where a will covers some of the property of the deceased. It will also apply to court cases that have not been finalised at the time it comes into force.

What property does the Bill apply to?

It applies to the self-acquired property of someone who dies without making a will.

What happens to household property?

It passes onto the spouse and child. Household property includes jewellery, clothes, furniture and furnishings, cash and money in bank accounts. Appliances such as a fridge, television, radio and kitchen equipment are also included in the definition. This is to prevent the extended family members from depriving the spouse and child of the use of property acquired or shared with the deceased.

When the surviving spouse makes a contribution to the matrimonial home what happens?

The surviving spouse is entitled to more than fifty percent of the house. The spouse obtains a share because of the marital union as well as the contribution made to the acquisition of the property.

What happens where there is more than one house?

Where the estate includes more than one house, the surviving spouse is given the option to choose one house whilst the child or children choose another. This is to ensure that the surviving spouse and children are adequately housed.

How are disagreements dealt with?

In cases of disagreement as to which of the houses should be given to the surviving spouse or child, or when they are unwilling or unable to make a choice, the administrator of the estate can refer the matter to the court.

What is the distribution where the intestate is survived by spouse and child?

Beneficiary	Proportion of Estate
Surviving spouse	35%
Surviving children	40%
Surviving parent(s)	15%
According to customary law	10%
If no parents:	
Surviving spouse	45%
Surviving children	45%
According to customary law	10%

What happens where the Intestate is survived by more than one spouse?

Where there is more than one spouse, fifty percent of the estate is to go to the surviving spouses, whilst forty percent is to go to the surviving children. Provision is also made for the surviving parent and for the customary successor.

Beneficiary	Proportion of Estate
Surviving spouses	50%
Surviving children	40%
Surviving parent(s)	5%
According to customary law	5%

What is the situation where the spouses are separated?

Where spouses are separated, and have been so for three or more years, the court can decide the percentage of the estate that should be given to the separated spouse. To ensure this spouse is treated fairly, the percentage should not be less than thirty percent of the estate.

Beneficiary	Proportion of Estate
Separated spouse	Not less than 30%

What is the interest of the surviving spouse in matrimonial home?

The surviving spouse is to receive a fifty percent interest or share in the matrimonial home. Where however, the surviving spouse contributed to the matrimonial home in the course of the marriage, the surviving spouse should have more than a fifty percent share or interest in the property.

Beneficiary	Proportion of Estate
One surviving spouse	50% interest or share
If surviving spouse contributed to matrimonial	More than 50% share

Can a surviving spouse buy out?

Yes. This can happen when the estate consists of only one house and the surviving spouse contributed to the acquisition of the house. Where a surviving spouse makes a contribution to the acquisition or improvement to the only house of the marriage, the surviving spouse may negotiate with the other beneficiaries for their interest to be bought.

Where the surviving spouse is a joint owner what happens?

Where a surviving spouse jointly acquires property with the deceased, an additional twenty-five percent share is acquired by the spouse. This is to ensure that the surviving spouse does not lose out on any investment made in the property and in addition obtains a share by virtue of being a spouse.

Beneficiary	Proportion of Estate
Surviving spouse	Additional 25% share of that property by virtue of being a spouse in addition to 50% share by virtue of being a joint owner

What is the situation where the property is mortgaged?

The surviving spouse or child can apply to the court for the sale of the mortgaged property or its redemption that is to pay off the mortgage.

How are school-going dependants of the deceased to be treated?

Dependants of the deceased who are in school and aged eighteen years or below or those who are incapacitated are to be provided for before the estate is distributed. This means the education fees should be paid and provision be made for other necessities before the estate is distributed. Necessaries include essentials for health, reasonable shelter and the development of a child.

Is it an offence not to provide for the children of the deceased?

It is a criminal offence for a person not to make reasonable provision for the educational training and other necessities of a child and dependant of the deceased. The necessities of life are items for health, education, life and shelter.

If convicted, the term of imprisonment should not exceed four years. In addition, a fine of five hundred penalty units will be imposed. The value of a penalty unit is twelve Ghana cedis. This means that the maximum fine is GH¢6,000.00.

In addition, the court may make an order for the re-instatement or reimbursement of the spouse or child who has been deprived of the educational training or necessities of life.

Beneficiary	Proportion of Estate
Dependent children (undertaking education or incapacitated)	Provision to be made before distribution.
Dependent children in school	Provision to be made for payment of fees and other necessities

What is the distribution where the deceased is survived by only a spouse?

Where there is no surviving child of the deceased, seventy percent of the estate goes to the surviving spouse, twenty-five percent goes to the surviving parent and five percent is distributed according to customary law. A surviving spouse obtains eighty percent where there is no parent or child. This is to ensure that the immediate family of the deceased receives a larger portion of the estate.

Beneficiary	Proportion of Estate
Spouse, where no surviving child	70%
Parent(s)	25%
In accordance with customary law family	5%
If no surviving child and parent, surviving spouse	80%

Where the deceased is survived by only a child what happens?

Where there is no surviving spouse, the child obtains seventy-five percent of the estate whilst twenty percent goes to the surviving parent and five percent is distributed in accordance with customary law. Where there is no surviving parent, ninety percent goes to the children and ten percent is distributed in accordance with customary law.

Beneficiary	Proportion of Estate
Child	75%
Parent	20%
In accordance with customary law	5%

What happens where the Intestate is survived by spouse and child of another woman?

Beneficiary	Proportion of Estate
Surviving spouse	50%
Surviving children	35%
Surviving parent(s)	10%
According to customary law	5%

What is the distribution where the intestate is only survived by a parent?

Beneficiary	Proportion of Estate
Parent	90%
Family	10%

What is the distribution of the remaining property of the deceased where customary law does not apply?

Where a foreigner makes Ghana his or her home, the rules of domestic customary law to be applied when the foreigner dies intestate, may not be applicable to the foreigner who may not have identified with any particular ethnic group. In this case, the portion of the estate of the deceased foreigner which should have been distributed in accordance with customary law goes to the beneficiaries entitled to share the property using the formula of the law.

What are the customary law provisions for succession by the extended family?

Where a portion of the estate of the deceased is to go to the extended family, it will be the family to which the deceased belonged. If the deceased did not belong to any family in accordance with customary law, then the family identified with the deceased at the time of death of the intestate will be the family entitled to the property. If these family members do not exist, the families of the parents of the deceased or the State will be entitled to the property that should go to the family.

Where the Intestate is survived by neither a spouse, parent or child, what happens?

In this situation, the rules of customary law are to be applied to determine or identify the relatives of the deceased who will inherit the property. According to custom, a group of persons, a hierarchy of persons or the family may take the property. Where a customary law rule does not govern the sharing of the property of the deceased, the property will vest in the State. A person who was maintained by the deceased or who was closely identified with the deceased may make an application to the court for maintenance from the estate of the deceased.

Beneficiary	Proportion of Estate
Family customary law	All the property
If no customary lineage	The Republic of Ghana

How are small estates to be dealt with?

Where an intestate dies leaving an estate that does not exceed one thousand Ghana cedis, the surviving spouse and child are entitled to the property. Where the surviving parent is the sole beneficiary, the parent inherits the property. This is to limit the fragmentation, the breaking up of the estate into little bits that will occur if a large number of beneficiaries are to share a small estate.

Beneficiary	Proportion of Estate
Surviving spouse and / or child or surviving parent (value may be increased by L.I. by the Minister) clause 21	All the property

What are the proportions where the estate is to be shared by two or more persons?

The shares are to be equal.

When spouses die at the same time how is this to be treated?

It will be presumed that the older spouse died before the younger spouse.

When there are dependent grandchildren of the intestate what happens?

Where a grandchild of the intestate is also a dependant of the intestate, the grandchild is entitled to maintenance from the deceased's estate. The portion that the grandchild's parent would have been entitled to if that parent had not died before the intestate died, is what will be inherited by the grandchild. The criteria is the dependency of the grandchild on the intestate at the time of death of the intestate.

Can a spouse be ejected from the matrimonial home?

It is an offence to eject the spouse from the matrimonial home before the distribution of the estate of the deceased. There is an exception where an ejection of a spouse and children may be carried out by a court order. This is where the court orders that they leave the matrimonial home.

Does the law specify other offences against a spouse and entitled persons?

Yes. These are

- unlawful deprivation of a person who is entitled to the use of a part of the property and
- removal, destruction or unlawful interference with the property of the deceased person
- locking up of property of the deceased
- taking possession of household property by a person within the matrimonial home before the distribution of the estate, where the penalty is five hundred penalty units, which is six thousand Ghana Cedis or four years imprisonment or both.

The penalty is five hundred penalty units which is six thousand Ghana Cedis or four years imprisonment or both. The court may make any order considered appropriate in the best interest of the person ejected or deprived.

Property Rights of Spouses

Reasons for new legislation on the property rights of spouses

The rules on the distribution of property on divorce under Act 367 are not far reaching enough to satisfy the Constitutional human rights requirements and article 22 (3) in particular. Different sets of rules using different principles and concepts have been used to determine the property rights of spouses. The lack of clear standard provisions based on the philosophy of the Constitutional provisions has led to inconsistent court decisions that lack fairness, equity and discriminate against the vulnerable spouse. The existing rules do not guarantee property rights of a spouse and are reliant on the discretion of the court.

Despite this, the data from the Ghana Household Asset Survey, 2010 reveals higher percentages of males reporting loss of property when divorced than females as far as their separate property is concerned. As regards joint property, nationally and in the rural areas, women lost property jointly owned whereas in urban areas males lost more property jointly owned than females.

In times past, husbands were the sole bread winners of the family and as a result, there was a presumption that any property acquired during the marriage belonged to the husband. The services of the spouse rendered in the home towards the progress of the family, acquisition of property through trading or other income generating activities were not recognised generally by the courts. On occasions when liberal judges sought to use equitable principles on property sharing, a substantial contribution had to be shown supported by evidence. In real life situations however, the possession of the evidence required to establish a case has posed challenges because the contribution does not always take the form of a direct cash payment or the financing of improvements to the property.

The courts have failed to take account of the contribution of the non-working spouse to the welfare of the matrimonial home. Examples of the contribution of the non-working spouse are when the spouse works in the family business or on the family farm, where the spouse provides childcare and where the spouse is the homemaker. In these examples, the spouse is not paid. These situations may cause the sacrifice of education or other employment opportunities and should be taken into account when matrimonial property is being shared.

There has also not been uniformity across the three marriage types, particularly customary marriage and Muslim marriage where the marriage may be polygamous. Under customary law, there is a concept of separateness of identity and of property acquisition. The definition of joint property in this context becomes an issue where a spouse, generally the vulnerable wife, makes a form of contribution to the acquisition or improvement of the property of the other spouse. In this case, it is difficult to determine what beneficial interest should be given to the spouse who contributed. This situation is compounded where multiple wives contribute to the property of a husband such as in a Muslim or customary marriage, both of which may be polygamous.

Another difficult situation is where there is cohabitation, a situation that occurs when people of the opposite sex live together without a legal marriage but where the spouses are capable of being married to each other, most often times because the marriage rites have not been concluded.

Another challenging area is with gifts. Gifts and money given by a husband to a wife to trade, referred to as “seed money” are difficult to determine, since they raise issues as to whether or not they are joint property.

The courts in Ghana have attempted to deal with these complex issues but the decisions vary and lack consistency. The drafting of the Property Rights of Spouses Bill 2009 presented a difficult task and only materialised because of the consultative process it went through. The Bill is an example of social change by legislation. The Bill reflects law by the emergence of social and economic factors and was laid in Parliament in October 2009.

The Highlights of the Property Rights of Spouses Bill

What is the definition of a spouse?

A spouse means a man married to a woman or a woman married to a man under the Marriages Act 1884-1985.

What types of marriage does the law deal with?

The Bill provides for three types of marriage, civil marriage under the Ordinance which is monogamous, marriage under the Mohammedans Ordinance and customary marriage which are potentially polygamous.

Does the Bill deal with a situation where people live together but are not married?

Yes. It deals with people aged 18 years and above who live together and ***are capable of being married*** to each other but do not have a lawful marriage. They are cohabitants.

What is the minimum period of cohabitation to benefit from the law?

Five Years

Does the law provide for marital agreements?

Yes. The parties to a marriage or cohabitants may make an agreement to regulate their property rights. This agreement may be made before they are married or cohabit or after they are married and cohabit. It may cover the separate property of each spouse acquired before marriage or cohabitation. It may also cover how property acquired during the marriage or cohabitation will be distributed when the marriage or cohabitation is dissolved.

What form does the agreement take?

It may be oral, verbal, or in writing. The written agreement is to be signed by the parties and witnessed. Where it is an oral agreement, each person should have one witness. The agreement may be made an order of court. If an oral agreement is to be used in court, it should be confirmed by affidavit which is the legal confirmation of a document.

What does a marital agreement do?

The agreement defines the share of the property or any part of the property that each person is entitled to on dissolution of the union. It provides for the calculation of the share and method of distribution.

Can the parties to the agreement obtain independent legal advice?

Yes

Can a court refuse to enforce an agreement?

A court may decline the enforcement of a marital agreement where it is considered to be unjust.

Can a court enquire about a marital agreement?

Yes. A party to the agreement or a person who has an interest in the subject matter of the agreement, may apply to the court for an enquiry to be made where there are reasonable grounds to do so.

Can the court set aside an agreement?

A court may set aside a marital agreement and a spouse or party to an agreement may make an application for an enquiry to be made by the court on the basis of duress, undue influence, fraud, illegality, misrepresentation, lack of intention and failure to fully disclose assets by a spouse. The unequal bargaining position of a spouse may cause the court to set aside the agreement and make it invalid.

What is joint property?

The definition of joint property includes the matrimonial home where it is joint immovable property, household property and property other than separate property, acquired during the marriage. The definition includes what was initially separate property but becomes joint property after a spouse has made a subsequent substantial contribution to its acquisition.

What is separate property?

It is property acquired personally, through a person's toil. It also includes inherited property or gifts received before or during a marriage. Other examples of separate property are damages for personal injury and the proceeds from an insurance policy and separate property acquired during marriage or cohabitation.

Although separate property is not to be taken into account for the purpose of distribution, if there is an agreement between the spouses that the property should be regarded as joint property, the property may be shared between the spouses.

Where a spouse makes a contribution in cash or in kind to the acquisition or maintenance of separate property, the property will be regarded as joint property. The responsibility to prove that property is separate is on the claimant. This can be by receipts, witnesses or other means of providing evidence.

How is the distribution of property to be done?

The order to distribute property is only to be made after the cohabitation has terminated or after an application for the dissolution of the marriage has been granted. It applies only to jointly acquired property obtained by the spouses during the cohabitation or marriage.

Are the reasons for ending the relationship to be considered?

The reasons for the breakdown of the marriage or consensual union are irrelevant. The court is to take the following matters into consideration:

- length of the marriage
- age of the spouse
- spousal contribution
- immediate family contribution
- economic circumstances
- other spouses
- period of cohabitation
- whether there is an agreement related to the ownership and distribution of the property
- financial misconduct
- other factors considered necessary by the court

Each spouse is to be given an equal share of the property, fifty percent acquired by the spouses during the marriage, unless a spouse proves that the other spouse is only entitled to one-third of the property acquired. However, where there is an agreement that shows how the property is to be shared, the court will follow that agreement.

Is a monetary contribution to be given more weight?

No. Contributions in kind that are non-monetary by a spouse, such as providing childcare, are to be considered by the court.

How are transactions related to the matrimonial home to be dealt with?

A partner in a consensual union or a spouse in a marriage needs the consent of the other partner before a transaction related to the matrimonial home is entered into if the property is joint property. Where the matrimonial home is not jointly acquired, the non-owning spouse is to be given six months notice.

What happens if a spouse enters into a contract without consent?

The transaction will be set aside by the court. There may be instances where the court will dispense with the requirement of consent. Examples are when a spouse is mentally incapacitated but this should be under the certificate of a mental health professional or psychiatrist. The court may dispense with the requirement of consent when the whereabouts of a spouse is unknown for a period of seven years as with the presumption of death. The court may also consider a good reason for which consent should be dispensed with.

How are gifts to be dealt with?

A gift given by one partner to another during cohabitation or marriage is the separate property of the recipient.

How are debts of a spouse incurred before the marriage to be dealt with?

Where a spouse incurs a debt before marriage, unless there is an agreement to the contrary, the debt is the liability of the spouse who incurred the debt.

What of debts of a spouse incurred during marriage?

Where a debt is incurred by a spouse during marriage with the consent of the other spouse and it is for the necessities of life, that is for everyday life, for the immediate family, both spouses are responsible to pay the debt equally. If the debt is incurred without the consent of the other spouse, the debt is to be borne by the spouse who incurred the debt unless agreed otherwise.

What are the property rights in a polygamous marriage?

If a man marries a first wife and acquires joint property, it will be owned by the man and the woman. If there is a subsequent marriage, the property jointly acquired during the subsistence of the second marriage will belong to the husband and co-wives from the time the second marriage was contracted. This formula will apply to subsequent marriages.

Is it necessary to declare property where there are multiple wives?

Yes

How is rented property to be dealt with?

Rented property may be assigned to a party that did not contract the tenancy agreement on termination of cohabitation or dissolution of the marriage if it is considered expedient for the court to do so in the best interest of the family. When

this happens, the party to whom the assignment is made is considered by law to replace the original tenant. Where the person who rented the premises is not given the property by the court, that person may be directed by the court to pay the rent for at least six months after the assignment. The six month period is to ensure that the other spouse is not left without a place of residence and the owner of the rented premises is to be given notice of the court order.

What happens when the spouse contributes to the acquisition of property during marriage?

The spouse acquires a beneficial interest in the property acquired by the other spouse whether the monetary or non-monetary contribution was made before or during marriage. The contributing spouse will acquire a beneficial interest in the property which is equivalent to the contribution he or she has made.

How is property acquired during marriage to be dealt with?

Spouses have an equal beneficial interest in property acquired during marriage and where the property is acquired in the name of a particular spouse, it is for the person who claims that the property is separate property to prove that the property is separate.

How are maintenance orders determined?

The Matrimonial Causes Act, 1971 (Act 367) has provisions on maintenance but the new legislation on the property rights of spouses will supplement them.

What are the issues considered by the court in the grant of a maintenance order?

Some of the issues to be considered by the court when granting a maintenance order are:

- the financial resources of the spouse who seeks maintenance
- the property given to that spouse in the distribution
- the present and future earning capacity of both spouses
- the reduced earning capacity of a spouse because of sacrifices made for the family
- the age, physical and mental condition of the spouse seeking maintenance
- the ability of the spouse to satisfy his or her needs independently

- the children of the marriage in the custody of the person seeking maintenance
- the standard of living established during the marriage, and
- the duration of the marriage

The maintenance order ends on death of either spouse, or when the spouse remarries.

Which court can deal with the property rights of spouses?

A District Court, Circuit Court or High Court can deal with a matter concerning the property rights of spouses. To ensure privacy, cases are to be heard in the judge or magistrate's office, where only the lawyers and the parties to the case are present.

Does the Legal Aid Scheme Act apply?

Persons who cannot afford to pay for legal fees to be represented in court by a lawyer may apply for legal aid under the Legal Aid Scheme Act 1997 (Act 542). Mediation, an attempt to settle the matter, is a first step to try and settle issues before any court process begins.

Can there be settlement by alternative dispute resolution?

Yes

What are the offences concerned with the property rights of spouses?

It is an offence when a spouse does the following before the determination of the matter by the court:

- prevents the other spouse from staying in the matrimonial home
- prevents the other spouse from using the household property, such as electrical and electronic gadgets, household utensils, vehicle and farming implements
- sells property that both spouses acquired without the consent of the other spouse,
- sells property that both spouses acquired in order to pre-empt the decision of the court

- denies the other spouse use of the proceeds from the sale of joint property, or
- destroys joint property to defeat the purpose of the Act or the Matrimonial Causes Act, 1971 (Act 367)

If a spouse does any of these acts and is convicted, the penalty is a fine of not more than four hundred and fifty penalty units, five thousand four hundred Ghana Cedis or a term of imprisonment of not less than three years or both. In addition, the court may make an order for the return of property to the disadvantaged spouse or provide a right to an amount of money on the termination of the cohabitation or dissolution of the marriage.

Actions to be taken to benefit from the Intestate Succession Bill and the Property Rights of Spouses Bill

- Embrace a habit of record keeping. This is because the two Bills are based on the entitlement to property. In order to establish contributions made, it is necessary to produce evidence of payment, receipts and other documentation related for example to a gift, right to family land and a non-monetary contribution.
- Seek legal advice and engage the services of a lawyer. Where however, the person is not able to afford a lawyer, the person can apply to the Legal Service Scheme for legal representation. The Legal Aid Scheme Act 1997 (Act 542) states specifically that if a person earns the Government minimum wage or less and desires legal representation in an intestacy matter, the person is to be assisted by the Scheme. A person who seeks assistance to enforce a property right may also approach FIDA, LAWA or AWLA, the civil society organisations concerned with the rights of women and the vulnerable in society that provide free legal advice to women in particular, in distress.
- The Property Rights of Spouses Bill recognises the role of a mediator in the settlement of disputes under the Bill and accordingly, an aggrieved person can identify a mediator acceptable to both parties who is impartial to assist the parties to resolve issues satisfactorily. This person could be a pastor, imam, traditional ruler or any other person respected and acceptable to the parties.
- Lodge a complaint with the police for prosecution of the offender.

- Prepare a marital property agreement with your spouse or partner. The agreement can be made about separate property, property acquired during the relationship, or the distribution of property acquired during the cohabitation or marriage. Marital agreements provided by law are a new concept and are to be encouraged since they will settle ownership rights to property and will prevent acrimony and disputes.

Conclusion

The genesis of these important social policy laws has been a classic case of consultation, education and consensus building. The revised intestate succession law will plug the loopholes that have weakened its intention to provide a spouse with reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.

Vulnerable spouses and human rights activists are anxiously waiting for the enactment of the legislation on the property rights of spouses that will provide unequivocal rules for the equitable distribution of property between spouses or cohabitants on separation and divorce and will ensure that spouses have equal access to property jointly acquired during marriage.

Although it is acknowledged that law is a tool for social change, it is not a panacea and must be coupled with educational campaigns, sensitisation programmes, advocacy and innovative methods such as role play, drama and the use of the media to enlighten the populace about their property rights on intestacy, when cohabitation is terminated or when a marriage is dissolved.

The Republic of Ghana has done well to domesticate the Convention on the Elimination of All Forms of Discrimination against Women, what remains to be seen is if these emerging laws can be implemented in the best interest of the vulnerable in a marital relationship or in cohabitation. Civil society should continue to be the watchdog on the implementation of these human rights laws and lobby to ensure that enforcement of these important social policy laws remain on the national agenda.