

Property Rights of Nigerian Women at Divorce: A Case for a Redistribution Order

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Abstract

In Nigeria, marriage is hardly conceived as a partnership of equals in relation to the property rights of spouses during marriage and at divorce. This is because the Nigerian courts do not redistribute property at divorce. This leaves the financially weaker spouse (usually the wife) at an economically disadvantaged position. This article therefore compares the position of the matrimonial laws in England with that of Nigeria, in order to establish whether there are provisions for the redistribution of property between spouses at divorce. The comparative analysis reveals that family laws in England empower the family court to redistribute property amongst spouses at divorce. On the contrary, the matrimonial property laws in Nigeria provide for the settlement of property at divorce. The analysis also reveals that the courts in Nigeria adopt the strict property rights approach in ordering the settlement of property, which is detrimental to the wife. The article also makes a case for a redistribution through the economic analysis of the worth of a housewife. The authors therefore argue that the Nigerian courts should depart from this approach and borrow from the English courts. The authors recommend the amendment of the matrimonial property laws to fill this gap. That would enable Nigerian courts to make a redistribution order, so as to vary the recognised property rights of spouses in order to provide compensation for any reasonable loss caused by marriage and ensure that the financial benefits of marriage are shared on a just and equitable basis.

Keywords

Divorce; marriage; Nigeria; property; property rights; women.

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1 Introduction

It is not a matter of debate that disputes concerning the settlement and transfer of property at divorce most often give rise to litigation, especially in countries with advanced or well-defined matrimonial property regimes which recognise the various rights and contributions of spouses in relation to such property.¹ While in some countries the divorce courts have wide powers under the statute to redistribute property as they deem just and equitable taking cognisance of statutory guidelines,² in others the way and manner in which property is redistributed or divided at divorce are regulated by statute, thereby allowing courts little or no discretion to interfere in the redistribution of property.³

The position of the law in Nigeria is radically different, however. At divorce Nigerian courts do not order the redistribution of property amongst spouses; neither does the extant law contain any guidelines for doing so.⁴ This is notwithstanding the fact that section 72 of the *Matrimonial Causes Act* (hereafter the MCA)⁵ grants the court the power to make a property settlement order.

Nigerian family law is founded on the English common law tradition which forms a significant part of Nigerian law.⁶ Consequently, whenever there is a dispute between spouses over the ownership of property at divorce, "the

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¹ *Sadiku v Sadiku* 2007 ZAGPHC 1 (26 January 2007).

² Section 21(2) of the *Matrimonial Causes Act* Cap 18 of 1973; *Miller v Miller*; *McFarlane v McFarlane* [2006] 2 AC 618 (HL); ss 78 and 79 of the *Family Law Act* 1975.

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

⁴ Etomi and Asia 2015 <http://global.practicallaw.com/6-613-4665>.

⁵ *Matrimonial Causes Act* 18 of 1970 (Cap M7 Laws of the Federation of Nigeria 2004) (hereafter MCA 1970).

⁶ Abdulmumini 2011 *Emory Int'l L Rev* 882, 886.

courts have recourse to the ordinary rules of property law".⁷

Prior to the Received English Law in Nigeria and the enactment of statutes which regulate the property rights of spouses,⁸ customary law marriage⁹ was the usual practice in Nigeria.¹⁰ The capacity of a wife married under customary law to acquire and own property is dependent on the tribe or village into which she marries because customs are diverse in Nigeria.¹¹ In Ibo culture a woman married under customary law is not permitted to acquire and own property to the exclusion of her husband.¹² The justification for this is that in pre-colonial times both the capital with which a woman traded and her income were seen as belonging to her husband.¹³ The wife's right to acquire and own real estate was subject to the husband's prior consent and overall control¹⁴ and a woman married under the customary law was not entitled to the settlement or transfer of property, other than her personal effects, at divorce.¹⁵ Conversely, some cultures permit the customary law wife to own both personal and real property,¹⁶ as the property of the wife is always separate and distinct from the husband's.¹⁷ The *Idoma* customary wife can own property, but it is believed that whatever property she owns belongs to her husband and heir.¹⁸ It is worthy of note that some of these customs are being eroded.

Under customary law, however, whether separately or jointly owned by the spouses, properties cannot be redistributed by the courts upon the application of a spouse for the benefit of either spouse or the children of the marriage. What the court does is to determine "who owns what" by virtue of

⁷ Umukoro 2006 *Commercial and Property Law Journal* 117.

⁸ See the *Married Women's Property Act* 1882 (hereafter MWPA) and the MCA 1970.

⁹ This includes Islamic marriages.

¹⁰ Muna 2011 *Ind J Global Legal Studies* 88.

¹¹ Ashiru 2007 *J Afr L* 320.

¹² *Obi Customary Law Manual* para 321. "The manual was produced by the Law Revision, Research and Reporting Division of the Ministry of Justice, Enugu and contains the customary laws currently applicable in all communities in Anambra and Imo states." *Obi Customary Law Manual* para 322 also provides that "although the movable and immovable property which a married woman acquires belongs to her exclusively, such property is subject to the overall control of her husband. She must obtain her husband's consent before she can give away any property she acquired during marriage to any person other than her child in lifetime or by will", cited in Ashiru 2007 *J Afr L* 321.

¹³ Onokah *Family Law* 251-252.

¹⁴ Onokah *Family Law* 253-254.

¹⁵ Ashiru 2007 *J Afr L* 320-321; Onuoha 2008 *IJNL* 82-83; Edu "Women and Property Rights under Customary Law" 145.

¹⁶ Nwabueze *Nigerian Land Law* 171.

¹⁷ Onokah *Family Law* 252.

¹⁸ Section 14 of the *Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order* 1959.

purchase, acquisition or inheritance.

The legal position of the property rights of women has been made clearer by the introduction of statutory marriage in Nigeria. This is by virtue of the enactment of the *Marriage Act* (hereafter the MA)¹⁹ and the MCA, together with the combined effect of the provisions of the *Married Women's Property Act* (MWPA),²⁰ which granted married women the right to own their own separate property as if they were *feme sole*.²¹ Notwithstanding this shift in focus from customary to statutory marriages with their proprietary consequences, the ordinary rules of property law, which are in most cases applied by Nigerian courts, still do not produce the desired justice as they are based on the establishment of legal ownership.²²

The position of the law in Nigeria *vis-à-vis* the practice in other countries is that a spouse who claims an interest in property must show cogent evidence of a financial contribution to its purchase.²³ In a number of cases²⁴ Nigerian courts have held that, where a spouse (in most cases the wife) does not contribute financially towards the acquisition of a property, her claim for an interest in such property purchased by the male spouse will fail at divorce.²⁵ The courts do this by holding that the property rights between married spouses are completely separate. For a spouse's application for a property right to succeed, he or she must prove, on a preponderance of probability, that he or she is a joint owner of the property in question or that his or her financial contribution towards the purchase or development of the property was substantial.²⁶

The need for the courts to recognise the beneficial entitlements of spouses at divorce taking into consideration the direct and indirect contributions of spouses to the acquisition of property and their respective contributions to the welfare of the family is advanced. The opinion is expressed that a law which empowers the court to make a redistribution order at divorce will reflect the current trend in the marital relationships between spouses in Nigeria and equally be in tune with the progressive changes occurring

¹⁹ *Marriage Act* 1914 (Cap M6 Laws of the Federation of Nigeria, 2004).

²⁰ *Matrimonial Causes Act* Cap 18 of 1973; *Married Women's Property Law* (Cap 76 Laws of Western Region of Nigeria, 1959) (hereafter *MWPL*) which is a local enactment by some States in Nigeria.

²¹ Unmarried or a single woman.

²² Umukoro 2006 *Commercial and Property Law Journal* 118.

²³ Umukoro 2006 *Commercial and Property Law Journal* 118; *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1, 4; *Essien v Essien* [2009] 9 NWLR (Pt 1146) 306, 331-332; Ashiru 2007 *J Afr L* 322.

²⁴ *Egunjobi v Egunjobi* (1976) 2 FNLR 78; *Kafi v Kafi* [1986] 3 NWLR (Pt 27) 175; *Nwanya v Nwanya* [1987] 3 NWLR (Pt 62) 697; *Sodipe v Sodipe* (1990) 5 WRN 98.

²⁵ *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1, 4; *Essien v Essien* [2009] 9 NWLR (Pt 1146) 306, 331-332.

²⁶ *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1, 4.

globally in the field of matrimonial property law.

The purpose of this article is to compare the position of the matrimonial laws in England and Nigeria in order to establish the extent to which provision is made for the redistribution of property between spouses at divorce. The intention is to draw lessons from the matrimonial laws in England that can help empower and guide courts in Nigeria to redistribute property amongst spouses at divorce. The article begins by discussing the legal position in Nigeria and the approaches adopted by Nigerian courts in addressing property rights of spouses at divorce. This is followed by a discussion of the property rights of spouses under English law in part 5 of the article. Drawing inspiration from part 5, part 6 of the article makes a case for a redistribution order at divorce in Nigeria. The article ends with suggestions on how to amend Nigeria's MCA in order to reflect the proposed changes.

2 Property rights of married women under statute

Section 72 of the MCA makes provisions for the power of the High Court in proceedings relating to the settlement of property.²⁷ Section 72(1) provides:²⁸

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

The court is enjoined to make a just and equitable order based on the circumstances of each case before it. This equitable order is in relation to the settlement and not the redistribution of the property. On the other hand, section 73 of the MCA deals with the general powers of the court in respect of financial provisions for spouses in proceedings for maintenance, custody and property settlement.²⁹ Section 73(1)(j) of the MCA is instructive as it authorises the court to discharge a property settlement order which was made pursuant to section 72 of the MCA if the spouse in whose favour the property settlement order was made remarries, or upon any other just cause for doing so.³⁰ Thus, by virtue of the provision of section 73(1)(j) of the MCA, the "settlement of property" as contemplated in section 72 of the MCA implies only the right to use and enjoy the property subject to the occurrence of an event(s).³¹ It does not imply a transfer of the ownership of the property from one spouse to the other except in cases where the court makes an

²⁷ Section 72 of the MCA.

²⁸ Section 72(1) of the MCA.

²⁹ Section 73 of the MCA.

³⁰ Section 73(1)(j) of the MCA.

³¹ Section 73(1)(j) of the MCA.

order of sale for the purpose of discharging a maintenance order. It is also noted that in most cases the courts would order a lump sum payment to a (female) spouse rather than settle or transfer a property to her.³² In *Sodipe v Sodipe*,³³ there was no evidence of a direct financial contribution; the court, however, having valued the matrimonial property to be worth NGN10,000,000 (Ten Million Naira), casually ordered a lump sum payment of NGN200,000 (Two Hundred Thousand Naira) to a wife who had spent 43 years in the marriage.³⁴

On the other hand, the MWPA establishes the doctrine of separate property between the spouses. The doctrine of separate property recognises the separate rights of the spouses to acquire and deal in property during the subsistence of their marriage as if they were not married. The ownership of property is ascertained in most cases in terms of the strict principles of the law of property, except where a spouse can by evidence show some financial contribution to the other spouse's property, which could entitle her to some proprietary interest.³⁵

The MWPA vests married women with separate ownership rights to property³⁶ as if they were *feme sole*.³⁷ By virtue of its provisions, the rights of women married under the MA to acquire, hold, alienate and dispose of property by will without interference from their husbands or any trustee are recognised.³⁸ With the operation of the MWPA, any personal (movable) or real (immovable) property acquired by a woman before and after her marriage is treated as her separate property.³⁹

Section 17 of the MWPA empowers a spouse to commence an action in court for the determination of his or her title to or possession of property where there is a dispute between the husband and wife.⁴⁰ In such a case, the judge is enjoined to make an order as he thinks fit in relation to the disputed property.⁴¹

Married women's contractual rights in respect of their separate property are

³² *Okala v Okala* (1973) ECSNLR 67 and *Sotomi v Sotomi* (1976) 2 FNLR 164. These cases can be compared with the cases of *Kafi v Kafi* [1986] 3 NWLR (Pt 27) 175; *Akinboni v Akinboni* [2002] 5 NWLR (Pt 761) 564, where the courts made orders for the settlement of property, albeit with conditions.

³³ *Sodipe v Sodipe* (1990) 5 WRN 98.

³⁴ *Sodipe v Sodipe* (1990) 5 WRN 98.

³⁵ *Miller Family Property* 3.

³⁶ Umukoro 2006 *Commercial and Property Law Journal* 118.

³⁷ Section 1(1) of the MWPA.

³⁸ Section 1(1) of the MWPA.

³⁹ Sections 2 and 5 of the MWPA.

⁴⁰ Section 17 of the MWPA.

⁴¹ Section 17 of the MWPA.

recognised, and they bear all entitlements and liabilities arising therefrom.⁴² It is noted, however, that the equal recognition of the property rights of spouses in statutory marriages is not extended to spouses married under customary law or Islamic law.⁴³ Section 1(2) of MWPL provides: "Nothing in this law shall affect the capacity, property or liabilities of any persons married solely in accordance with the requirements of customary law."⁴⁴

It is emphasised that the MWPA does not regulate the redistribution or readjustment of matrimonial property between spouses on the dissolution of a statutory marriage.⁴⁵ The primary aim of the MWPA in respect of disputed property between spouses is for the court to determine questions of ownership of property between spouses as it thinks fit.⁴⁶ Whenever there is a property-related dispute between spouses, therefore, Nigerian courts interpret the provisions of the MWPA strictly to determine the extent of a spouse's interest in the property of the other spouse.⁴⁷ For a spouse to succeed, he or she must prove having made a direct financial contribution to the purchase or development of the disputed property based on the ordinary rules of property law.⁴⁸

3 Judicial approaches to the property rights of spouses at divorce

In applications brought before courts pursuant to the MWPA/MWPL and the MCA, Nigerian courts adopt a strict property rights approach in the determination of spouses' entitlements to property. In a few cases, however, perhaps arising from the relief sought by the party, the courts have also adopted an equity/trust approach in the determination of the property rights of spouses at divorce.

3.1 The Strict Property Rights Approach vis-à-vis the Equity/Trust Approach

"Equity", in the comprehensive sense of the term, is grounded on principles such as "fairness", "justness" and "right dealing" that regulate the relationship between human beings.⁴⁹ It also implies that equal and impartial justice should be effected between parties with contradictory entitlements

⁴² Sections 1(3)-(5) of the MWPA.

⁴³ Onokah *Family Law* 273, where the author states that the MWPA or the MWPL has no effect on the property rights of customary spouses; Gbadamosi *Reproductive Health and Rights* 27.

⁴⁴ Section 1(2) of the MWPL.

⁴⁵ *Pettitt v. Pettitt* [1969] 2 All ER 385 (HL) 393.

⁴⁶ *Pettitt v. Pettitt* [1969] 2 All ER 385 (HL) 393.

⁴⁷ Arinze-Umobi 2004 *Unizik Law Journal* 197.

⁴⁸ *Egunjobi v Egunjobi* [1976] 2 FNLR 78.

⁴⁹ "Equity" in Black *Black's Law Dictionary* 634.

and human rights, a set of laws developed by the English Courts of Chancery prior to 1873.⁵⁰ It is a part of the law that is employed to regulate the enforcement of the claims of parties under the administration of trusts, mortgages, common law rights, that the common law did not provide for, so as to cure the deficiencies of the common law, through the ordering of definite and precautionary remedies.⁵¹ However, a trust could be described as a relationship where a trustee is forced in equity to hold real or personal property, via either lawful or "equitable title", for the use of the legatees (*cestui que trust*) or any other entity in law, in such a way that the actual benefit of the assets goes to the legatees or "other objects of the trust".⁵² Equity and trust laws were made applicable in Nigeria through the status of General Application of 1st January 1900.⁵³ A trust could be private, public or charitable. It could also be expressed, implied or resulting and constructive.⁵⁴ For the purpose of this article we shall concentrate on a resulting trust.

A resulting trust is a relationship where an individual keeps an asset for the profit of another, which is deducible by a court in certain cases where a person transfers an asset to another and gives the recipient lawful ownership of the asset, without the intention of giving the recipient either equitable or beneficial interest in the asset.⁵⁵ Most times a donor transfers the legal ownership of a property to a person who did not contribute to its acquisition to preserve. It is taken that the asset will revert to the benefit of the transferor or the person who financed the property.⁵⁶ It is "resulting" because the ownership will revert to the donor. This is based on a presumption of the intention of the transferor by the court. A resulting trust could be "automatic" or "presumed".⁵⁷ A trust is presumed to be resulting in instances where the intent of the trust is assumed or implied from the events surrounding the transferor during the transaction; for instance, where "a property is purchased or a legal title made in the name of another or other persons".⁵⁸ While resulting trusts automatically transpire in conditions where there is no presumption of the intent of the transferor, nevertheless they are assumed to occur as a consequence of the exigencies of the case.⁵⁹

⁵⁰ Black *Black's Law Dictionary* 634; Kodinlinye *Introduction to Equity*.

⁵¹ Black *Black's Law Dictionary* 634.

⁵² Keeton *Law of Trusts* 3; Kodinlinye *Introduction to Equity* 57.

⁵³ Kodinlinye *Introduction to Equity* 9; s 45(1) of the *Interpretation Act* 1 of 1964 (Cap I23 Laws of the Federation of Nigeria, 2004).

⁵⁴ Kodinlinye *Introduction to Equity* 66.

⁵⁵ *Ezeanah v Atta* [2004] 7 NWLR (Pt 873) 468.

⁵⁶ Garuba and Ezekiel 2015 *U Botswana LJ* 83.

⁵⁷ *Re Vandervell's Trust (No 2)* [1974] Ch 269.

⁵⁸ *Re Vandervell's Trust (No 2)* [1974] Ch 269; Garuba and Ezekiel 2015 *U Botswana LJ* 83.

⁵⁹ *Re Vandervell's Trust (No 2)* [1974] Ch 269.

However, it is possible to identify circumstances where resulting trusts can be assumed. First, where there is a failure of an express trust. This can occur where a donor transfers property to a trustee and the trust fails, leading to the uncertainty of the object of the trust.⁶⁰ Thus, the assets will revert to the donor. A resulting trust can also come into existence where the beneficial interest in the expressed trust is not completely distributed.⁶¹ That is, there are surplus assets after the distribution of the properties to the beneficiaries, or in a situation where there were several donations and there is a residue after all the beneficiaries have taken their shares of the asset.⁶² Therefore, the remainder will revert to all the donors.

Of interest to this exercise is where an asset is purchased in the name of another person. There is either a presumption of a trust to the procurer or of advancement.⁶³ The principle of the presumption of a trust to the procurer was laid down in the case of *Dyer v Dyer*,⁶⁴ where the court held that a person whose name was used to acquire an asset without his or her contribution to the purchase price is a trustee to the financier of the asset. This dictum was followed in *Coker v Coker*.⁶⁵ Also in *Ukata v Emembo*⁶⁶ the defendant by a written agreement promised to lease a property in Aba to the plaintiff after he had acquired an assignment from the Crown lease.⁶⁷ Consequent to the agreement, the plaintiff paid the total price of NGN2,000 (Two Thousand Naira) to the defendant, on expiration of the lease.⁶⁸ The plaintiff also paid the lease renewal fee to defendant in which the defendant acquired in his name. The court held that since the plaintiff had paid the purchase price, the defendant was holding the asset for the benefit of the plaintiff. Therefore, the defendant was a trustee to the plaintiff.⁶⁹ This is the strict property rights approach adopted by the Nigerian Court.

The presumption of advancement can arise where an asset is bought in the

⁶⁰ *Re Ball* (1947) Ch 228; Kodinlinye *Introduction to Equity* 85; *Re Ames' Settlement* (1946) Ch 217, where money meant for a marriage settlement was declared a resulting trust for the settlor's estate after the marriage had been declared void *ab initio* via a decree of nullity. This means there was no marriage, therefore the trust had failed.

⁶¹ Kodinlinye *Introduction to Equity* 86-87.

⁶² Kodinlinye *Introduction to Equity* 86-87; *Re Abbott* (1900) 2 C 326; *Re Gillingham Bus Disaster Fund* (1958) Ch 300; *Re Obabunmi Pedro* (1961) LLR 127. Rent was collected by the trustee for the education of the children and grandchildren of the donor. After all the grandchildren had graduated from school, the residue as declared a resulting trust.

⁶³ Kodinlinye *Introduction to Equity* 87-89;

⁶⁴ *Dyer v Dyer* (1788) 2 Cox Eq 92.

⁶⁵ *Coker v Coker* [1964] LLR 188.

⁶⁶ *Ukata v Emembo* (1963) 7 ENLR 137.

⁶⁷ *Ukata v Emembo* (1963) 7 ENLR 137.

⁶⁸ *Ukata v Emembo* (1963) 7 ENLR 137.

⁶⁹ *Ukata v Emembo* (1963) 7 ENLR 137.

name of a person who is in an intimate relationship with the purchaser such as a nuclear family relationship and a person in *loco parentis*. In these scenerios the asset is regarded as a gift and the resulting trust is invalidated.⁷⁰ However, the presumption of advancement can be refuted through evidence gleaned from the acts or declarations of the parties before or during the acquisition of the asset.⁷¹

A presumption of advancement can also occur where a father procured assets in the name of a child,⁷² or where a husband bought a property in the name of a wife, or a fiance in the name of a fiancée.⁷³ In *Roberts v Wilson* the deceased purchased the property at 47 Balogun Street, Lagos in the name of his wife in 1884.⁷⁴ In 1960 the Lagos Executive Development Board acquired the property compulsorily. In trying to rebut the presumption of advancement the plaintiff claimed that they were co-owners of the property and entitled to be paid compensation because their father collected rent on the property while he was alive. The court held that collection of rent by the donor was insufficient to rebut the presumption of advancement in favour of the wife.⁷⁵ Alternatively, if a wife buys a property in the name of her husband, this will be held as a resulting trust in favour of the wife because she is not expected to advance such gifts to her husband.⁷⁶ In addition, where a person who is in *loco parentis* to another acquires a property in the name of that child, evidence will be adduced to rebut that fact.⁷⁷

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

It is noted that, in relation to cases which have been brought pursuant to section 17 of the MWPA for the determination of the property rights of

⁷⁰ Kodinlinye *Introduction to Equity* 89; *Bennet v Bennet* (1879) 10 Ch D 474.

⁷¹ *Shephard v Cartwright* (1955) AC 431 449.

⁷² *Ughutevbe v Shonowo* [2004] 16 NWLR (Pt 899) 300; *Grey v Grey* (1677) Swans 594; *Commissioner of Stamp Duties v Byrnes* (1911) AC 386.

⁷³ *Silver v Silver* (1958) 1 All ER 523; *Pettitt v Pettitt* (1970) AC 777; *Moate v Moate* (1948) 2 All ER 486.

⁷⁴ *Roberts v Wilson* (1962) LLR 39.

⁷⁵ *Roberts v Wilson* (1962) LLR 39.

⁷⁶ *Mercier v Mercier* (1903) 2 Ch 98.

⁷⁷ *Ojule v Okoya* (1968) 2 All NLR 42, 153.

spouses, the courts have adopted the strict property rights approach.⁷⁸ Even where a spouse has approached the court for an interest in property pursuant to section 72 of the MCA, the court has often placed reliance on documentary evidence and proof of a financial contribution.

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

It is the court's responsibility before making a property order to determine the extent of the interests which the spouses have in their respective property, whether individually or jointly owned. In the absence of an agreement or a declaration of trust where the legal estate is in the name of one of the spouses, courts are encouraged to apply trust and equitable principles to the property relationship between spouses to determine their beneficial entitlement.⁷⁹

In *Mueller v Mueller*,⁸⁰ for instance, the court having reached the conclusion that the property in dispute was substantially financed and constructed by the husband stated:⁸¹

The finance for the land and the construction definitely came from the petitioner and, since they were married, it is only fair that the entire property be partitioned... .

Similarly, in *Oghoyone v Oghoyone*⁸² the Court of Appeal expressed the view that it would be unconscionable to allow a spouse to claim exclusive possession of a matrimonial property, especially where the court can by the conduct of the spouses, either express or inferred, determine the shared intentions. According to the court in *Okere v Akaluka*,⁸³ it would be most unconscionable to deprive a woman and her children of the right in a property to which she contributed substantially in regard to its acquisition and development.⁸⁴ The court also expressed the view that the indirect

⁷⁸ That is, for a claimant to succeed, he or she must either prove legal title by producing documentary evidence or prove having made a financial contribution towards the acquisition of the property in dispute. By adopting the strict property approach the court is precluded from varying vested titles to property.

⁷⁹ *Stack v Dowden* [2007] WL 1157953 (HL); *Abbott v Abbott* [2007] WL 2126565 (PCA) and *Jones v Kernott* [2012] 1 AC 776 (SC(E)); Lee 2008 LQR 209-210; Smithdale 2011 CSLR 74.

⁸⁰ *Mueller v Mueller* (2005) LPELR 12687 (CA) 1, 16 per Fabiyi, JCA.

⁸¹ *Mueller v Mueller* (2005) LPELR 12687 (CA) 1, 16.

⁸² *Oghoyone v Oghoyone* [2010] 3 NWLR (Pt 1182) 564, 584.

⁸³ *Okere v Akaluka* (2014) LPELR-24287 (CA) 1, 60-61.

⁸⁴ *Okere v Akaluka* (2014) LPELR-24287 (CA) 1, 60-61.

contributions of wives to the matrimonial property should grant them a beneficial entitlement to the property on the basis that "... it was the performance of their functions as wives that enabled their husbands ... to perform theirs."⁸⁵

While it is noted that these judgements favoured the need for the recognition of a wife's indirect contributions to matrimonial property in certain cases, it is in only a limited number of cases that the courts have, through the ingenuity of counsel, sustained a claim for matrimonial property rights based on the equity and trust approach.⁸⁶ The authors therefore argue that the Nigerian courts should depart from the strict property approach and adopt a more flexible approach. Where a husband purchases a property in his own name while his wife is a stay-at-home wife or in circumstances where the wife has a career outside the family and spends her income on home-making or paying school fees or rent or food for the family while he invests his earnings in property, that husband should be held a trustee for the wife, because the wife has indirectly contributed to the purchase price of the property.

4 The status of the property rights of Nigerian women at divorce

The relationship between spouses in marriages is founded on the principles of equality and justice. The notion of equality in this context implies the need for an equal right to resources and opportunities within marriage. The preamble to the *Constitution of the Federal Republic of Nigeria, 1999* (hereafter the CFRN)⁸⁷ states clearly that the Federal Republic of Nigeria is built "on the principles of freedom, equality and justice" for all persons. It is also noted that in Nigeria the constitutional provision on equality "represents an important expansion in the area of legal protection for human rights."⁸⁸ In the Nigerian legal system, therefore, "[e]quality before the law is achieved where persons in similar circumstances are treated similarly ...,"⁸⁹ where men and women have equal opportunities and are given equal conditions for the realisation of their full potential. "Equality" is thus the parameter adopted by Nigerian society to treat differences. It ensures that the law is not unfairly used to the advantage or disadvantage of certain persons and that similar rules are applied to similar situations.

⁸⁵ *Okere v Akaluka* (2014) LPELR-24287 (CA) 1, 60-61.

⁸⁶ *Okere v Akaluka* (2014) LPELR-24287 (CA) 1.

⁸⁷ *Constitution of the Federal Republic of Nigeria, 1999* (Cap C23 Laws of the Federation of Nigeria, 2004) (hereafter the CFRN).

⁸⁸ Akande *Introduction to the Constitution* 106.

⁸⁹ Akande *Introduction to the Constitution* 107.

In Nigeria, women in marriages do not possess equal status with men.⁹⁰ They are treated as inferior to their male counterparts.⁹¹ The root of this discriminatory tendency lies in customs which amongst other things discriminate against women in terms of their property rights,⁹² despite the provisions of section 18(3) of the *Evidence Act*,⁹³ which states:

In any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience.

For instance, in *Mojekwu v Mojekwu* the Court of Appeal declared the "*Oli-ekpe*" custom of the Nnewi people of Nigeria to be discriminatory. This custom allows a brother to inherit his late brother's estate to the exclusion of the latter's wife and female children.⁹⁴ Tobi JCA queried the "*Oli-ekpe*" custom and considered it to be repugnant to natural justice, equity and good conscience, and inconsistent "with equity and fair play in an egalitarian society ... where the civilised sociology does not discriminate against women."⁹⁵ It is noted that the repugnancy issue was raised and decided *suo motu* by the Court of Appeal. On appeal to the Supreme Court, the apex court did not allow the pronouncement on the "*Oli-ekpe*" custom to stand. It proceeded to disapprove of it as unwarranted in the circumstances of the case.⁹⁶ It held that "the court below was in error to raise, deal and decide the issue concerning the repugnancy of the '*oli-ekpe*' custom of Nnewi *suo motu* without hearing from the parties."⁹⁷ In *Ukeje v Ukeje*, however, the Supreme Court pronounced a similar custom to be discriminatory and unconstitutional and upheld the right of a girl child to inherit properties.⁹⁸

The CFRN declares its supremacy in section 1(1) in the following words:

This Constitution is supreme and its provisions shall have binding force on all

⁹⁰ Akande "Women and the Law" 6-27; Oyelade 2006 *U Benin LJ* 100.

⁹¹ Omage 2013 *Eur Sci J* 326; s 360 of the *Criminal Code Act* 1916 (Cap C38 Laws of the Federation of Nigeria, 2004) which punishes indecent assault against women with two years' imprisonment as against a three years jail term for the same crime perpetrated against men, a felony punishable with three years in jail at s 353 of same Act. S 55 of the *Penal Code (Northern States) Federal Provisions Act* 25 of 1960 permits husbands to inflict corporal punishment on their wives; s 55 of the *Labour Act* (Cap L1 Laws of Federation of Nigeria, 2004) prohibits women from employment that involves night duties, except health workers.

⁹² Ashiru 2007 *J Afr L* 331; Onuoha 2008 *IJNL* 80, 82-83; Adekile 2010 <http://ssrn.com/abstract=1616270> 22; Muna 2011 *Ind J Global Legal Studies* 101; Edu "Women and Property Rights under Customary Law" 144; Oyelade 2006 *U Benin LJ* 100.

⁹³ *Evidence Act* 18 of 2011.

⁹⁴ *Mojekwu v Mojekwu* [1997] 7 NWLR (Pt 512) 283, 304-305.

⁹⁵ *Mojekwu v Mojekwu* [1997] 7 NWLR (Pt 512) 283, 304-305.

⁹⁶ *Mojekwu v Iwuchukwu* [2004] 11 NWLR (Pt 883) 196.

⁹⁷ *Mojekwu v Iwuchukwu* [2004] 11 NWLR (Pt 883) 196.

⁹⁸ *Ukeje v Ukeje* (2014) All FWLR (Pt 730) 1323.

authorities and persons throughout the Federal Republic of Nigeria.

It proceeds, in section 1(3), to declare that:

If any law is inconsistent with the provision of this Constitution, this Constitution shall prevail, and that other law shall to the extent of its inconsistency be void.

Therefore, any law (whether customary or a law made by any legislative enactment) which is discriminatory in nature and disentitles a citizen on the ground of gender to any right which ordinarily and necessarily accrues to such a citizen cannot withstand a constitutional challenge. To this extent any "culture that attributes superiority to one sex over the other exposes the sex that is considered inferior to various forms of discrimination."⁹⁹

Furthermore, in section 42(1)(a) of the CFRN, every citizen, whether a male or a female, has the right not to be discriminated against on the grounds of gender and religion, amongst other things, and must not¹⁰⁰

... be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other ... sex, religions ... are not made subject.

The right to be free from discrimination based on gender has also been addressed in several international, regional and municipal instruments which promote equality of the sexes. Notwithstanding this constitutional provision, Nigerian women are still discriminated against in areas such as inheritance and succession, family and child-care responsibilities and the relegation of the woman's role to domestic duties in the family.

Section 18(3) of the *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*¹⁰¹ urges the Nigerian government to take reasonable steps to eliminate all forms of discrimination against women and to protect their rights as contained in international conventions.

The equal responsibilities of spouses in marriages are emphasised by article 23(4) of the *International Covenant on Civil and Political Rights*.¹⁰²

⁹⁹ Ngwanke 2002 *CJWL/RFD* 143.

¹⁰⁰ Alemika 2010 *U Maid LJ* 28 states that discrimination against women, which is endemic in most societies, is a violation of their human rights. According to Muna 2011 *Ind J Global Legal Studies* 101, "[t]he discrimination of women is rooted in inequality, male domination, poverty, aggression, misogyny, and entrenched customs and myths. The real solution to the problem is eradication of customs that undermine the dignity of women."

¹⁰¹ *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act* 2 of 1983 (Cap A9 Laws of the Federation of Nigeria, 2004).

¹⁰² *International Covenant on Civil and Political Rights* (1976).

These equal responsibilities of men and women are also recognised during marriage and at divorce. This simply means that the cultural practice of relegating a woman's position to domestic duties at home and to the upbringing of the children is a violation of the rights of women. Thus, parental responsibilities between men and women during marriage and at divorce are equal and joint in relation to their children; and these they must discharge to the best of their abilities. There should be no discrimination in this regard.

Similarly, article 16(1) of the *Convention on the Elimination of All Forms of Discrimination against Women* (hereafter the CEDAW) requires State Parties to take all necessary steps to eliminate discrimination against women in marriages and family relations.¹⁰³ It emphasises the equal rights and responsibilities of spouses during marriage and at divorce.¹⁰⁴ Of much importance is the provision of article 16(1)(h) of the CEDAW, which recognises the equal rights of spouses in relation to—

... the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Unfortunately, Nigeria is yet to domesticate CEDAW. An attempt to domesticate CEDAW via the Gender and Equal Opportunities (GOE) Bill, 2016 met stiff religious and cultural resistance and therefore it is yet to be passed.¹⁰⁵ The proposed bill, if passed, will empower women to acquire and own property, benefit from their late husband's estate, and provides for her right to the choice of nativity and identity at divorce. However, the bill has no provision for property right at divorce.¹⁰⁶

Article 7(d) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*¹⁰⁷ encourages State Parties amongst other things to recognise the equitable rights of spouses to share in the joint property which results from their marriage.

Another law protecting spouses in Nigeria is section 9 of *Violence Against Persons (Prohibition) Act* (VAPP), a gender neutral act which imposes on

¹⁰³ *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (hereafter the CEDAW) 13; note that Nigeria is yet to domesticate CEDAW.

¹⁰⁴ Article 16(1)(c) of the CEDAW.

¹⁰⁵ Eniola 2018 <https://www.newsdeeply.com/womensadvancement/community/2018/08/07/deeply-talks-engaging-men-in-womens-advancement>.

¹⁰⁶ Proposed *Gender and Equal Opportunities Bill* 2016 (*GOE Bill*).

¹⁰⁷ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003). This was adopted in Maputo, Mozambique on 11 July 2003 and was ratified by Nigeria in 2004. The principal Charter is the *African Charter on Human and Peoples' Rights* (1986) which has been domesticated as the *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act* 2 of 1983 (Cap A9 Laws of the Federation of Nigeria, 2004).

the perpetrators, instigators, accessories, abettors, counsellors, or supporters of the forceful expulsion of a spouse from a home a penalty ranging from one to two years of imprisonment, with or without a fine ranging from NGN 200,000 to NGN 300,000 (two hundred thousand to three hundred thousand naira).¹⁰⁸ Unfortunately this law is applicable only in the Federal capital territory in Abuja, because it is a criminal matter under the residual legislative list of the Constitution of Nigeria.¹⁰⁹ This implies that for it to be relied on, States will have to legislate on it.

Notwithstanding the above provisions, the inherent discrimination between women and men continues to rear its head in the property rights of spouses at divorce.¹¹⁰ The strict application of the law on the settlement of property in Nigeria has in most cases prevented women from claiming a beneficial entitlement to their husbands' property at divorce.¹¹¹ They are, thus, left uncompensated for reasonable losses suffered or which they might be capable of suffering at divorce.¹¹² Nigerian women are also unrewarded for all the indirect financial contributions which they made to the purchase or development of any property directly linked to their male spouses.¹¹³

The woman's role as a homemaker and her obligations towards the welfare of the family are not taken into consideration in determining the question of whether they are beneficially entitled to any property. The reasons for this are not farfetched, as the extant law does not empower the courts to redistribute the property of spouses or to alter their property interest at divorce on a just and equitable basis.

To this day, the social reality of the domestic and mothering roles of wives

¹⁰⁸ *Violence against Persons (Prohibition) Act 2015 (VAPP Act)*.

¹⁰⁹ *Constitution of the Federal Republic of Nigeria, 1999 (Cap C23 Laws of the Federation of Nigeria, 2004)*.

¹¹⁰ See *Onwuchekwa v Onwuchekwa & Obuekwe* [1991] 5 NWLR (Pt 194) 739, where the female spouse could not establish her financial contribution to the marriage and was left empty-handed; Adekile 2010 <http://ssrn.com/abstract=1616270>.

¹¹¹ Ashiru 2007 *J Afr L* 329; Adekile 2010 <http://ssrn.com/abstract=1616270> 15-16 observes that s 72 of the MCA "... is not meant for economic empowerment. It appears it is not designed to assist a spouse to obtain equal access to property acquired by the other by creating the concept of marital or matrimonial property as found in other jurisdictions".

¹¹² Ashiru 2007 *J Afr L* 328-329; Omoyemen 2010 <http://www.pambazuka.org/gender-minorities/assessing-women%E2%80%99s-rights-nigeria>. According to Anyanwu *Marital Status, Household Size and Poverty* 11 "... women are more prone to poverty due principally to low education and lack of opportunity to own assets such as land". Waite and Gallagher "What are the Possible Financial Consequences of Divorce?" 110 states that women bear more of the financial losses than men on the breakdown of marriage as a result of unequal wages and more financial commitment to the physical custody of children on marriage breakdown.

¹¹³ *Amadi v Nwosu* 1992 Legalpedia SC UJBT 1, 4; *Essien v Essien* [2009] 9 NWLR(Pt 1146) 306, 331-332.

in Nigeria means that they remain in a totally dependent position with no rights in matrimonial property if the marriage ends, unless they can show evidence of a substantial financial contribution to the purchase of such property.¹¹⁴ The Nigerian position is far different from that which obtains in a country like England, where the wife's domestic service is one of the factors to be considered by the courts in the redistribution of the spouses' property at divorce. A succinct examination of the position in England is therefore desirable.

5 The property rights of spouses under English law

The legislative mechanisms for divorce under English laws can be traced to the *Matrimonial Causes Act*, 1857, which came into force in 1858.¹¹⁵ At that time, action for divorce began in the "Ecclesiastical Courts under the canon law of the Church of England for 'separation from bed and board' ie allowing the couple to live apart";¹¹⁶ continued with action at common law for "criminal conversation", that is a suit for damages for adultery, the only reason for the divorce,¹¹⁷ and action via parliamentary legislation for the award of the divorce and an opportunity to remarry.¹¹⁸ At that time divorce proceedings were mostly available to men.¹¹⁹ In the 1870s when husbands perpetrated domestic violence against their wives who were working, since divorce was economically unrealistic to these career women, the magistrates' courts were empowered to grant separation orders with maintenance to significant others who were victims of such violence, and to grant judicial separation.¹²⁰ Several attempts to amend the law to reflect equal divorce rights to both spouses were abortive.

However, from the early 20th century the right of women to institute divorce proceedings began to gain ground, resulting from an increase in agitation by plebeian wives and the drive to mitigate the effect of divorce on women.¹²¹ Divorce on grounds other than adultery seemed to be an exclusive reserve for men between 1920 to 1930s, when there was an increase in the promotion of women's autonomy.¹²² The inequality in divorce litigation was further reduced by the advancement of legal aid to wives who needed such services for divorce proceeding in the 1950s.¹²³

¹¹⁴ Ashiru 2007 *J Afr L* 328-329.

¹¹⁵ Haskey 2018 *Family Law* 1409.

¹¹⁶ Haskey 2018 *Family Law* 1410.

¹¹⁷ Haskey 2018 *Family Law* 1410.

¹¹⁸ Haskey 2018 *Family Law* 1410.

¹¹⁹ Haskey 2018 *Family Law* 1411.

¹²⁰ Haskey 2018 *Family Law* 1411.

¹²¹ Haskey 2018 *Family Law* 1411-1412.

¹²² Haskey 2018 *Family Law* 1412.

¹²³ Haskey 2018 *Family Law* 1415.

The ownership of property is determined in accordance with the strict principles of the law of property under English law,¹²⁴ and except where a spouse can establish by evidence that he or she made some financial contributions of some kind to the acquisition or development of the assets, the court will grant him or her no proprietary interest in the family assets.¹²⁵ Hence, the system of the complete separation of property operates in England. Should one spouse, therefore, buy a property for their common use, the other spouse lacks any proprietary interest in that property. Notwithstanding the adoption in England of the system of the complete separation of property, there is a radical departure in English law and case law from the earlier presumption that the exclusive ownership of property purchased during a marriage was vested in the spouse who had purchased the property.¹²⁶ English law presently take into consideration a wife's contribution towards the upkeep of the matrimonial home in determining her entitlement to property at divorce.¹²⁷

The *Matrimonial Proceedings and Property Act* (hereafter the MPPA)¹²⁸ placed the spouses on an equal footing and gave the court the wide discretion to adjust their property rights by a shift of emphasis—

... from maintenance of a wife by her husband to a process of readjustment of the whole financial position of the spouses to meet the new situation brought about by the termination of marriage.¹²⁹

In this regard, English law shifted its focus from "maintenance" to the "financial readjustment" of spouses at divorce.

The English court is vested with wide redistribution powers by virtue of the *Matrimonial Causes Act* of 1973 (hereafter the MCA 1973).¹³⁰ It is noted that sections 23 and 24 of the Act protect the disadvantaged spouse (most often the wife) at divorce from any undue financial hardship which she may suffer. Section 23 of the Act empowers the court to make financial provision orders for a spouse¹³¹ in order to adjust his or her financial status at divorce. On the other hand, section 24 of the Act empowers the court to make property

¹²⁴ Miller *Family Property* 3.

¹²⁵ Miller *Family Property* 3.

¹²⁶ Bromley *Bromley's Family Law* 442.

¹²⁷ Bromley *Bromley's Family Law* 442

¹²⁸ *Matrimonial Proceedings and Property Act* Cap 45 of 1970 (hereafter the MPPA). See s 4 of the MPPA, which was later re-enacted to s 24 of the *Matrimonial Causes Act* Cap 18 of 1973 (hereafter the MCA 1973). This Act (as amended by the *Matrimonial and Family Proceedings Act* Cap 42 of 1984) repealed the *Divorce Act* Cap 55 of 1969.

¹²⁹ Miller *Family Property* 4.

¹³⁰ Sections 23-25 of the MCA 1973.

¹³¹ These are orders for periodic or lump sum provisions, as provided by s 21(1) of the MCA 1973.

adjustment orders in relation to the property rights of the spouses in order to adjust their financial positions. A property adjustment order includes: a property transfer order;¹³² a property settlement order;¹³³ a variation of nuptial settlement made on the spouses;¹³⁴ or "an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement".¹³⁵ English courts can also order the sale of a property for the purpose of meeting the financial obligations of a divorced spouse, as conferred on the court by section 24A of the Act.¹³⁶

The orders made pursuant to sections 23 and 24(1)(b)-(d) of the Act are for the purpose of protecting the disadvantaged spouse from any undue hardship, pending such time as he or she becomes financially readjusted, remarries or dies.¹³⁷ However, the powers of the English courts to vary or discharge orders for financial relief do not affect the provision of section 24(1)(a) of the Act which empowers the court to order a spouse to transfer his or her property to the other.¹³⁸ The issue of "remarriage or death", which is considered as a basis for the variation or discharge of financial relief in favour of a spouse, does not affect a court order which is made pursuant to section 24(1)(a) of the Act. Simply put, section 24(1)(a) of the Act makes provision for the unconditional transfer of property from one spouse to the other spouse.¹³⁹

Of importance is section 25 of the Act, which deals with the statutory guidelines for the exercise of the court's wide powers of redistribution. This section contains matters which the court is enjoined to consider in the exercise of its powers to make financial provisions and property adjustment orders.

¹³² Section 24(1)(a) of the MCA 1973.

¹³³ Section 24(1)(b) of the MCA 1973.

¹³⁴ Section 24(1)(c) of the MCA 1973. This includes a settlement made by a will or codicil.

¹³⁵ Section 24(1)(d) of the MCA 1973.

¹³⁶ Wilkinson and De Hass *Property Distribution on Divorce* 1-13.

¹³⁷ Sections 28(1) and (2) of the MCA 1973 provide that such payments made pursuant to s 23 of the MCA 1973 will cease to have effect upon the death or remarriage of a spouse in whose favour they were made. By s 23 of the MCA 1973, a spouse who has remarried after the grant of a decree dissolving his or her marriage cannot apply to the court for a financial provision or property adjustment against the other spouse.

¹³⁸ By s 31 of the MCA 1973, the English court has the "power to vary or discharge ... or to suspend ... and to revive" certain orders for financial relief. It is submitted that s 31 of the MCA 1973 applies only to ss 23; 24(1)(b) -(d); 24A(1), which empowers the court to order the sale of a property; and pension sharing orders under s 24B of the MCA 1973.

¹³⁹ Compared to the Nigerian position, a property settlement order made pursuant to s 72 of the MCA 1970, which is mostly made as a means of providing maintenance for a spouse, is subject to variation or reversal in cases where the spouse in whose favour the order was made has remarried.

Section 25(1) of the Act explicitly states that the welfare of the child shall be considered first. The onus is on the court under this subsection to determine the manner in which the redistribution order will be made taking cognisance of the circumstances of each case.¹⁴⁰ For instance, rather than make an order for a periodic payment to a spouse, the court could exercise its discretion to make a clean break order.¹⁴¹ The rationale behind this order is to avoid "ongoing dependency following divorce".¹⁴² This "enables the parties to achieve financial independence after divorce, rather than to impose continuing liability"¹⁴³ on them.¹⁴⁴

In making a redistribution order, section 25(2) enjoins the court to consider the following:

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
- (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit ... which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

The above matters for the court's consideration are not listed in order of priority and the weight to be given to each of them would be contingent on

¹⁴⁰ Section 25(1) of the MCA 1973.

¹⁴¹ *White v White* [2001] 1 AC 596 (HL) 604, *McFarlane v McFarlane*; *Miller v Miller* [2006] 2 AC 618 (HL).

¹⁴² Bainham 2006 *CLJ* 514.

¹⁴³ Lowe and Douglas *Bromley's Family Law* 1028.

¹⁴⁴ In the bid to achieve a clean break, however, the court is encouraged to exercise caution not to deny a claim for financial provision which can be satisfied only through periodic payments. See Ellman 2007 *LQR* 8.

the proper exercise of its discretion and the peculiar facts of each case.¹⁴⁵ It is noted that section 25(2)(f) of the Act enables the court to give recognition to the spouses' financial and non-financial contributions to the family's welfare.¹⁴⁶ By this provision, a wife's contribution as a homemaker, caregiver, wife and mother is given consideration equa; to a husband's financial contribution.¹⁴⁷ It was clarified by Baroness Hale in *Miller v Miller; McFarlane v McFarlane*¹⁴⁸ that the term "contribution" as used in section 25(2)(f) of the Act does not imply financial contributions "to the parties' accumulated wealth, but contributions to the welfare of the family"¹⁴⁹ and, in that regard, spouses should be seen as contributing to the best of their abilities.¹⁵⁰

The recent case of *Wyatt v Vince*¹⁵¹ is illustrative of the position of the rights of a spouse under the English law. In the instant case the couple were married in 18 December 1981. Vince accepted responsibility for the daughter Wyatt had had before the marriage. In May 1983 they had a son Dane and they managed to survive on a social grant.¹⁵² In 1991 the husband instituted an action for the custody of the two children, but custody was awarded to the wife with an order of contact with the children for the husband, and nominal periodic payments of child benefits to the wife.¹⁵³ They were separated in 1984 and divorced in 1992. Vince was not able to provide for the family but became rich after the divorce.¹⁵⁴ In 2001 Dane, his son went to work and live with Vince and his second wife and son.¹⁵⁵

However, in 2011 Wyatt made an application for an order of a lump sum and that of a provisional payment by her husband at the High Court. The husband cross-applied to the court to strike out her application on the grounds that the applicant has no reasonable grounds for bringing and defending the claim, and secondly that her application was an abuse of court process.¹⁵⁶ Vince's cross-application was dismissed by the deputy judge, who awarded her the sum of £31,250 to be paid into her solicitor's

¹⁴⁵ *Piglowska v Piglowska* [1999] 1 WLR 1360 (HL); *White v White* [2001] 1 AC 596 (HL) 603-604; Masson, Bailey-Harris and Probert *Cretney's Principles of Family Law* 374.

¹⁴⁶ Lowe and Douglas *Bromley's Family Law* 1044; Resetar 2008 *EJCL* 3.

¹⁴⁷ *White v White* [2001] 1 AC 596 (HL) 605-606; *Wyatt v Vince* [2015] UKSC 14, 34; Lowe and Douglas *Bromley's Family Law* 1030.

¹⁴⁸ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 (HL).

¹⁴⁹ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 (HL) 662-663.

¹⁵⁰ Ellman 2007 *LQR* 3.

¹⁵¹ *Wyatt v Vince* [2015] UKSC 14.

¹⁵² *Wyatt v Vince* [2015] UKSC 14 para 2.

¹⁵³ *Wyatt v Vince* [2015] UKSC 14 para 13.

¹⁵⁴ *Wyatt v Vince* [2015] UKSC 14 para 2.

¹⁵⁵ *Wyatt v Vince* [2015] UKSC 14 para 2.

¹⁵⁶ Rule 4.4 of the *Family Procedure Rules*, 2010 ("the family rules").

account for 4 months, amounting to £125,000.¹⁵⁷ Dissatisfied, the husband appealed to the court of appeal, where the order of the deputy judge of the High Court was struck out and the wife was ordered to refund £36,677 to the husband.¹⁵⁸

The wife appealed to the Supreme Court. Her appeal raised the following questions: whether the court had the jurisdiction under financial order Rule 5.4 of the family rules, or had the court of appeal acted in error. If so, then what was the appropriate pronouncement to be made in the light of this circumstance, and was the court correct in setting aside the sum of money awarded, or in ordering the refund?¹⁵⁹ The supreme court concluded that the court of appeal had been in error when it struck out the wife's application and that there was no place for summary judgement in divorce proceedings.¹⁶⁰ This was because the court was of the opinion that orders for financial distributions and property adjudgment had no time limit in divorce cases,¹⁶¹ since sections 23(1) and 24(1) declare that orders may be made on granting a decree of divorce "or at any time thereafter".¹⁶² Thus the wife's delay in instituting the action was irrelevant. In addition, the supreme court also relied on section 25(2)(f),¹⁶³ which provides that in determining financial and property award in divorce cases that the court should consider "the contributions which each of the parties has made ... to the welfare of the family, including any contribution by looking after the home or caring for the family."¹⁶⁴ In the instant case the wife in her argument relied on her care of Dane and Emily between 1984 and 2001 and thereafter for Emily, without substantial financial support from the husband, and taking care of both children in her state of poverty.¹⁶⁵ The supreme court agreed that the wife's suit had a possibility of success and therefore reversed the decision of the court of appeal and referred the case back to the family arbitration court for trial.

In the determination of the property rights of spouses at divorce, there is a benchmark of equal division.¹⁶⁶ Under English law it is presumed that both spouses contributed to the family's welfare to the best of their ability.¹⁶⁷ Spouses' conduct or the assessment of their contribution does not affect

¹⁵⁷ *Wyatt v Vince* [2015] UKSC 14 para 2.

¹⁵⁸ *Wyatt v Vince* [2015] UKSC 14 para 2.

¹⁵⁹ *Wyatt v Vince* [2015] UKSC 14 para 3.

¹⁶⁰ *Wyatt v Vince* [2015] UKSC 14 para 25.

¹⁶¹ *Wyatt v Vince* [2015] UKSC 14 para 32.

¹⁶² Sections 23(1) and 24(1) of the MCA 1973.

¹⁶³ Section 25(2)(f) of the MCA 1973.

¹⁶⁴ Section 25(2)(f) of the MCA 1973.

¹⁶⁵ *Wyatt v Vince* [2015] UKSC 14 paras 34(a), (b), (c) and (d).

¹⁶⁶ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 (HL) para 16.

¹⁶⁷ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 (HL) para 146; Ellman 2007 LQR 3.

financial claims.¹⁶⁸ The quantum of the contribution of spouses is brought into focus only in exceptional cases and assessed only if there was such disparity in their contributions that it would be inequitable to disregard that in granting financial claims.

On the extent of the English courts' statutory powers to make financial provisions and property adjustment orders at divorce, it has been stated that the discretionary powers of the English courts are almost limitless, albeit the orders of the courts must come within the statutory powers of the Act.¹⁶⁹ It is equally observed that "the statutory exercise must in each case be seen as an attempt to achieve a fair, sensible and practical solution to the financial problems of the parties following the marriage breakdown with first consideration being given to the children."¹⁷⁰ In view of the extensive powers of the English courts to adjust the property rights of spouses,¹⁷¹ the need to make an enquiry into the precise interest that each spouse has in the matrimonial home or other assets has been obviated.¹⁷²

6 A case for a redistribution order in Nigeria

It is a truism that female spouses perform most of the family's domestic chores, whether or not they are in full-time employment,¹⁷³ and they contribute hugely to the family's welfare.¹⁷⁴ Their responsibility towards discharging their domestic services at home often limits their employment opportunities and the hours they can put into labour.¹⁷⁵ As "mothers, they are more likely than single women to work part time",¹⁷⁶ which is likely to affect their earning capacity even after they have returned to full-time employment.¹⁷⁷ Even women who work full-time also sacrifice their earning potential in order to save their marriages.¹⁷⁸ Asiyanbola holds the opinion that as women are expected to raise their children and keep house in addition to pursuing their vocations, they may not have the time and vigour

¹⁶⁸ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 (HL) 619; s 25(2)(g) of the MCA 1973.

¹⁶⁹ Masson, Bailey-Harris and Probert *Cretney's Principles of Family Law* 340.

¹⁷⁰ Wilkinson and De Hass *Property Distribution on Divorce* 14-15.

¹⁷¹ See ss 24 and 25 of the MCA 1973.

¹⁷² Lowe and Douglas *Bromley's Family Law* 131, 132, 145.

¹⁷³ Ellman 2007-2008 *Fam LQ* 461, 469.

¹⁷⁴ Omolayo, Falegan and Ajila 2013 *JPBS* 9; Lasode and Awotedu 2014 *Procedia* 103-104.

¹⁷⁵ Edu "Women and Property Rights under Customary Law" 145.

¹⁷⁶ Ellman 2007-2008 *Fam LQ* 468.

¹⁷⁷ Jacobsen and Levin 1995 *Monthly Labour Review* 14; Hotchkiss and Pitts *Female Labor Force Intermittency* 1-2; Hotchkiss and Pitts *Role of Labor Market Intermittency* 1.

¹⁷⁸ Ellman 2007-2008 *Fam LQ* 470; Omolayo, Falegan and Ajila 2013 *JPBS* 11 argue that despite a woman's dual roles as a homemaker and a working mother; she strives to satisfy the needs of the family.

to devote to careers that men have.¹⁷⁹

Currently, reality of family life in Nigeria reveals that even women who work are requested by their husbands to invest their wages in aspects of home making such as feeding the family, and paying the children's school fees (including those of children who go to school abroad at a fee of up to \$20,000 per annum) the rent and the bills, while the men invest their earnings on capital project such as property and development. Unfortunately, the woman ends up with no savings. We therefore argue that the court should change its approach in deciding property rights. The lists in this section should give rise to resulting trust. In certain cases, women are requested by their husbands to be full-time housewives. That is, they must not have careers outside their homes. However, at divorce these women are seen not to have contributed to the matrimonial property and are asked to move out since they cannot adduce evidence of having made a financial contribution of the property. Hence the authors' opinion that the Nigerian marital property laws should be amended to reflect the rights of such women.¹⁸⁰

Garuba and Ezekiel are of the opinion that since more women in Nigeria are getting more financially empowered they should be stripped of the benefit of "presumption of resulting trust and advancement, which operates to favour women".¹⁸¹ But they fail to take into account the unquantified or the quantified contributions of women towards their families, while the men are expected to spend on capital projects, as stated in the preceding paragraph. They also fail to tell us that when men are looking for wives in Nigeria, they look for career women who will not be a liability to them but will instead share the financial burden (50%/50%) of the home with them. Garuba and Ezekiel also fail to tell us how when our stay-at-home mothers engage in petty trading they sell off their jewellery and expensive clothing to supplement the upkeep money and pay the children's school fees. Their assertion is therefore in error. It is out of touch with the reality of the life situations of families in Nigeria and unfair to the immeasurable fiscal non-financial contribution of women to family care to enable the men to acquire and develop property.

It is noted that "marriage not only leads to the acquisition of assets, but also to the loss of assets – namely, the homemaker's earning capacity, job skills and professional contacts".¹⁸² Most of the domestic duties discharged by

¹⁷⁹ Asiyanbola "Patriarchy, Male Dominance" 8.

¹⁸⁰ Note that there is a gap in the jurisprudence in this area in Nigeria.

¹⁸¹ Garuba and Ezekiel 2015 *U Botswana LJ* 79-107.

¹⁸² Wade 1985 *FL Rev* 83.

the homemaker are essentially to the benefit of the husband.¹⁸³ At divorce, the male spouse takes all the assets at the expense of the female spouse.¹⁸⁴

Women are thus exploited in the marital relationship.¹⁸⁵ This is the result of the inequality which exists in marriage, which arises from the high earning capacity of men *vis-à-vis* the traditional roles of women as wives, mothers, carers and homemakers.¹⁸⁶

The duration of the marriage, the responsibilities of the spouses during the subsistence of the marriage, their future responsibilities after divorce, and the need to prevent a situation where one of the spouses will be left in real need while the other is in a better financial state, all of these issues should constitute special circumstances for the exercise of the court's discretion to redistribute the property of spouses in a bid to do what is just and equitable.

The cost of performing the role of a homemaker and the financial and non-financial contributions of a spouse to the welfare of the family should be accorded proportionate to the monetary contribution of the other spouse.¹⁸⁷ Both contributions must be treated as having equal economic value.¹⁸⁸ The "creation of a scheme that promotes social and economic justice requires a fundamental recognition of marriage as an equal partnership in which the partners make contributions which are different in nature but equally valuable."¹⁸⁹

There is a need to take the direct and in direct (financial and non-financial) contributions of women in the management of their families into consideration in the determination of the matrimonial property rights of spouses at divorce. It has been pointed out that such "indirect contribution is progressively being given prominence in other jurisdictions in the determination of disputes over matrimonial property."¹⁹⁰ Non-financial and financial contributions to the maintenance of the family by a spouse (especially the wife), which include the performance of her obligations as a homemaker and caregiver, the payment of bills and rates and attending to the business of the husband, which relieves the husband of some domestic and financial burdens and enable his business to progress, should be considered in an application for a beneficial interest in property which was

¹⁸³ Musa 2014 *Journal of Education and Social Research* 297-298.

¹⁸⁴ Wade 1985 *FL Rev* 83.

¹⁸⁵ Musa 2014 *Journal of Education and Social Research* 297-298.

¹⁸⁶ Levitan and Belous 1981 *Monthly Labour Review* 27; Edu "Women and Property Rights under Customary Law" 145.

¹⁸⁷ Heaton 2005 *SAJHR* 564.

¹⁸⁸ Heaton 2005 *SAJHR* 574.

¹⁸⁹ Lawson 1994 *U Tas LR* 297.

¹⁹⁰ Lawson 1994 *U Tas LR* 297.

purchased solely by the husband during the subsistence of the marriage.

Himmelweit and Mohun¹⁹¹ argue that domestic labour, which includes the child bearing and rearing done by all housewives in their homes is not characterised as wage labour, because some capitalists believe that those tasks are not commodity-related, they are not profit oriented, and are viewed as emotional rather than economic. They do not involve exchange.¹⁹² They argue that domestic labour is private production for the direct consumption of those who are wage labourers, and that it is required for the continuous manufacture of "labour power".¹⁹³ If the ability to work that is either "used up or wasted" is not in constant supply, or no probable fresh manual workers are born, then there will be a scarcity of labour power. Consequently, production will be impeded, and because there is a scarcity of a wage labourers there will be no profit.¹⁹⁴

The work of a homemaker cannot be fully monetised. However, economists have estimated the worth of the average tasks of a housewife or a stay-at-home mother in India as Rs45,000 (forty-five thousand Indian Rupees) per month. If multiplied by twelve, the annual salary would be Rs540,000.00 (five hundred and forty thousand Indian Rupees).¹⁹⁵ This implies that a stay-at-home wife who is considered to have not contributed to the building of a house would have earned a monthly salary of about NGN229,147.32 (two hundred and twenty-nine thousand, one hundred and forty-seven Naira, thirty-two Kobo) or an annual income of NGN2,749,599.51 (two million, seven hundred and forty-nine thousand, five hundred and ninety-nine Naira, fifty-one Kobo) annually in Nigeria.¹⁹⁶ In the United Kingdom it was estimated that persons who do jobs like those a housewife does without payment earn about £24,645. The Nigerian Naira equivalent is NGN11,696,970.42 (eleven million, six hundred and ninety-six thousand, nine hundred and seventy Naira, forty-two kobo).¹⁹⁷

¹⁹¹ Himmelweit and Mohun 1977 *Camb J Econ* 15.

¹⁹² Himmelweit and Mohun 1977 *Camb J Econ* 15.

¹⁹³ Himmelweit and Mohun 1977 *Camb J Econ* 15 -16.

¹⁹⁴ Himmelweit and Mohun 1977 *Camb J Econ* 16.

¹⁹⁵ Zaidi 2017 https://economictimes.indiatimes.com/news/economy/indicator_s/how-much-salary-should-a-homemaker-get/printarticle/61761686.cms. Note that we picked India, because Indians have family values that are similar to those of Nigerians.

¹⁹⁶ This was the current online Rupees to Naira Exchange rate for 22 January 2020 at 4: 39am South Africa time in Xe 2020 <https://www.xe.com/currencyconverter/convert/?amount=45%2C000&From=INR&To=NGN>.

¹⁹⁷ Goldhill 2014 <https://www.telegraph.co.uk/finance/personalfinance/11164040/How-much-is-a-housewife-worth.html>. Note that this was the current online British to Naira Exchange rate for 22 January 2020 at 14:00pm South Africa time in Xe 2020 <https://www.xe.com/currencyconverter/convert/?amount=45%2C000&From=INR&To=NGN>.

In the United States of America, the average home maker range is as stated statistic for the United states is the average monthly salary is \$2,000 with an annual salary of \$24,006 of a homemaker NGN 8,692,456.85 (eight million, six hundred and ninety-two thousand, four hundred and fifty-six Naira, eighty-five Kobo).¹⁹⁸ The authors therefore argue that it is unjust and inequitable to ask a housewife in Nigeria (who spends her life in the production of labour power consumed by her husband who is a wage earn) to show her financial contribution to the property acquired in the course of the marriage.

Accordingly, the paper argues that the non-financial and financial contributions of a wife to other expenses in the family should be considered in the redistribution of property at divorce. We therefore assert the *Matrimonial Causes Act* should be amended to reflect the equitable redistribution of the property of spouses at divorce.

8 Conclusion

This investigation has revealed that under Nigerian family law there are no provisions similar to the powers conferred on the English courts by section 25 of the MCA 1973. While what exists in England is the separation of property with judicial adjudication (discretion) to deal with "all the economically viable assets"¹⁹⁹ of the two spouses at divorce, in Nigeria there is a complete separation of property without judicial discretion to redistribute the property of spouses. In relation to their property rights, women (in most cases) are discriminated against, and they suffer great financial disadvantage at divorce. This is because the court usually adopts the strict property approach, since there are no provisions enabling the redistribution of property at divorce. The investigation also reveals that women are considered to be non-contributors to the acquisition of the family's property, since they cannot aduce evidence of having made a direct contribution to the matrimonial property. They are therefore denied any right or benefit to it at divorce. In addition, the research has also exposed the fact that the English law provides that the indirect or non financial contribution of the wife must be taken into consideration in the redistribution of the property. To butress the consideration of the indirect contribution of a stay-at-home mother, the research has estimated the monetary value of the work of a homemaker around the world, which reveals that a homemaker in Nigeria is worth between NGN 2,749,599.51 and NGN 11,696,970.42

¹⁹⁸ Zip Recruiter 2020 <https://www.ziprecruiter.com/Salaries/Homemaker-Salary>; Xe 2020 <https://www.xe.com/currencyconverter/convert/?amount=45%2C000&From=INR&To=NGN>.

¹⁹⁹ Masson, Bailey-Harris and Probert *Cretney's Principles of Family Law* 340.

annually, as stated above. This figures does not capture all the tasks carried out by a housewife at home.

Therefore, it is argued that a wife who has in principle earned such a wage at home has contributed immensely to the acquisition of the family property. Similarly, it is also just and equitable to assert that women who pay foreign and local school fees for the children of the marriage or feed and manage the family and visitors with their salary in Nigeria at the expense of their savings and comfort have contributed financially to the property that is held in the name of their husbands. Thus, it is argued that the husband should be held as a trustee in favour of the wife. Against this backdrop, the authors recommend that section 72 of the MCA section 72 should be amended to read as follows:

The court may in proceeding under this Act by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of the marriage, such settlement and [redistribution] of property to which the parties are or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of each case:

1. In cases of divorce, the court should redibute the the property acquired during a marriage in a just and equitable manner.
2. In making the redistribution and settlement order, the court must consider and evaluate the following:-
 - a) the economic value of the indirect contribution of the wife to the marriage;
 - b) calculate the amount of money spent by the woman in feeding the family;
 - c) the money spent on foreign and local school fees of the children of the marriage
 - d) if the property was built on family land, an estate valueler must be consulted so the money can be shared in accordance with current value of the property.
 - e) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
 - f) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - g) the standard of living enjoyed by the family before the breakdown of the marriage;
 - h) the age of each party to the marriage and the duration of the marriage;

- i) any physical or mental disability of either of the parties to the marriage;
- j) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- k) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it; and
- l) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit ... which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.²⁰⁰

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List of Abbreviations

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| Camb J Econ | Cambridge Journal of Economics |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CFRN | Constitution of the Federal Republic of Nigeria, 1999 |
| CJWLD/RFD | Canadian Journal of Women and the Law/Revue Femmes et droit |
| CLJ | Cambridge Law Journal |
| CSLR | Cambridge Student Law Review |
| EJCL | Electronic Journal of Comparative Law |
| Emory Int'l L Rev | Emory International Law Review |
| Eur Sci J | European Scientific Journal |
| Fam LQ | Family Law Quarterly |
| FL Rev | Federal Law Review |
| GOE Bill | Gender and Equal Opportunities Bill |
| IJNL | International Journal of Not-for-Profit Law |
| Ind J Global Legal Studies | Indiana Journal of Global Legal Studies |
| J Afr L | Journal of African Law |
| JPBS | Journal of Psychology and Behavioral Science |
| LQR | Law Quarterly Review |
| MA | Marriage Act |
| MCA 1970 | Matrimonial Causes Act 18 of 1970 |
| MCA 1973 | Matrimonial Causes Act Cap 18 of 1973 |
| MPPA | Matrimonial Proceedings and Property Act |
| MWPA | Married Women's Property Act 1882 |
| MWPL | Married Women's Property Law |
| Rs | Indian Rupees |
| SAJHR | South African Journal on Human Rights |
| U Benin LJ | University of Benin Law Journal |
| U Botswana LJ | University of Botswana Law Journal |
| U Maid LJ | University of Maiduguri Law Journal |
| U Tas LR | University of Tasmania Law Review |
| VAPP | Violence Against Persons (Prohibition) Act |