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BACHELOR OF LAWS HONOURS DEGREE

### RESEARCH TOPIC:

WELFARE OF CHILDREN AND DISPOSAL OF THE MATRIMONIAL  
PROPERTY UPON DIVORCE: A LEGAL ANALYSIS

SUBMITTED BY

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## DECLARATION

I **BASUTU S. MAKWAIBA**, hereby declare that this dissertation is the result of my investigation and research, except to the extent indicated in the acknowledgements, references and by comments included in the board of the report, and that it has not been submitted in part or full for any other degree at any other University.

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## **APPROVAL FORM**

The undersigned certify that they have read and recommended to the MIDLANDS STATE UNIVERSITY for acceptance, a dissertation entitled: **WELFARE OF CHILDREN AND DISPOSAL OF THE MATRIMONIAL PROPERTY UPON DIVORCE : A LEGAL ANALYSIS**, submitted by BASUTU S. MAKWAIBA in partial fulfilment of the requirements for the award for the Bachelor of Laws (Honours) Degree.

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## **DEDICATION**

To my parents Rorisang and Pastor Makwaiba,  
with love and eternal appreciation  
and to my late baby brother Plans Makwaiba,  
i will always miss you.

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## CHAPTER 1

### 1.1 INTRODUCTION

Divorce is the legal dissolution of a marriage by a Court.<sup>1</sup> On marriage breakdown, it will usually be needful for the divorcing couples to distribute and reallocate their matrimonial property. Matrimonial property means the matrimonial home or homes, house hold goods and effects in the matrimonial home, any other immovable or movable owned by both or either spouse and any property acquired during the subsistence of marriage.<sup>2</sup> The aspect of property sharing after the dissolution of a marriage has caused dire consequences to children and custodial parents. The dissertation endeavours to analyse the adequacy of existing laws governing the distribution of matrimonial property in particular the matrimonial home. The existing legal regime is analysed in comparison to the regional and international standards. The research notes the urgent need for reforms in this area of law and attempts to recommend them in the legislation that addresses the sharing of matrimonial property upon divorce. The impact of the 2013 Constitution of the Republic of Zimbabwe (hereinafter called the 'Constitution')<sup>3</sup> on divorce laws is analysed.

### 1.2 BACKGROUND TO STUDY

It is settled that after divorce, the parties to such a marriage tend to go separate ways. The fundamental challenge that emerges from such a scenario is the distribution of property that was acquired during the subsistence of the marriage. Children are in most cases the victims when it comes to the disposal of the matrimonial property following divorce.

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<sup>1</sup> The Black's Law Dictionary, Eighth Edition

<sup>2</sup> Matrimonial Property Act, 2013 (No 49 of 2013) Clause 6

<sup>3</sup> The Constitution of the Republic of Zimbabwe which came into force on the 22<sup>nd</sup> of August 2013

The division of assets consequent to a divorce is governed by Section 7 of the Matrimonial Causes Act (hereinafter referred to as the Act).<sup>4</sup>Section 7 (4) of the Act enjoins the appropriate Court to consider all the circumstances of the case in the exercise of its discretion in the division of assets by stating various guidelines. While this research agrees that these are important factors, it finds the views expressed by Gillepsie in *Shenje V Shenje*<sup>5</sup> to be crucial in dealing with factors listed in section 7 (4). The Judge noted that the factors in the subsection “deserve fresh comment”.

These guidelines are a verbatim transcript of the English guidelines set out in Section 25 of the English Matrimonial Causes Act,<sup>6</sup> except for the reference to children in various paragraphs of the Zimbabwean Act.<sup>7</sup> Section 7 of the Zimbabwe Matrimonial Causes Act, was taken directly from Section 25 of the English Matrimonial Causes Act, 1973, prior to its amendment by the Matrimonial Family Proceedings Act.<sup>8</sup> The English Act makes the re-allocation formula subservient to the interest of minor children by directing the Court to have first consideration to the interests of minor children.<sup>9</sup> Our Act contains no such direction.<sup>10</sup>The Zimbabwe Matrimonial Causes Act does not make the interests of children primary in the re-allocation formula when distributing property following divorce.

There is no specific provision directing the Courts to have first consideration to the interests of children when apportioning property. According to the Act, the Courts are free to make any order they see fit. Gray aptly points out that the fundamental problem in the construction of a legal formula for the re-allocation of matrimonial

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<sup>4</sup> Matrimonial Causes Act (Chapter 5:13)

<sup>5</sup> *Shenje V Shenje* 2001 (2) ZLR 160

<sup>6</sup> English Matrimonial Causes Act 1973 (Chapter 18)

<sup>7</sup> W. Ncube *Family Law in Zimbabwe* (1989) 175

<sup>8</sup> Matrimonial Proceedings Act (1984)

<sup>9</sup> Ncube (n 7 above) 175

<sup>10</sup> Ncube (n 7 above) 175

property on divorce law revolves around the question of whether that re-allocation is better achieved by means of a fixed rule of apportionment or through a discretion exercised judicially in light of the individual circumstances of the case.<sup>11</sup> Zimbabwe has opted for the latter approach, that of judicial discretion. As MALABA JA aptly noted in *Gonye V Gonye*,<sup>12</sup> a Court has an extremely wide discretion to exercise regarding the granting of an order for the apportionment of the assets of the spouses in divorce proceedings. However there are numerous difficulties raised by such an approach.<sup>13</sup> Entrusting the Courts with a wide discretion inevitably leads to indefinite legal rights and uncertainty in the law.<sup>14</sup> This is an area of jurisprudence which the research will refer to as being in a “considerable flux and uncertainty”.

The existing law in Section 7 (4) (b) of the Matrimonial Causes Act directs Courts to exercise its powers to make financial orders for the benefit of a child, so far as it is reasonable practicable having regard to the spouses’ means and just to do so in the financial position in which he would have been had the marriage not broken down.<sup>15</sup> The provision poses a number of problems. It leads to uncertainties in that it is concerned with likelihoods than mere possibilities. The making of a provision for a child is regarded as a matter of secondary importance.

The words “obligations” and “responsibilities” embrace obligation not only to the ex-spouses and children, but also other family obligations such as elderly parents or other relatives.<sup>16</sup> It is these words which allow the claims of any new dependants to be brought into the weighing process. The Court is not only looking at the parties’

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<sup>11</sup> Edwards V Flemming and another 1987 (4) SA 527 D-E

<sup>12</sup> Gonye V Gonye 2009 (1) ZLR 232

<sup>13</sup> Ncube (n 7 above) 175

<sup>14</sup> Ncube(n 7 above) 185

<sup>15</sup> Matrimonial Causes Act (n 4 above)

<sup>16</sup> M. Hayes and C. Williams *Family Law, Principles, Policy and Practice* (1995) 499

current needs when their children are dependent, but also at the likely future needs when the children have grown up.<sup>17</sup> The question to be asked then is how far for example, should the parties try to anticipate future events such as ill health, re-marriage, cohabitation and employment prospects.<sup>18</sup> It can thus be evidenced that this provision is based on likelihoods and lacks certainty.

As a result of neglecting the welfare of children, most decisions of the Courts with regard to distribution of property upon divorce reflect that much concentration is put on “resources” than the parties’ “needs”. A perusal of a number of judgements would show that the Courts tend to centre on how property was acquired, who owns what and what can be termed as joint property.<sup>19</sup> This is an error, especially in the Zimbabwe context where there are limited resources.

The Zimbabwe Matrimonial Causes Act provides that, “...in doing so the Court shall endeavour as far as is reasonable and practicable, and having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses”.<sup>20</sup>

The research is of the view that this raises a number of problems as this is not possible and practicable. The provision imposes on the Courts a task which is impossible for attainment. As such it is inappropriate. English law was amended to remove this instruction.

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<sup>17</sup> Hayes and Williams (n 16 above) 499

<sup>18</sup> Hayes and Williams (n 16 above) 499

<sup>19</sup> Katsamba V Katsamba 2014 (1) ZLR 187

<sup>20</sup> Matrimonial Causes Act (n 4 above)

### 1.3 STATEMENT OF PROBLEM

The ideal situation is provided for in section 26 (d) as read with sections 19 (1) and 81 (2) of the Constitution.<sup>21</sup> Ideally, the Courts centre more on needs at welfare benefit level of the children and custodial parents upon divorce. Furthermore section 46 (1) (C) of the constitution provides that the Court must also take into account international law, all treaties and conventions to which Zimbabwe is a party. As a result international human rights instruments such as the UN Convention on the Rights of the Child<sup>22</sup> and the African Charter on the Rights and Welfare of the Child<sup>23</sup> providing for the best interest of the child must be taken into account. However, in reality the Zimbabwean Courts do not have a consistent practice which they are using to share matrimonial property following divorce. The Matrimonial Causes Act governing the disposal of matrimonial property following divorce does not have a provision which directs the Court to ensure that arrangements for the welfare of children have been made and are satisfactory or the best that can be devised under the circumstances before a divorce is finalised. The Act has given a wide discretion to the Courts pertaining to how property is to be shared upon divorce. This has far reaching consequences as it leads to a prevailing uncertainty with regards to the orders that Courts are likely to make especially when looking at the matrimonial home. Other orders made by the Courts are socially disastrous. In other instances, the Courts have imposed the “clean break” principle where there are minor children to be cared for.<sup>24</sup> Application of the principle prejudices children a home. The future of the family home on divorce is an important matter because it provides accommodation for the family. It is the most urgent need especially for children. The

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<sup>21</sup> The Constitution of Zimbabwe (n 3 above)

<sup>22</sup> UN Convention on the Rights of the Child (CRC)

<sup>23</sup> African Charter on the Rights and Welfare of the Child (ACRWC)

<sup>24</sup> Mazorodze V Mazorodze HH-245-11 (Unreported)

research is of the argument that there would be important advantages if the legislation were clearly to embody the principle that the welfare of children should be seen as a matter of overriding importance. The Courts would be directed to take into account the welfare of children in the division of property following divorce and also there would recognition given to the value of the custodial parent's role.

#### **1.4 RESEARCH AIMS AND OBJECTIVES**

The research was guided by the following objectives:

(i) To critically evaluate the legal regime governing the distribution of matrimonial property and examine its adequacy or otherwise in addressing the distribution of such property after divorce in so far as it affects children

(ii) To conduct a constitutional analysis on the rights of children in relation to a home in particular the right to Shelter

(iii) To do a comparative analysis of the marriage framework as it relates to children and divorced custodial parents upon division of matrimonial assets following divorce in light of regional and International standards in particular the Zambian, Kenyan, Australian and England jurisdiction.

(IV) To recommend reform in the law relating to sharing of matrimonial property upon divorce

#### **1.5 METHODOLOGY**

The research was mainly a desk research. It utilised doctrinal and comparative analysis methods.

Doctrinal analysis is concerned with the formulation of legal doctrines through the analysis of legal rules. The research analysed relevant legal provisions in Acts of

Parliament, the Constitution and case law to ascertain the extent to which they address the issue of disposal of the matrimonial property following divorce and the welfare of children.

The research also took a comparative analysis approach. This is a methodology that aims to make comparisons across different countries. The research focused on Zambia, Kenya, UK and Australia and how they have dealt with the concept of sharing of matrimonial property upon divorce and the welfare of the Children. The study analysed the Zimbabwean law governing the sharing of matrimonial property upon divorce in light of the Zambian Matrimonial Causes Act, 2007. In the UK, the English Matrimonial Causes Act 1973 (Chapter 18), Matrimonial Family Proceedings Act, 1984 among other statutes were looked into. UK case law and literature was also explored. In Kenya, the Constitution of Kenya 2010, Land Registration Act, 2012, Matrimonial Property Act 2013 and the Matrimonial Causes Act, Chapter 152, Laws of Kenya among other statutes were looked into with regards to the division of matrimonial property upon divorce. In Australia, the Australia Family Law Act of 1975 was analysed.

## **1.6 JUSTIFICATION**

The study provides clarity on a legal issue and it gives an analysis of the impact of the 2013 Constitution of Zimbabwe on the laws governing the division of matrimonial property following divorce. Although the Constitution of Zimbabwe states that there must be arrangements for spouses and children in the event of dissolution of a marriage by death or dissolution, it cannot go unnoticed that there is no legislation that directs courts to ensure that such arrangements are made before a divorce is



finalised. What exactly does this protection entail?<sup>25</sup> S Chirawu remarks that the new Constitution and the implication of its impact is by no means a simple matter. One major challenge is that the laws have not yet been aligned to the new Constitution at the time of writing.<sup>26</sup>

Although the Matrimonial Causes Act confers discretionary powers on the Courts, very few Judgements have sheltered the best interest of the child in the distribution of property upon divorce. In order to protect the interests of children, legal experts are generally of the view that the best interests of the child must be the yardstick in respect of the legal position of a child of divorcing parents.<sup>27</sup> The Courts have also neglected to take into account the very nature of the obligations and responsibilities that the divorced custodial parent is likely to face after divorce. An evaluation of the cases that were decided after the coming into effect of the 2013 Constitution shall be undertaken and a determination is made whether any notable changes have been made?

The study is therefore important as it aims to recommend how best can the Zimbabwean Courts come up with a standard formula which can be used to protect the welfare of children in the apportionment of matrimonial property following divorce.

### **1.7 LIMITATION OF THE STUDY**

The dissertation was limited to studying the sharing of matrimonial property following divorce and how it affects children and the divorced custodial parents. When looking at the impacts of the distribution of property on children, it is inevitable not to look at

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<sup>25</sup> S Chirawu *Principles of the law of succession in Zimbabwe* (2015) 7

<sup>26</sup> Chirawu (n 25 above) 7

<sup>27</sup> B.V Heerden, A Cockrell and P. Keightley *Boberg Law of Persons and Family Law* (1999) 501

the consequences on the divorced custodial parent. This is because on divorce, the parties to a marriage are left in the very same personal situation in terms of the roles and responsibilities that the marriage assigned to them. The divorced custodial parent has responsibilities in ensuring that the children's needs for food, shelter, clothing, health and education are met.

## **1.8 SYNOPSIS OF CHAPTERS**

### **CHAPTER 1**

This Chapter gives an introduction, background to study, statement of the problem, research aims and objectives, justification, methodology, delimitation of the study as well as synopsis of chapters.

### **CHAPTER 2**

Chapter 2 will critically evaluate the legal regime governing the sharing of matrimonial property in Zimbabwe and examine its adequacy or otherwise in addressing the distribution of such property in particular the matrimonial home after divorce in so far as it affects children. The thrust is to evaluate the Zimbabwe Matrimonial Causes Act 1985; clearly pointing out how it has contributed to the problems facing children and divorced custodial parents in sharing matrimonial property upon divorce.

### **CHAPTER 3**

This Chapter conducts a constitutional analysis on the rights of children in relation to a home. It further scrutinizes the constitutional provisions particularly Sections 26 (d), 19 (1), and 81 (2) and whether they have solved the problems in the Matrimonial Causes Act? Failure to take into account realities by the sections is exposed. The

chapter also puts into spotlight the discriminatory language in the Matrimonial Causes Act.

#### **CHAPTER 4**

Chapter 4 deals with the comparative analysis of the divorce framework as it relates to children upon division of matrimonial assets upon divorce in light of regional and International standards. The chapter contrasts the Zimbabwean laws governing the disposal of matrimonial property upon divorce with Zambian, Kenyan, England, and Australian jurisdiction. This is in a bid to assess whether the current law is in conformity with regional and international standards or there is need for reform.

#### **CHAPTER 5**

This Chapter summarises and suggests recommendations on how the law is to be upon sharing of matrimonial property at divorce so as to uphold the concept of the best interest of children, non-discrimination and need for certainty in the law.

## CHAPTER 2

# LEGAL REGIME GOVERNING THE DISPOSAL OF MATRIMONIAL PROPERTY IN ZIMBABWE AND THE CONSEQUENCES OF SUCH DISPOSAL ON CHILDREN

## 2.1 INTRODUCTION

The formula for the re-allocation of matrimonial property in Zimbabwe is contained in Section 7 of the Matrimonial Causes Act.<sup>28</sup> Thus in making an award of division of matrimonial property following divorce, the Court applies the principles set out in Section 7 of the Matrimonial Causes Act.<sup>29</sup> Zimbabwe adopted a Constitution in 2013 which represents a major milestone in the development and protection of human rights in Zimbabwe. By virtue of Section 2 of the Constitution, Zimbabwe is a Constitutional supremacy. As a result the Constitutional provisions should be the yardsticks that measure the adequacy and appropriateness of the existent marriage and divorce laws. This chapter aims to make an analysis on the adequacy of the existing legal regime governing the distribution of matrimonial property with a closer look at the matrimonial home in so far as the welfare of children and custodial parents is concerned. The Chapter evaluates the Zimbabwe Matrimonial Causes Act, 1985 focusing on the provisions that have the potential to negatively affect the welfare of children in the event of a divorce.

## 2.2 WHAT IS MATRIMONIAL PROPERTY?

MALABA JA in the case of *Gonye v Gonye*<sup>30</sup> remarked that the terms used are the “assets of the spouses” and not “matrimonial property”. He explained that the

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<sup>28</sup> Matrimonial Causes Act (n 4 above)

<sup>29</sup> Matrimonial Causes Act (n 4 above)

<sup>30</sup> *Gonye V Gonye* (n 12 above)

adoption of the concept “matrimonial property” often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are on separation should be excluded from the distribution exercise. The concept “the assets of the spouses” is clearly intended to have assets owned by the spouses individually or jointly at the time of the dissolution of the marriage by the Court considered when an order is made with regard to the apportionment of such assets.

In the case of *Ruth Pasipanodya v Kosmas Mushoriwa*<sup>31</sup> KORSAH AJA said that it would be setting a dangerous precedent if a spouse several years after the breakdown of the marriage were allowed to claim a half share of the property acquired by the other spouse after such breakdown and which was not in existence during the period of their cohabitation.

### **2.3 WIDE DISCRETIONARY POWERS OF THE COURTS**

A number of judgements point to the fact that the Matrimonial Causes Act, 1985, has given wide discretionary powers to the Courts. KORSAH A.J.A in the case of *Ncube v Ncube*<sup>32</sup> whilst referring to the facts which the Court should take into account in the division of matrimonial assets remarked that the determination of the strict property rights of each spouse is invariably a theoretical exercise for which the Courts are imbued with a wide discretion.

SANDURA JA, with CHIDYAUSIKU CJ and ZIYAMBI JA agreeing in the case of *Hatendi v Hatendi*<sup>33</sup> held that the division of matrimonial assets and divorce in terms of Section 7 (1) of the Matrimonial Causes Act is a theoretical exercise in which the Courts are given a wide discretion. That discretion cannot be interfered with on

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<sup>31</sup> Ruth Pasipanodya v Kosmas Mushoriwa SC 146 / 98

<sup>32</sup> Ncube V Ncube 1993 (1) ZLR (39) (S) 40 H-41 A

<sup>33</sup> Hatendi V Hatendi 2001 (2) ZLR 530 (S)

Appeal unless the trial Court exercised the discretion erroneously. MALABA JA in the case of *Gonye v Gonye*<sup>34</sup> noted that a court has an extremely wide discretion to exercise regarding the granting of an order for the division of the assets of the spouses in divorce proceedings. Thus the rights claimed by the spouses under s 7(1) of the Act are dependent upon the exercise by the court of broad discretion.

It can be argued that although the Act gives wide powers to the Courts, very few judgements considered the welfare of children and custodial parents before the coming into effect of the Constitution. The approach to the question of distribution of assets upon divorce which is set out in the celebrated case of *Takafuma v Takafuma*<sup>35</sup> is heavily criticised in this research. This formula has been adopted by the Courts in a number of Judgements. MC NALLY JA held that in dividing up the assets the Court must not simply lump all the property together and then divide it up in a fair way as possible. The correct approach is to sort out the property into three lots, which may be termed “his”, “hers” and “theirs”. Then the Court should concentrate on the lot marked “theirs”. It must apportion this lot using the criteria set out in Section 7 (1) of the Matrimonial Causes Act, 1985. It must then go through the same process in relation to the wife. That is the first stage. Having completed this exercise, the Court must finally look at the overall result and again, applying the criteria set out in Section 7 (3) of the Act consider whether the objective has been achieved of placing the parties in the position they would have been had the marriage continued, in so far as this is reasonably practicable and just having regard to the conduct of the spouses.

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<sup>34</sup> *Gonye V Gonye* (n 12 above) 232

<sup>35</sup> *Takafuma v Takafuma* 1994 (2) ZLR 103

The approach was also discussed by KORSAN JA in the case of *Ncube v Ncube*.<sup>36</sup> The Judge dealt with a similar situation. He adopted the approach of starting from a position of 50-50 ownership and only moving away from that position if the justice and equity of the case required it. Of particular importance is page 11 of the judgement where the Judge remarked that, “as a registered joint owner, she is entitled to half a share of the value of that property”.

The approach in both cases is heavily criticised when looking at the welfare of children in the division of matrimonial property. The Courts centred more on the rights of the spouses and neglected the welfare of the child. Children do not appear in the re-allocation formula set out by the cases. The children should not be visited by hardships where it can be avoided because they are certainly not part to the divorce but their rights are eroded by the divorce.<sup>37</sup> The Courts should have factored in the needs of the child in coming up with the re-allocation formula. It should be emphasised that this research is of the argument that the welfare of any child is to be regarded as the first consideration, and the Courts should ensure that the children are adequately housed.

## 2.4 THE MATRIMONIAL HOME ON DIVORCE

Whether a particular abode constitutes the matrimonial home is a factor to be determined by where the parties set up home, and ordinarily reside. It does not have any direct relations to the property owned by either or both of the parties.<sup>38</sup> The future of the family home on divorce is an important matter, not just because of its financial value but because it provides accommodation for the family.<sup>39</sup> THORPE LJ

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<sup>36</sup> *Ncube v Ncube* (n 32 above)

<sup>37</sup> Mwayera J in *Duncan v Duncan* HH 232-17

<sup>38</sup> *Maponga v Maponga and others* 2004 (1) ZLR 63 (H)

<sup>39</sup> K. Standley *Family Law* (2004) 287

said that, “it is one of the paramount considerations in applying the Section 25 criteria, to endeavour to stretch what is available to cover the need of each for a home particularly where there are young children involved”.<sup>40</sup> Although the Court’s powers are extremely flexible, certain types of orders have become common. The first one is the (i) *Mesher order*.<sup>41</sup> The Mesher order entails that the order for sale and division of property is postponed during dependence of the children or until death, remarriage of the other spouse. The spouse who is awarded custody can be given the right to stay in the matrimonial home until the youngest child turns eighteen years and the house is then sold and proceeds shared.

Another order which the Court can make is the “*Clean break*”. The clean break principle as its name implies, envisages a situation where after divorce, there are no strings, financial or social tying the parties to the other.<sup>42</sup> Each party is given their due from the failed marriage and is left to up their lives and moves on.<sup>43</sup> The attractive feature of the clean break principle is that each spouse is enabled to realise his or her investment in the property. It can be argued that it is particularly appropriate where there are no children, and where each spouse can be adequately housed in alternative accommodation from his or her share.

Due to the wide discretion of the Courts conferred on them by the Act, there is no consistency on the application of the orders and this has impacted negatively the welfare of the children and the custodial parent with regards to the matrimonial

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<sup>40</sup> M V B (1988) 1 FLR 53

<sup>41</sup> Mesher V Mesher 1980 (1) ALL ER 126

<sup>42</sup> Nyatwa v Nene 1990 (1) ZLR 97

<sup>43</sup> Nyatwa v Nene (n 42 above) 97



home. The research questions the rationale of the Courts that have applied the clean break principle. In the case of *Mazorodze V Mazorodze*,<sup>44</sup> MAWADZE J held,

“This is a proper case where the parties should simply have a “clean break” to ensure the parties will not remain tied together for many years in view of the reason for the breakdown of the marriage”.

With respect, this is a problematic application of the law and if the problem is not rectified, the dangers of such Judgements will continue looming. In the case of *Nyatwa V Nene*,<sup>45</sup> EBRAHIM J had occasion to remark on the place of the clean break concept in our divorce law in the context of the provisions of the Matrimonial Causes Act. He was of the view that the statutory objective as set by Section 7 (3) of the Act is foreign to our legislation and militates against the clean break theory or principle towards which the entire statute is geared. The learned Judge proceeded to note that our own legislation was promulgated very shortly after the repeal from the English equivalent of a similar provision and our legislation did not take an opportunity to include the clean break principle into the legislation.

He explained that, “the Matrimonial Causes Act does not specifically embrace and provide for the clean break principle”.<sup>46</sup> On the contrary, it is on this basis that this Court has made orders for custodial parents to remain in occupation of the matrimonial residence after divorce and until the youngest child attains majority.<sup>47</sup> The reasoning of the Judge in the case is in line with the arguments made in this research. Ordering the sale of the matrimonial home upon divorce where there are children to be cared for can be properly described as socially disastrous if not irresponsible. It prejudices the children of a home. With respect, it is idle to talk about renting accommodation.

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<sup>44</sup> *Mazorodze v Mazorodze* (n 24 above)

<sup>45</sup> *Nyatwa v Nene* (n 42 above) 97

<sup>46</sup> *Nyatwa v Nene* (n 42 above) 97

<sup>47</sup> *Nyatwa v Nene* (n 42 above) 97

Another approach for the apportionment of the matrimonial home was presented in the case of *Marimba v Marimba*.<sup>48</sup> GILLEPSIE J considered the interests of minor children of the marriage. The Judge stated at 96 D that he deemed it his duty to make a division of property that would benefit the plaintiff to acquire and furnish a new house for the benefit of the children, immediately and without incurring further debt. He awarded 50 per cent of the net sale proceeds of the matrimonial home to her, 40 per cent to the defendant and 10 per cent to be held by the Master in trust for the minor children of the marriage in an interest bearing account from which funds may be disbursed by the Master in specified circumstances.

It is the argument of the research that where the facts suggest the unreliability of a parent as regards future maintenance of the minor children, the Court should order the creation of a trust for the minor children, out of a portion of that parent's share. The trust should be administered by the Master for the benefit of the minor children. This safeguards the welfare of children in the distribution of matrimonial property.

In making the above arguments for the disposal of the matrimonial home following divorce, the research aims to put it to light that in most individuals and most families, the most urgent need is a home.<sup>49</sup> It is therefore the provision of homes especially for children that the Courts should direct their attention in the first place.<sup>50</sup>

## **2.5 COURTS EMPHASIS ON “RESOURCES” THAN “NEEDS”**

When Courts are dealing with families of limited resources, “needs” are to be taken into first consideration than “resources”. A number of decisions show that the Courts tend to centre on how property was acquired, who owns what and what can be

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<sup>48</sup> *Marimba v Marimba* 1999 (1) ZLR 87

<sup>49</sup> *Browne V Pritchard* 1975 (3) ALL ER 721

<sup>50</sup> *Browne V Pritchard* (n 49 above) 721

termed as joint property.<sup>51</sup> GILLEPSIE J also expressed this concern in the case of *Shenje V Shenje*<sup>52</sup> and stated that the factors in the subsection deserve a “fresh comment”. One might form the impression from the decisions of the Courts that the crucial consideration is that of the respective contributions of the parties.<sup>53</sup> That would be an error.<sup>54</sup> The matter of contributions made to the family is the fifth listed of seven considerations.<sup>55</sup> Perhaps, it is time to recognize that the legislative intent, and the objective of the courts, is more weighed in favour of ensuring that the parties’ needs are met rather than their contributions are recouped.<sup>56</sup>

This research aims to put emphasis on the fact that, where there are few assets and small earning capacity especially in the Zimbabwean context, the Court should centre more on needs at welfare benefit level of the children. In the case of *Dart v Dart*,<sup>57</sup> Butler-sloss LJ put it as follows,

“In low income cases the assessment of the needs of the parties will lean heavily in favour of the children, and the mother is caring for the children...”<sup>58</sup>

## 2.6 CONCLUSION

The foregoing chapter put across the existing legal regime governing the division of matrimonial property following divorce in Zimbabwe. As THORPE LJ put it in *Cordle v Cordle*,<sup>59</sup> “nothing is more awful than homelessness”. The chapter exposed the price to pay for flexibility of discretion conferred by the Matrimonial Causes Act, 1985. The Act does not lay down any hierarchy and thus the outcome depends on

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<sup>51</sup> Katsamba V Katsamba (n 19 above) 87

<sup>52</sup> Shenje V Shenje (n 5 above) G-H

<sup>53</sup> Shenje V Shenje (n 5 above) G-H

<sup>54</sup> Shenje V Shenje (n 5 above) G-H

<sup>55</sup> Shenje V Shenje (n 5 above) G-H

<sup>56</sup> Shenje V Shenje (n 5 above) G-H

<sup>57</sup> Dart V Dart (1996) 2 FLR 286

<sup>58</sup> Dart V Dart (n 57 above) 286

<sup>59</sup> Cordle v Cordle 2002 (1) FLR 97, Paragraph 33

the attitude of the Judge. Since Judges are also people, this means that some degree of diversity in their application of values is inevitable. The need for definite property rights, not possible discretionary rights was emphasised. Moreover the chapter put it to clarity that (1) the welfare of any child should be regarded as the first consideration and the Courts should put more effort in ensuring that children are adequately housed (2) the housing needs of the parent with care will continue to dominate. As can be evidenced from the above arguments, there is a problem with the current legislation governing the distribution of matrimonial property upon divorce in so far as the welfare of children is concerned. The next chapter will analyse the potential impact the Constitution has had on divorce in so far as it relates to the disposal of the matrimonial property upon divorce.

## CHAPTER 3

### THE CONSTITUTIONAL IMPLICATIONS ON MATRIMONIAL PROPERTY AND PROTECTION OF THE WELFARE OF CHILDREN UPON DIVORCE

#### 3.1 INTRODUCTION

The precedent chapter exposed the challenges faced by children in the disposal of the matrimonial property upon divorce. It noted the need for urgent reforms in this area of law. This chapter seeks to answer the question of whether or not practically the 2013 Constitution of Zimbabwe has addressed the difficulties of the law in that regard. Does it fully protect the welfare of children by ensuring that they have adequate housing and financial support in the process of distribution of matrimonial property upon divorce? Moreover, it tests the effectiveness of international instruments on the divorce law framework in Zimbabwe in relation to the distribution of matrimonial property upon divorce. The chapter also conducts a Constitutional analysis on the rights of children in relation to a home. An assessment of the cases that were decided after the Constitution is made.

#### 3.2 CONSTITUTIONAL SUPREMACY

Zimbabwe is a Constitutional supremacy by virtue of Section 2 of the Constitution. All authority must be exercised in accordance with all the provisions of the Constitution. Thus in performing its functions, Parliament must act in conformity with the relevant provisions of the Constitution.<sup>60</sup>

#### 3.3 THE “PARAMOUNTCY” PRINCIPLE

The Constitution has come up with a highly protective tone towards children by providing that in all matters relating to children, the best interests of children

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<sup>60</sup> G. Linnington *Constitutional law of Zimbabwe* (2001) 57

concerned are “paramount”.<sup>61</sup> Where the child’s welfare is “paramount”, it overrides all other considerations and determines the course to be followed. Where the child’s welfare comes “first”, it means that the Court must give it greater weight than other considerations but it will not necessarily prevail over the matters which the Court must bear in mind.<sup>62</sup> The study strives to establish how the paramountcy principle operates in practice, particularly in the apportionment of property following divorce where the child’s rights are being weighed against other important competing rights. In that line, what remains questionable is whether the principle is applicable in the distribution of property upon divorce?

This research seeks to critique section 19 (1) and 81 (2) of the Constitution which provides that when a Court determines any matter concerning the child, the child’s best interest shall be the Court’s “paramount” consideration. For the purposes of this dissertation, it is important to understand fully the meaning of the provision. In the seminal decision of *J v C*<sup>63</sup> Lord Mac Dermott defined paramount as overriding. He stated,

“A process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the child’s welfare. That is...the paramount consideration because it rules upon or determines the course to be followed.”

In other words, children’s welfare trumps and outweighs all other consideration.<sup>64</sup> In light of the argument pursued in this research the paramountcy principle originated as a covert method of putting mothers on an equal footing with fathers in custody disputes, through the subordination of both father’s and mother’s interest of the

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<sup>61</sup>The Constitution of Zimbabwe (n 3 above)

<sup>62</sup> *Sutter v Sutter* (1987) 2 ALL ER 336

<sup>63</sup> *J v C* (1969) 1 ALL ER 788 821

<sup>64</sup> H. Reece-“The Paramountcy principle, Consensus or Construct?”

child.<sup>65</sup> The research agrees that in deciding the questions about the upbringing of a child, the Court is directed to regard the welfare of the child as “paramount consideration”. But in considering financial relief the Court is not required to go that far. It only needs to give “first” consideration to the welfare of the child in question.

It is the argument of this research that the paramountcy principle is inapplicable in the distribution of matrimonial property following divorce because there are also rights of the spouses to be considered. Regan<sup>66</sup> also argued that the welfare of children can only be a right to a particular level consistent with the welfare of others, since otherwise this would trump all other’s rights. It is the protection of children’s welfare which needs to be strengthened and supported and not the paramountcy of children’s rights. The paramountcy principle must be abandoned and replaced with a framework which recognizes that the child is merely one participant in a process in which the interests of all participants count.

### **3.4 THE CONSTITUTION’S FAILURE TO TAKE INTO ACCOUNT OF THE REALITIES**

The Court is only required to give “paramount” consideration to the welfare of a child who has not attained the age of eighteen years.<sup>67</sup> Sections 19 (1) and 81 (2) of the Constitution providing for best interests of the child are further criticized for not catering for interests of children who at the date of hearing have attained the age of 18 years or directing the Courts to consider “special circumstances”<sup>68</sup> in cases of majority. The provisions do not require the Court to take into account of the fact that children in practice do often stay in their homes until a later age whether because

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<sup>65</sup> C. Smart “Power and the politics of custody”

<sup>66</sup> Ronald Workin “contemporary jurisprudence” (1983) 122

<sup>67</sup> The Constitution of Zimbabwe (n 3 above) @ Section 81 (1) of the Constitution which defines a Child read with Section 19(1) and 81 (2)

<sup>68</sup> See Chapter 4 of this dissertation which discusses the Zambian Matrimonial Causes Act No 20 ( 2007)

they are undergoing education or training or because they prefer to do so, particularly during the early stages of their career.<sup>69</sup> In reality, especially in the Zimbabwean context, children remain dependant on their parents beyond the age of majority. This can be as a result of unemployment, undergoing education or even being disabled. As such the provisions have the potential to prejudice the welfare of children who have attained the age of eighteen years when distributing matrimonial property following divorce.

This reasoning in this research is in line with the remarks that were passed in the case of *Richardson v Richardson*.<sup>70</sup> The Court held that as a general proposition, it can be stated that the obligation to support lasts until a child is between 18 and 21 years of age. However, it can last longer than that if there are special circumstances such as the presence of physical or mental handicap in the child or the child is in full time attendance at an educational institution. The research calls for widening of the definition of a “child”. The definition should be qualified by “dependency” not “majority”.<sup>71</sup> This stance will ensure that the welfare of children is fully protected in the apportionment of matrimonial property upon divorce.

### 3.5 RIGHT TO SHELTER

The Constitution in its national objectives in Section 28 provides that, “the state and all institutions and agencies of the government at every level must take reasonable legislative and other measures within the limits of the resources available to them to enable every person to have access to adequate shelter”.<sup>72</sup> Although the national objectives can be invoked as an aid to interpret the laws related to the disposal of

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<sup>69</sup> S. M. Cretney, J. M. Masson and R. Bailey *Principles of Family Law* (2002) 319

<sup>70</sup> *Richardson v Richardson* 1994 (No 2) FLR 105

<sup>71</sup> See Section 71 (5) (ii) of the Zambian Matrimonial Causes Act (2007) which provides for consideration of special circumstances

<sup>72</sup> The Constitution of Zimbabwe(n 3 above)



the matrimonial home upon divorce, they are not justiciable. As such one cannot seek to enforce a right in terms of Section 28 which does not offer substantive justiciable rights. Section 81 (f)<sup>73</sup> of the Constitution provides for the children's rights not to be subjected to neglect or abuse. It therefore obliges the state to take adequate and appropriate measures to ensure that children who are in the care of other persons as well as state institutions are not in any way neglected or abused.<sup>74</sup> Furthermore, the Constitution provides for the right to shelter for children in terms of Section 81 (f).<sup>75</sup> From the text of Section 81 (f), it is important to note that the rights of children are not qualified by the limitation of "available resources" and "progressive realisation". It is the argument of this research that to a greater extent, the state has an obligation to give effect to the right to shelter for children in the division of matrimonial property upon divorce.

The right to shelter is an important need for children and it is closely linked with the right to life. In the Indian case of *Francis Coralie v Administrator Union Territory of Delhi*,<sup>76</sup> the Court held that,

"The right to life includes the right to live with human dignity and all that goes with it namely, the bare necessities of life such as adequate nutrition, clothing and shelter..."

Similarly in the case of *Government of the Republic of South Africa and others v Grootboom*,<sup>77</sup> the Court held that,

"There can be no doubt that human dignity; freedom and equality are denied to those who have no food, clothing and shelter".

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<sup>73</sup> The Constitution of Zimbabwe (n 3 above)

<sup>74</sup> G. Devenish *A commentary on the South African bill of rights* (1999) 388

<sup>75</sup> The Constitution of Zimbabwe (n 3 above)

<sup>76</sup> *Francis v Administrator union territory of Delhi* 1981 (2) SCR 516

<sup>77</sup> *Government of South Africa v Groot boom* CCT/00 @ paragraph 23

For this research, the principal difficulty with the right to shelter lies in its Justiciability, the extent to which it can be enforced by a Court. Another problem also relates to its enforcement in a given case.

### 3.6 NECESSARY PROTECTION OF CHILDREN IN THE EVENT OF A DIVORCE

Section 26 (d)<sup>78</sup> of the Constitution provides that the state must ensure that, “in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses”. Children are entitled to adequate protection by the Courts in particular the High Court as their upper guardian.<sup>79</sup> It should be noted that at the time of writing, the Constitution was still relatively new and some of its provisions were still to be tested and interpreted by the Courts. What exactly does this protection entail?<sup>80</sup> It is also important to note that the Matrimonial Causes Act, 1985, also does not direct the Courts to ensure that such arrangements are made before a divorce is finalised. Moreover Section 26 (d) of the Constitution is part of the national objectives which are not justiciable. What this means is that this right to protection of the matrimonial home for children by the Courts before a divorce is finalised is uncertain until such time the state put in place necessary measures to ensure protection of children upon divorce as directed by the national objective.

In view of the arguments raised above, TSANGA J also shared the same sentiments in the case of *Madzara v Stanbic*.<sup>81</sup> The Judge remarked that,

“That the protection of the matrimonial home is legally desirable does not need much argument because of its important role in any family context. This is indicative of a lacuna in the law which needs to be addressed legislatively in terms of spelling out the exact parameters of the protection of the matrimonial home”.

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<sup>78</sup> Constitution of Zimbabwe (n 3 above)

<sup>79</sup> Constitution of Zimbabwe (n 3 above) Section 81 (3)

<sup>80</sup> Chirawu (n 25 above) 7

<sup>81</sup> *Madzara v Stanbic* HH 546-15

The Judge went on to remark that Section 26 (c) and 26 (d) are part of the national objectives in the Constitution which are designed to guide the state and all its institutions in formulating and implementing laws and policy decisions. Materially, they do not fall under the fundamental rights where the applicant can say that her rights have been violated. Its primary thrust is to guide the state and all its institutions. This research advocates that the **Parliament define the term “protection” to include the protection of matrimonial property in particular the matrimonial home on the end of the spouse’s marriage so as to protect the welfare of children.**

### 3.7 DISCRIMINATION

Section 56 of the Constitution provides for equality and non-discrimination.<sup>82</sup> An appropriate Court may make an order with regard to..., “any child of the marriage.”<sup>83</sup> It is the argument of this research that this categorization is discriminatory in view of the Constitution which outlaws discrimination of being born in or out of wedlock. MAWADZE J in the case of *Mazorodze v Mazorodze*<sup>84</sup> remarked that, “the defendant’s position is informed by her concern for the welfare of three children in her custody including the (illegitimate child)”. The dissertation analyses this provision referring to the wording of the English Matrimonial Causes Act which applies to “children of the family.”<sup>85</sup> ‘Child of the family’ includes not just the parents’ own child but a non-marital child of one or both parties and any child treated by the parties as a child of the family.<sup>86</sup> The research calls for the amendment of the Matrimonial

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<sup>82</sup> Constitution of Zimbabwe (n 3 above) Section 56

<sup>83</sup> Matrimonial Causes Act (n 4 above)

<sup>84</sup> *Mazorodze v Mazorodze* (n 24 above)

<sup>85</sup> English Matrimonial Causes Act (n 6 above)

<sup>86</sup> English Matrimonial Causes Act (n 6 above)

Causes Act, 1985 to extend from “child of the marriage” to “child of the family” so that it conforms to the Constitution and fully protects the welfare of children.

### 3.8 INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

On the Regional and International plane, the African Charter on the Rights and Welfare of the Child<sup>87</sup> and the UN Convention on the Rights of the Child<sup>88</sup> provide that a child’s best interest shall be “a primary consideration”. They further provide for non-discrimination. In interpreting the Constitution, regard should be given to Section 34 as read with Section 327. The provision implore that the state should bring its laws into conformity with the international instruments. Moreover, the Courts are to be guided by Section 46 (1) (C) and (e).<sup>89</sup>

### 3.9 ANALYSIS OF CASES THAT WERE DECIDED AFTER THE CONSTITUTION

Despite the weaknesses of the Constitution explored, this research would be incomplete if it ignores some positive judgements that were passed by the Courts after the coming into effect of the Constitution. In the case of *Katsamba v Katsamba*,<sup>90</sup> TSANGA J factored in the welfare of children in the division of property. She remarked that,

“It is the role of the Courts to minimise eventualities such as increased risks of poverty from inadequate post-divorce support arrangements that can often be brought to bear upon children as a result of their parent’s divorce”.

She further stated that on divorce, more often than not, the parties to a marriage are left in the very same situation in terms of roles and the responsibilities that the marriage assigned to them. In the case of *Duncan v Duncan*<sup>91</sup> MWAYERA J held that, “the best interests of children come to into the fore upon considering divorce

<sup>87</sup> ACRWC (n 23 above)

<sup>88</sup> CRC (n 22 above)

<sup>89</sup> Constitution of Zimbabwe (n 3 above)

<sup>90</sup> *Katsamba v Katsamba* (n 19 above) 187

<sup>91</sup> *Duncan v Duncan* (n 37 above), See also *Dzaramba v Dzaramba* HH 38-16

and ancillary issues where there are minor children at stake”. The remarks in the cases are positive and progressive.

### **3.10 CONCLUSION**

The chapter analysed the loopholes that exist in the Constitution in relation to the distribution of property following divorce. It emphasised the point that in issues relating to the disposal of the matrimonial property upon divorce, the Court need only to give “first” and not “paramount” consideration the welfare of the child in question. The “paramountcy” framework in the Constitution should be abandoned as it is inapplicable in the distribution of matrimonial property upon divorce where there are also rights of spouses to be considered. The research also reinforced the point that in order to protect the welfare of children in the apportionment of matrimonial property upon divorce, the definition of a child should be qualified by “dependency” and not “majority”. The Courts should look at other special circumstances beyond majority which can include education, disability and whether or not the child is gainfully employed. The research advocates that the Parliament define the term “protection” in the Constitution to include the protection of matrimonial property in particular the matrimonial home on the termination of the spouses’ marriage so as to protect the welfare of children. The research put into spotlight the discriminatory language in the Matrimonial Causes Act, 1985. It calls for the amendment of the Act from “child of the marriage” to “child of the family” so as to fully protect the welfare of children. Having discussed the loopholes in the Constitution, the following chapter will make comparisons to the regional and international standards.

## **CHAPTER 4**

### **COMPARATIVE ANALYSIS: ZIMBABWEAN DIVORCE LAW FRAMEWORK AS IT RELATES TO CHILDREN UPON THE DIVISION OF MATRIMONIAL PROPERTY IN LIGHT OF ZAMBIA, KENYA AND INTERNATIONAL STANDARDS**

#### **4.1 INTRODUCTION**

The aforementioned chapter dealt with the unrealised consequences the provisions of the Zimbabwean 2013 Constitution have had on the current legal regime regulating the disposal of the matrimonial property upon divorce. This chapter will show that the law regarding the distribution of matrimonial property upon divorce as it relates to the protection of the welfare of children is years behind similar legislation of countries such as Zambia, Kenya and under International standards. This chapter comprise an in-depth comparative examination of the Zimbabwe family law against the same under the jurisdictions of the above mentioned countries. The target is to plainly display the failing of the law regulating the apportionment of matrimonial property upon divorce in so far as the welfare of children and custodial parents is concerned.

#### **4.2 FIRST CONSIDERATION TO THE WELFARE OF CHILDREN**

The Matrimonial Causes Act, 1985, governing the division of matrimonial property following divorce does not contain a provision directing the Courts to have first consideration to the welfare of children in the re-allocation formula. It does not emphasise as priority the welfare of the children a primary consideration in the distribution of the matrimonial property. In contrast, the English Act makes the re-distribution formula subservient to the welfare of minor children by directing the Court

to have first consideration to the interests of minor children.<sup>92</sup> Section 25 of the English Matrimonial Causes Act, 1973, was amended to read,

“it shall be the duty of the Court in deciding whether to exercise powers under section 23, 24 or 24 A above and if what so in what manner to have regard to all circumstances of the case, first consideration being given to the welfare while a minor or any child of the family who has not attained the age of eighteen.”<sup>93</sup>

In the case of *Miller v Miller*,<sup>94</sup> the HOUSE OF LORDS commenting on this provision remarked that,

“Although the 1973 Act as amended in 1984 contains no express objective for the Court, it does contain some pointers towards the correct approach. First the Court is directed to give first priority to the welfare of children while a minor or any child of the family who has not attained the age of 18. This is a clear recognition of the reality that, although the couple may seek to go their separate ways, they are still jointly responsible for the welfare of their children”.

It must be emphasised that the provision for first consideration to the welfare of children also arises in the context of the exercise of the Court’s powers to make orders in relation to spouses and is not solely related to the making of orders relating to children. In the case of *C v C*,<sup>95</sup> the Court of Appeal upheld substantial awards to a wife notwithstanding the fact that the marriage had lasted for only 9 months. WARD LJ remarked that, “the statutory obligation to give first consideration to the welfare of the parties’ four year old child was a material factor in the decision”.

As can be evidenced, the invariable practice in England law is to try to maintain a stable home for the children after their parent’s divorce. Research indicates that this is successful in doing than in securing comparable income for them in the future.<sup>96</sup> This stance by the English jurisdiction is unvarying with the reasoning of this research. The law should seek to emphasise as a priority the necessity to make such

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<sup>92</sup> Ncube (n 7 above) 175

<sup>93</sup> Matrimonial and family proceedings Act (1984)

<sup>94</sup> *Miller v Miller* 2006 (House of Lords)

<sup>95</sup> *C v C* (1997) 2 FLR 26

<sup>96</sup> S. Arthur, J. Lewis and M. Ma Clean “Settling up: Making financial arrangements after divorce” (2002)

financial provision as would safeguard the welfare of children. The welfare of children remains the first consideration. The Courts should consider all the circumstances, always bearing in mind the important consideration of the welfare of children, and then attempt to attain a financial result which is just between the spouses. The consequences of not doing so are increased risks of poverty for the children.

#### **4.3 SATISFACTORY ARRANGEMENTS FOR THE CHILDREN BEFORE A DIVORCE IS FINALISED**

The Matrimonial Causes Act, 1985, does not have any provision which directs the Court to ensure that arrangements for the welfare of children have been made and are satisfactory or the best that can be devised under the circumstances before a divorce is finalised. It is submitted that on this shortcoming, there are lessons that can be learnt from Zambia. The Zambian Matrimonial causes Act<sup>97</sup> provides that a decree nisi of dissolution of a marriage or nullity of a voidable marriage shall not become absolute unless the Court by order has declared that it is satisfied that,

“Proper arrangements in all the circumstances have been made for the welfare, and where appropriate, education or advancement for those children”

Section 71 of the said Act further provides that the decree shall not be made absolute except where it is impracticable for the party or parties appearing before the Court to make such arrangements. Section 71 (2) is couched as follows,

“The Court shall not make an order declaring that it is satisfied...unless it has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children named in the order before the Court within a specified time”.

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<sup>97</sup> Zambia Matrimonial Causes Act, No 20 of 2007 @ Section 42 b(i), See also Section 71



Failure to abide by this provision leads to a void order. Similarly, Section 41 of the English Matrimonial Causes Act, as amended<sup>98</sup> provides that,

“The Court shall not make absolute a decree of divorce or nullity of marriage, grant a decree of Judicial separation, unless the Court by order, has declared that it is satisfied that b (i) arrangements for the welfare of every named child have been made and are satisfactory or the best that can be devised under the circumstances”.

The above provisions are consistent with the sentiments of this dissertation. It is the argument of this research that upon the distribution of matrimonial property following divorce, the Court must direct their attention in the first instance to the provision of a home for children. It can achieve this for instance by ordering the transfer of the house to the parent with whom the child is to live, or the division of proceeds of sale permitting her to purchase accommodation, or settling it on terms that it be not sold during the children’s dependency. This remains ideal and can only be possible when there is a specific provision in the Act directing the Courts to ensure that the arrangements for the welfare of the child are adequate before a divorce is finalised.

#### **4.4 PROTECTION OF THE MATRIMONIAL PROPERTY IN PARTICULAR THE MATRIMONIAL HOME UPON DIVORCE**

The major shortcoming in the law governing the disposal of the matrimonial property upon divorce in Zimbabwe is that there is no legislation that addresses the question of the matrimonial home before, during and upon the dissolution of the marriage. This research makes comparison on this stance with Kenya and England. Section 68<sup>99</sup> of the Kenyan Constitution requires Parliament to enact legislation on “to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage”. Such a law will no

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<sup>98</sup> Matrimonial and family proceedings Act (n 93 above)

<sup>99</sup> Constitution of Kenya (2010) Chapter 5, Part 68 (C) (iii)

doubt direct a Court, when or after granting a decree of divorce or separation order a division of any assets acquired between them which protects the matrimonial home.

The Kenyan Parliament indeed rose to the occasion and enacted the Matrimonial Property Act.<sup>100</sup> The Act provides for the rights and responsibilities of spouses in relation to the matrimonial property. It statutorily defines matrimonial and separate property and protects the right of each spouse to marital property.<sup>101</sup> Separate property is the property of only one spouse, while matrimonial property is “(a) the matrimonial home or homes, (b) house hold goods and effects in the matrimonial home or homes and (c) any other immovable and movable property, jointly acquired during the subsistence of the marriage.”<sup>102</sup>

Article 45 (3) of the Kenyan Constitution<sup>103</sup> provides that the parties to a marriage are entitled to equal rights at the time of marriage during the marriage and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. One of the earliest opportunities to interpret the provisions of Article 45 (3) came one year after the promulgation in the case of *Agnes Nanjala William v Jacob Petrus Nicholas Goes*<sup>104</sup> where the Court stated as follows, “it arguably extends to matrimonial property and is a Constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends”. When contrasting with Zimbabwe, this provision is under the national objectives which are used to guide the state and its institutions. It is not entrenched in the Constitution and thus is not a right that can be enforced in Court.

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<sup>100</sup> Kenya Matrimonial Property Act (2013)

<sup>101</sup> Kenya Matrimonial Property Act (n 100 above) Part 4.13

<sup>102</sup> Kenya Matrimonial Property Act (n 100 above) Part 3.6 (1)

<sup>103</sup> Constitution of Kenya (n 99 above) Article 45 (3)

<sup>104</sup> *Agnes Nanjala William v Jacob Petrus Nicholas Goes* Civil Appeal No 127 of 2011

The Land Registration Act of 2012<sup>105</sup> also protects real property rights including the rights of spouses. Section 93 of the said Act specifies that if one spouse obtains land for co-ownership and use for both spouses, there will be a presumption that the spouses hold the land as joint tenants. Further if the land is held only in the name of one spouse, but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or spouses shall be deemed by virtue of that labour to have acquired an interest in that land.<sup>106</sup> Section 93 (3) imputes a duty on any lender or purchaser of a property that is held in the name of a single spouse to inquire about the other spouse before purchasing the property.

Similarly in England, the Matrimonial homes Act<sup>107</sup> was passed whose main thrust was to protect the matrimonial home by providing for interests of a married spouse to the matrimonial home regardless of the fact that it is not registered in their own name. Banks in England have also subsequently adopted an ethical code of conduct regarding the sale of the matrimonial home. In Zimbabwe, the case of *Madzara v Stanbic Bank*<sup>108</sup> point to the fact that legislative intervention is needed to address the rights of the spouses and children with regard to the matrimonial home during and at the dissolution of the marriage. TSANGA J dealt with a case where the spouse sought an order that she should be able to veto an encumbrance of the matrimonial home and that they have a right to be consulted before sale. She remarked that,

“What constitutes a matrimonial home if a spouse is to be prevented from encumbering such a home, whether by sale, mortgage or pledge for a debt, needs to be legislatively articulated. What constitutes an encumbrance itself needs to be spelt out. Furthermore the conditions under which a party may be allowed to encumber the property, whether by consent or Court order would need to be fully spelt out, given

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<sup>105</sup> Land Registration Act, No 3 of 2012

<sup>106</sup> Land Registration Act (n 105 above) Part 4, 93 (3)

<sup>107</sup> Matrimonial Homes Act (1967)

<sup>108</sup> *Madzara v Stanbic Bank* (n 81 above)

that a spouse may have no objections to the matrimonial home being used as security where they envisage that likely benefits will flow from a given a loan. The rights of the untitled party also need to be addressed where the property is not jointly owned as in this case”.

The Judge further remarked that these are not “issues that can be addressed through the enthusiastic pen of an overly activist Judge”. These issues require informed dialogue and the legislator’s engagement with relevant stakeholders on what would be realistic. Sight should also not be lost of the significance of participation for efficacy of laws by those whom they will have a bearing. She also explained that there is a need by the local banks to adopt best practices and a code of ethics on how they engage with parties in relation to the matrimonial property given the tremendous impact that the sale inevitably has on the family.

The position in Kenya, England and the remarks in the above cited case in relation to the protection of the matrimonial home upon divorce are consistent with the arguments made in this research. The matrimonial home upon divorce should be protected as it is the most urgent need for the individuals concerned. This research calls for the law to intervene with normative guidelines on the protection of the matrimonial property, in particular the matrimonial home upon divorce.

#### **4.5 CONSIDERATION OF THE WELFARE OF CHILDREN “ONLY” AT INFANCY**

As argued from the previous chapter, the Court is only required to give “paramount” consideration to the welfare of a child who has not attained the age of eighteen years.<sup>109</sup> It must also be emphasised that the Matrimonial Causes Act, 1985 also does not provide for special circumstances that can prevail even when the child has reached the age of majority. As a result, the welfare of children who have attained majority is not adequately protected in the division of matrimonial property upon

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<sup>109</sup> Constitution of Zimbabwe (n 3 above) Section 81 (1) of the Constitution which defines a child read with Section 19 (1) and 81 (2)

divorce. The dissertation makes comparisons on this aspect with Zambia. The Zambian Matrimonial Causes Act<sup>110</sup> in Section 41 provides that,

“The Court may in a particular case, if it is of opinion that there are special circumstances which justify its so doing order that this section shall apply in relation of a child of the marriage who has attained the age of twenty one years at the date of the decree nisi”.

The said Act further states that this section applies to the following children of the family,

“Under the age of twenty five and is receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not the child is also in gainful employment.”<sup>111</sup>

What is clear from the Zambian Matrimonial Causes Act, 2007 is that the Court may give such directions if it is of the opinion that there are special circumstances which make it desirable in the interest of the child that this section shall apply.<sup>112</sup> This research calls for the legislators to cure the lacuna in the Zimbabwean Matrimonial Causes Act, 1985 by providing for special circumstances where the welfare of a major child can be desirably considered in the division of matrimonial property.

#### **4.6 DISCRIMINATION**

The Zambian Matrimonial Causes Act<sup>113</sup> provides that for the purposes of the application of this Act in relation to a marriage (a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other (b) a child of the husband and wife born before the marriage, whether legitimated by the marriage or not (C) a child of either the husband wife including a child born outside wedlock to either one of them and a child adopted by either of them, if at the relevant time the child was ordinarily a member of the house hold of the husband and wife

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<sup>110</sup> Zambian Matrimonial Causes Act (n 68 above)

<sup>111</sup> Zambian Matrimonial Causes Act (n 68 above)

<sup>112</sup> Zambian Matrimonial Causes Act (n 68 above) Section 71 (b)

<sup>113</sup> Zambian Matrimonial Causes Act (n 68 above) Section 5 (1)

and accepted by both as a member of the family, shall be deemed to be a child of the family, and a child of the husband and wife. Similarly, the English Matrimonial Causes Act applies to “children of the family”.<sup>114</sup> In light of the above provisions, it is the argument of this dissertation that the wording in the Matrimonial Causes Act, 1985 which refers to “child of the marriage” is discriminatory and needs to be amended. This will ensure adequate protection of children in the division of matrimonial property upon divorce.

#### 4.7 ROLE OF THE CUSTODIAL PARENT

TSANGA J in the case of *Katsamba v Katsamba*<sup>115</sup> remarked that “on divorce, more often than not, the parties to a marriage are left in the very same personal situation in terms of the roles and responsibilities that the marriage assigned to them”. Thus, where a wife, as in this case, has performed the child rearing and carrying role, relying largely on financial support from her husband, the reality of continuing such obligations post separation, without adequate support, can be particularly detrimental for the physical and mental wellbeing of the spouse and children. The responsibilities that a divorced custodial parent can expect to face in relation to the children primarily include ensuring that their needs for shelter, food, clothing, education and health care are met. In addition to time and emotional devotion that these responsibilities require, the bottom line is that they need an assured source of income. She further stated that,

“Whilst an immediate partnership approach in the division of the matrimonial home especially as pressed for by plaintiff, with each spouse getting 50 per cent, may appear just and equitable as between the spouses, the very nature of obligations and responsibilities that the custodial parent is likely to face may in fact place her at a greater disadvantage as compared to the husband”.

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<sup>114</sup> English Matrimonial Causes Act (n 6 above)

<sup>115</sup> *Katsamba v Katsamba* (n 19 above) 87

MWAYERA J in the case of *Duncan v Duncan*<sup>116</sup> also remarked that “the parties have agreed she be the custodial parent and it naturally follows that children and mother require shelter. The Judge further stated that,

“The drive to push the plaintiff (custodial parent) and children to rented accommodation given the defendant has no need for immediate shelter is unjustified in the circumstances. The plaintiff and the children are accustomed to the Avondale home and have need for shelter”.

What is clear from the above remarks is that failure to recognise the role of the custodial parent after divorce also prejudices the welfare of children. This research contrasts the Zimbabwe Matrimonial Causes Act, 1985 with Australia on this aspect. The factors considered under the Australian family Law Act<sup>117</sup> in the division of matrimonial property relevant in this discussion is (c) whether either party has the care or control of a child of a marriage who has not attained the age of 18 years (d) commitment to support a child (i) the need to protect a party who wishes to continue that party’s role as a parent. Once these factors are considered, the Court may give the person with the lower earning capacity an additional loading of the matrimonial property. This is especially the case if that person has a high cost of living, such as can come from the care of children. This will often mean that a person in that situation will receive more than 50 per cent of the parties’ property.<sup>118</sup> This research is of the argument that the legislature should insert a provision in the Zimbabwean Matrimonial Causes Act, 1985 which directs the Courts to take into account whether either party has the care or control of a child as a factor for consideration.

#### **4.8 CONCLUSION**

The aim of the foregoing chapter was to highlight the weaknesses of the law governing the disposal of matrimonial property upon divorce in relation to the welfare

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<sup>116</sup> *Duncan v Duncan* (n 37 above)

<sup>117</sup> Family Law Act, 1975, See Section 75 (2)

<sup>118</sup> G. Sheehan and J. Hughes “Division of matrimonial property in Australia” (2001)

of children in light of Zambia, Kenya and international standards. Having thoroughly investigated the law regulating the division of matrimonial property in the above stated jurisdictions, this chapter concludes that legislative reform is needed in this area of law in Zimbabwe. This chapter emphasised the introduction of a first principle which gives first priority to the provision of accommodation for children. After that, all property should be subject to a presumption of equal sharing between the parties. Furthermore the chapter advocates for the legislature to enact an Act of Parliament to bring justice to the shattered matrimonial home. The legislature reform should place its energy in coming up with the appropriate legislation outlining the operative framework for dealing with the matrimonial home during the course of the marriage and most importantly upon its dissolution. The chapter also reinforced the point that it is only fair that whatever distribution is deemed does not burden the custodial parent so much that she or he is left without accommodation. The direction to give first consideration to the children's welfare often justifies giving home to the primary carer, the parent with whom children are to live with. The discriminatory language in the Matrimonial Causes Act, 1985 should be abandoned. What should be adopted are "special circumstances" where the welfare of a major child can be desirably considered in the distribution of matrimonial property upon divorce. The last chapter will give recommendations on a preferable state of the law and how such a situation can be achieved.



## **CHAPTER 5**

### **SUMMARY AND RECOMMENDATIONS**

#### **5.1 INTRODUCTION**

The research was set out to investigate the approach of re-allocation of matrimonial property upon divorce in Zimbabwe and examine how satisfactory the law is in protecting the welfare of children and custodial parents. The dissertation also sought to know whether the Zimbabwean law that governs apportionment of such property is justifiable in the regional and international ambit by contrasting with other jurisdictions. The research noted that there is an urgent need for reforms in this area of law. This chapter gives a summary of the research that was undertaken and makes recommendations on the necessary reform.

#### **5.2 SUMMARY OF FINDINGS**

From the objectives explored in Chapter 1, the following conclusions are drawn:

#### **5.3 LEGAL REGIME GOVERNING THE DISPOSAL OF MATRIMONIAL PROPERTY**

It is submitted by this dissertation that the Zimbabwe Matrimonial Causes Act, 1985 has given the Courts extremely wide discretion to exercise regarding the granting of an order for the division of assets of the spouses in divorce proceedings. As such, there are no settled answers to some fundamental questions of principle and policy about the nature of the spouses and children's rights once their marriage comes to an end.

It was concluded by this research that the guidelines set out by the Act in the apportionment of matrimonial property upon divorce need to be reviewed. The

research also concludes that children have been on the receiving end and mere spectators in the formula for re-distribution of matrimonial property. The study thus deduces the need for definite property rights and that the welfare of any child should be regarded as the first consideration. Courts should put more effort in ensuring that children are adequately housed.

#### **5.4 CONSTITUTIONAL PROVISIONS ON THE RIGHTS OF CHILDREN IN RELATION TO A HOME IN PARTICULAR THE RIGHT TO SHELTER**

The research concludes that the Zimbabwe Constitution contains some key provisions which have a direct link to the issue of the matrimonial home shelter. In discussing these rights in the Constitution, the study comes to the conclusion that the difficulty lies in the Justiciability and the extent of enforcement of these rights in Court.

Despite being progressive, the research gathers that the Constitution has its shortcomings. It was the reckoning of the research that Sections 19 (1) and 81 (2) which state that “a child’s best interests are paramount in every matter concerning the child” are inapplicable in the distribution of matrimonial property following divorce. This is because there are also rights of the spouses to be considered. The major concern of the research is that Section 26 (d) which provides for the necessary protection of children and spouses in the event of divorce is not entrenched under the bill of rights where one can approach the Court upon infringement. This research notes that there have been some positive Judgements with regard to protection of welfare of children in the distribution of matrimonial property following divorce after the enactment of the Zimbabwean Constitution in 2013.<sup>119</sup>

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<sup>119</sup> Katsamba v Katsamba (n 19 above) 87, Duncan v Duncan (n 37 above), Dzaramba v Dzaramba (n 91 above)

## 5.5 STANDARDS OF BEST PRACTICE FROM OTHER JURISDICTIONS

The dissertation discussed the disposal of matrimonial property upon divorce in light of other jurisdictions namely Zambia, Kenya, England and Australia. The study came to the conclusion that the approach to this subject under these jurisdictions is exceptional and that the Zimbabwean law on this aspect falls far short of regional and International standards. The Constitution of Kenya and its legislation regulates, recognises and protects the matrimonial home at the dissolution of the marriage. It also protects the real rights of spouses. The research also looked at the amended English Matrimonial Causes Act, 1973 which directs the Court to give first priority to the welfare of children in the distribution of matrimonial property upon divorce.

The study also discussed the Zambian Matrimonial Causes Act, together with the amended English Matrimonial Causes Act, 1973 which direct the Courts to ensure that proper arrangements in all circumstances have been made for the welfare of children before a divorce is finalised. The research came to the conclusion that the language in the Matrimonial Causes Act, 1985 is discriminatory. The provision “any child of the marriage” in the Act was analysed referring to the wording of the amended English Matrimonial Causes Act, 1973 and the Zambian Matrimonial Causes Act, 2007 which apply to “Child of the family”.

The dissertation deduces that there are “special circumstances” that can exist even when a child has attained majority. The chapter drew lessons from the Zambian Matrimonial Causes Act, 2007 which provides that the Court may in a particular case, if it is of the opinion that there are special circumstances which justify its so doing order that this Section shall apply in relation to a child of the marriage who has attained the age of twenty one years at the date of the decree nisi. The research

reckons that the welfare of children with special circumstances should be taken into account in the disposal of matrimonial property upon divorce.

It was also the presumption of the dissertation that upon divorce, the parties to a marriage are left in the very same personal situation in terms of the roles and responsibilities that the marriage assigned to them. The research is of the conclusion that failure to take into account the role of the custodial parent after divorce prejudices the welfare of children. The study made a comparison on this stance with the Australian approach. The Family Law Act of Australia, 1975 takes into account the role of the custodial parent in the division of matrimonial property upon divorce.

In view of the above conclusions, it is the submission of the dissertation that there is need to re-interrogate the issue of the division of matrimonial property upon divorce in so far as the welfare of children is concerned and consider the approach by Zambia, Kenya, England and Australia discussed in this study.

## **5.6 RECOMMENDATIONS**

1. In light of the standards of best practice examined in this research, the study recommends that the guidelines contained in Section 7 (4) of the Matrimonial Causes Act (Chapter 5.13), 1985 should be amended to give greater significance to the following matters:

(a) The provision of adequate financial support for children should be a first priority. The law should seek to emphasise as a priority the necessity to make such financial provision as would safeguard the welfare of children. Moreover, the Courts should be directed to ensure that proper arrangements for children have been made before a divorce is finalised. In this connection, the research recommends that the Courts should have adequate information about the actual cost of providing for the needs of

children<sup>120</sup>. This research calls for administrative steps to be taken to ensure that the Courts have adequate and reliable information about the current cost of providing for the needs of children<sup>121</sup>. The lesson on this aspect is drawn from the English Matrimonial Causes Act, 1973 which makes the re-allocation formula subservient to the welfare of minor children by directing the Court to have first consideration to the interests of minor children.

(b) To seek to place the parties in the financial position in which they would have been had the marriage not broken down should no longer be a statutory objective. The primary objective of this provision is that the financial position of the parties in as far as possible should not be affected by their divorce. The policy poses on the Courts a task which is rarely possible for attainment. English law was amended to remove this instruction to put the parties in the position they would have occupied had the marriage survived.

(c) The Matrimonial Causes Act, 1985 should give adequate recognition to the value of the custodial parent's role. The research recommends that the legislators insert a provision in the Act which directs the Court to take into account whether either party has the care or control of a child as a factor for consideration. On this perspective, the study was enlightened by the Australian jurisdiction. The Australian Family Law Act, 1975 contains factors that take into account the role of the custodial parent after divorce. Such factors include commitment to support a child, whether either party has the care or control of a child of a marriage who has not attained the age of 18 years and the need to protect a party who wishes to continue that party's role as a parent.

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<sup>120</sup> See the English Law Commission 1981 Report (Law commission No 112)

<sup>121</sup> English Law Commission 1981 Report ( n 120 above)

(d) The provision in the Matrimonial Causes Act, 1985 which provides that “child of the marriage” should be repealed as it is discriminatory and replaced with “child of the family”. That Zimbabwe needs an amendment on this provision is clearly put to light by the Zambian Matrimonial Causes Act, 2007 which provides for “children of the family”. It states that a child adopted, a child of the husband and wife born before the marriage and a child born outside wedlock, if at the relevant time the child was ordinarily a member of the household of the husband and wife shall be deemed to be a child of the family. In the same vein, the English Matrimonial Causes Act, 1973 also provides for “children of the family”.

(e) The legislators should insert a provision in the Matrimonial Causes Act, 1985 providing for “special circumstances” where the welfare of a major child can be taken into consideration in the disposal of matrimonial property following divorce. The research arrived at this perspective having looked at the Zambian Matrimonial Causes Act, 2007 which provides that a Court may in a particular case, if it is of the opinion that there are special circumstances which justify its so doing, order that this section shall apply in relation to a child of the marriage who has attained the age of 21 years at the decree of nisi. Of importance is the provision which states that the Section applies to the child of the family, “under the age of twenty five and is receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not the child is also in gainful employment”.

(f) The legislators should enact an Act of Parliament with normative guidelines on the protection of the matrimonial property, in particular the matrimonial home during and at the dissolution of the spouses’ marriage. On the matrimonial home, this dissertation concedes that before it is sold upon divorce, it is important for the Courts to take into account the use made of it. Lessons on this thinking were drawn from

Kenya. The Kenyan Constitution (2010) requires Parliament to enact legislation on “to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of the marriage”. The Parliament of Kenya enacted the Matrimonial property Act (2013) which provides for the rights and responsibilities of spouses in relation to matrimonial property. The Land Registration Act of 2012 also protects real property rights including the rights of spouses.

(ii) The research recommends that the provision in the Constitution of Zimbabwe providing for necessary protection of children and spouses in the event of dissolution of a marriage be entrenched under the bill of rights. This research arrived at this point of view after having analysed the Kenyan Constitution. The Kenyan Constitution entrenched under its bill of rights the provision that the parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. The Kenyan Courts have clearly explained that this provision extends to matrimonial property and is a Constitutional right that marital property is shared 50-50 in the event a marriage ends.

(g) The “Paramountcy” principle provided by the Constitution of Zimbabwe should be abandoned and replaced with a principle of “first consideration” in all matters concerning a child. On this approach, the study drew lessons from the English Matrimonial Causes Act, 1973 and regional and International conventions. The English Matrimonial Causes Act provides that “first consideration” must be given to the welfare of any child of the family who has not attained the age of 18.<sup>122</sup> Article 3 of the UN Convention on the Rights of the child<sup>123</sup> and Article 4 on the Rights and

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<sup>122</sup> English Matrimonial Causes Act (n 6 above) @ Section 25 (1)

<sup>123</sup> CRC (n 22 above)

welfare of the Child <sup>124</sup>provide that the best interest of the child shall be a “primary consideration”.

## 5.7 CONCLUSION

The chief aim of the dissertation was to highlight the problems encountered by children and custodial parents in the disposal of matrimonial property following divorce. This was done firstly by evaluating the Zimbabwe Matrimonial Causes Act, 1985 clearly pointing out how it has contributed to the problems faced by children in the distribution of matrimonial property upon divorce. The research further analysed how the Courts have dealt with the sharing of the matrimonial home following divorce in so far as the welfare of children is concerned. After noting challenges faced by children in the division of the matrimonial home, the research called for introduction of a principle giving priority to the needs of children. The study also called for the abandonment of the “paramountcy” principle in the Zimbabwean Constitution and that it should be replaced with a framework which takes into account the interests of all the parties. This is the argument advanced in Chapter 3. The major lesson learnt from an analysis of other jurisdictions in the regional and international domain is that the Zimbabwe Matrimonial Causes Act, 1985 needs an urgent amendment. It should be amended with inserting provisions directing the Courts to ensure that proper arrangements for the welfare of children have been made and are satisfactory before a divorce is finalised, to provide for “special circumstances” for major children who have attained majority so that their welfare can also be taken into account in the division of matrimonial property and to insert a provision which recognizes the role of the custodial parent. The discriminatory language in the Act should be done away with. The standpoint of the research was and is still that there is a need for the

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<sup>124</sup> ACRWC (n 23 above)



legislature to enact laws spelling out the exact parameters on the protection of the matrimonial home during and upon divorce. The recommendations proposed will arguably ensure that this ideal situation is achieved if so implemented.

## BIBLIOGRAPHY

### TEXTBOOKS

- Chirawu, S (2015): *Principles of the law of succession* – WLSA
- Cretney S.M, Masson J.M and Harris R.B (2002): *Principles of Family Law* -Sweet and Maxwell
- Daviel CJ and Jordan RA (2005): *Law of Persons*-Juta and Company Limited
- Devenish, G (1999): *A Commentary on the South African bill of rights*- Butterworths
- Gregg, L (2001): *Constitutional Law of Zimbabwe*- Legal Resources Foundation
- Hayes M and Williams C (1995): *Family Law Principles, policy and practice* - Butterworths
- Herring, J (2009): *Family Law*, 4<sup>th</sup> Edition - Henry Ling Ltd
- Heerden BV, Cockrell A and Keightley R (1999): *Boberg's Law of Persons and Family Law*, 2<sup>nd</sup> Edition-Juta and Company Limited
- Ncube, W (1989): *Family Law in Zimbabwe*-Legal Resources Foundation
- Sinclair, J.D (1996): *The Law of marriage* - Juta and Co, Ltd
- Standley, K (2010): *Family Law*, 7<sup>th</sup> Edition -CPI Antony Rowe, Chippenham and East Bourne
- Visser PJ and Potgieter JM (2004): *Introduction to family Law*-Juta and Co, Ltd

### ARTICLES AND JOURNALS

- Archampong, E.A 'Matrimonial property division at marriage breakdown, the way forward' (2007/2008) *KNUST law journal*
- Bainham, A 'Children-the modern law' (1993) *Bristol*
- Chambers, D 'Re-thinking the substantive rules for custody disputes in divorce' (1984) *Michigan*
- Kline, M 'Child welfare law "Best interests of the child" ideology and first nations' (1992) *Osgoode Hall*
- Ncube, W 'Re-Allocation of Matrimonial Property at the Dissolution of Marriage in Zimbabwe' (1990) Vol 34 *Journal of African Law* No1
- Thomas, K 'Selected theories of Constitutional interpretation' (2011) *Congress research services*
- Sheehan G and Hughes J 'Division of Matrimonial Property in Australia' (2001)

## **DICTIONARIES**

Black Law Dictionary 8<sup>th</sup> Edition: West Thompson business, USA

The New International Webster's Comprehensive Dictionary of the English language (2003 edition): Encyclopaedic edition-Trident Press International

## **ACTS AND STATUTORY INSTRUMENTS**

Australian Family Law Act, 1975

English Matrimonial Causes Act, 1973 (Chapter 18)

English Matrimonial and Family Proceedings Act, 1984

English Matrimonial Homes Act, 1967

Kenyan Matrimonial Property Act, 2013 (No 40)

Kenyan Land Registration Act, 2012 (No 3)

The Constitution of the Republic of Zimbabwe, 2013 (Amendment Number 20)

The Constitution of Kenya (2010)

Zimbabwean Matrimonial Causes Act (Chapter 5.13)

Zambian Matrimonial Causes Act, 2007 (No 20)

## **REGIONAL AND INTERNATIONAL INSTRUMENTS**

African Charter on the Rights and welfare of the child (ACRWC)

U.N Conventions on the Rights of the Child (CRC)

## **CASE LIST**

### **ZIMBABWEAN CASES**

Duncan v Duncan HH 232-17

Dzaramba v Dzaramba HH 38-16

Gonye v Gonye 2009 (1) ZLR, 232 (S)

Hatendi v Hatendi 2001 (2) ZLR, 530 (S)

Katsamba v Katsamba 2014 (1) ZLR 187 (H)

Mazorodze v Mazorodze HH 245-11 (Unreported)

Maponga v Maponga and others 2004 (1) ZLR, 63 (H)

Marimba v Marimba 1999 (1) ZLR, 87 (H)

Madzara v Stanbic HH 546-15

Ncube v Ncube 1993 (1) ZLR

Nyatwa v Nene 1990 (1) ZLR, 97

Takafuma v Takafuma 1994 (2) ZLR, 103

Ruth Pasipanodya v Kosmas Mushoriwa SC 146/98

Shenje v Shenje 2001 (2) ZLR, 160 (H)

### **SOUTH AFRICAN CASES**

Edwards v Flemming and another 1987 (4) SA 525

Government of South Africa v Grootboom CCT/00, Paragraph 3

### **KENYAN CASES**

Agnes Nanjala William v Jacob Petrus Nicholas Goes, Civil Appeal Number 127 of 2011

### **ENGLISH CASES**

Browne v Pritchard 1975 (3) ALL ER, 721

C v C 1997 (2) FLR, 26

Cordle v Cordle 2002 (1) FLR, 97

Dart v Dart 1996 (2) FLR, 286

J v C (1969) 1 ALL ER, 788

M v B Ancillary Proceedings: Lump sum (1988) 1 FLR, 53

Meshar v Meshar 1980 (1) ALL ER, 126

Miller v Miller 2006, (House of Lords)

Richardson v Richardson 1994 (No 2) FLR, 105

Sutter v Sutter 1987 (2) ALL ER, 336

WHJ V WHJ 2002 (1) FLR, 415

### **INDIAN CASES**

Francis v Administrator Union Territory of Delhi 1981 (2) SCR, 516