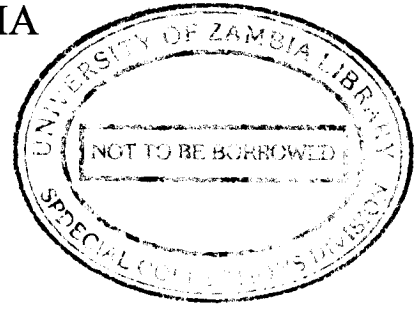


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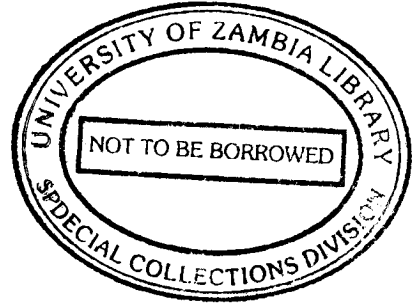
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Supervisor — Dr. Munalula

Date: 6/2/08 (i)

IS THERE A NEED FOR PRENUPTIAL AGREEMENTS IN ZAMBIA?



BY

ANNALISE JOLLY.

A paper submitted to the University of Zambia in partial fulfillment of the requirement for the award of a Bachelor Degree in Law (LLB).

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DECLARATION.

I, Annalise Jolly, Computer number 27133494, do hereby declare that I am the author of this Directed Research Paper entitled: Is there a need for Prenuptial agreements in Zambia, and confirm that it is my original work. I further declare that due acknowledgement has been given where other peoples work has been used. I verily believe that this research has not been presented in the School or indeed in any other learning institution for academic purposes.

Date: 4/02/08

Student's Signature.......... (iv)

DEDICATION.

To my late father, Michael Christopher Jolly everything I am and everything I will be is the product of the love and encouragement that I received from you.

To my mother, Glenda Jolly who has truly been a great inspiration to me and even better a great backbone that has stood and believed in me and encouraged me to persevere throughout my studies.

Most of all to God, for it is through him that what once seemed impossible indeed turned out to be possible.

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ABSTRACT.

Married women have throughout history been said to be doubly jeopardized in property rights. As women they often could not inherit property from their parents or husbands. This position was greatly seen in customary marriages. Despite the fact that in many instances women had contributed directly or indirectly, the position remained unfavourable to women. In instances of divorce women initially had little if any claim to family property after Divorce. It is imperative to note that the advent of colonialism introduced a dual legal system i.e. English law and Indigenous Customary law and as such the major problem was the difficulty of reconciling the two legal systems.

Marriage could be governed by means of the Marriage Act as applied in England or Customary law. However, in terms of Customary law in Zambia it was such that the law was unwritten and uncertain as a result of which the practice of mixing the two legal systems rendered the whole issue of women's rights after divorce undefined.

This paper will seek to ensure that the definition of women's rights after divorce are clearly given full force and effect. The general objective of the essay is ultimately to contribute to Family law in Zambia by providing a mechanism that may secure that grossly unfair marriage settlements in terms of the Marriage Act and Customary law are avoided by allowing parties to a marriage if they wish to be able before or during the marriage to enter into agreements called Prenuptial agreements. These agreements concern parties to a marriage is property rights and maintenance rights and by entering such agreements they will have greater certainty as to the control over their financial affairs and as such this mechanism can indeed eliminate any inequalities, injustice and hardships that are to ensue if at all the parties divorce.

(vii).

TABLE OF CASES.

1. Black Clawson International Ltd v Papierwerke Waldhof Aschaffenburg AG [1975] AC 591 at 638.
2. Chibwe v Chibwe SCZ Appeal No.38 of 2000.
3. Ex parte Burger [1995]1 SA 140.
4. Ex parte Coetzee [1984] (2) SA 363(W)
4. Edelstein v Edelstein 1952 3 SA (A)
- 5.Ex Parte Spinazze [1985] 3 SA 650.
6. Fothergill v Monarch Airlines Ltd [1981] AC.251 at 279.
7. Grobbelaar v Van der Vyver [1954]1 SA 248(A) 253.
8. Hazel v Hazel 1972 ALL ER 923.
9. Hyman v Hyman [1929] AC 201.
10. Martha Kembo Mwanamwalye and Collins Mwanamwalye
11. McFarlane v McFarlane [2006] *IFLR* 1186.
12. Milbourn v Milbourn [1987] 3 SA 62 (W).
13. Miller v Miller [2006] UKHL
14. Mwiya v Mwiya [1977] ZR.1773.
15. N v N [1997] 1 FLR 900.
16. Richard Musonda v Florence Musonda SCZ Appeal No. 53 of 1998
17. Violet Kambole Tembo and David Tembo Appeal No.42 of 2002.
18. Wachtel v Wachtel [1973] 1 All ER 829.

TABLE OF STATUTES.

1. The Constitution of the Republic of Zambia, Chapter 1 of the Laws of Zambia.
2. The Marriage Act ,CAP 50 of the Laws of Zambia.
3. The Matrimonial Causes Act of England of 1973.
4. The Matrimonial Causes Act of Zambia No.20 of 2007.
5. The Local Courts Act, Chapter 29 *of the laws of Zambia*
6. Deeds Registry Act of South Africa 47 of 1937.
7. The Married Women's Property Act 1882 of England.

CHAPTER ONE.

1.0 Background.

The Constitution of the Republic of Zambia, Chapter 1 and the Marriage Act, Chapter 50, provide the primary Legal sources of the Laws of Marriage. These two statutes acknowledge Civil Law Marriages and Customary Law marriages. This is in accordance with the dual legal system that Zambia inherited at independence on 24th of October, 1964. The dualism comprises Civil law and Customary law which are administered under parallel legal systems.¹

The dual legal system has been seen to pose difficulties because of the choice of personal laws to apply to peoples lives and also because of the reliance that is placed on received laws contained in English statutes.²

Zambia has a Marriage Act however did not have a Divorce statute and looked to England for the laws. The Marriage Act was confined to regulations and formalities for contracting a valid Civil marriage. It did not deal with divorce and other domestic relations matters such as custody and maintenance or financial provisions for the spouse or child of the family or with settlement of property after divorce.³

For matters relating to Divorce, settlement of property, nullity of marriage, ancillary relief and custody of children, Zambia has been applying the Matrimonial Causes Act of England of 1973. This Act has in the United Kingdom been revised and some provisions have been repealed and replaced and also consolidated with other divorce laws such as the Divorce Reform Act, 1969 and the Matrimonial Causes Act of 1958.⁴

¹ L. Mushota "Family Law in Zambia: Cases and Materials" (2005) at 9.

² L. Mushota "Family Law in Zambia" at 12.

³ Mushota at 12.

⁴ Mushota at 12.

As a result of the aforementioned it is indeed true to say that a serious problem has been existing in the nation because whereas the Marriage Act regulates marriages, Courts in Zambia have continued to look to England for divorce and other domestic relations.⁵

Section 25 of the Matrimonial Causes Act of 1973 states that “in instances where parties to a marriage divorce the court is obliged among other things to have regard to all the circumstances of the case and so exercise its powers so “as to place the parties so far as is practicable and having regard to the conduct in the financial position they would have been in if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.”⁶

It is from the foregoing provision that Lord Denning in the case of *Wachtel v Wachtel*⁷ evolved the principle of the one third share of the family assets for a wife because of the belief that a husband was likely to shoulder more financial obligations towards the children of the family after the break up of the marriage than the wife.

However, on 6th September 2007^{the} Parliament of Zambia enacted an Act i.e. The Matrimonial Causes Act No. 20 of 2007. This Act applies to Civil marriages and makes provision for divorce and other matrimonial causes: to provide for the maintenance of a party to a marriage and for children of the family; to provide for the settlement of property between parties to a marriage, to provide for the custody or guardianship of children of the marriage and to provide for matters connected with or incidental to the foregoing.⁸

⁵L. Mushota “*Family Law in Zambia: Cases and Materials*” (2005) at 13.

⁶L. Mushota “*Family Law in Zambia*” (2005) at 312.

⁷[1973] AER 829.

⁸ACT No.20 of 2007 at 301.

It is imperative to note that in terms of customary marriages such circumstances were not taken into account upon dissolution of the marriage.

Previously, customary law did not support maintenance of a divorced wife or separated wife; which meant that in instances where parties divorced the woman would not be entitled to a share of property even if she had contributed to its acquisition.⁹

However social and economic changes no longer support this position and a precedent was set in a Local court in Zambia, giving women married under Customary law the right to a share of marital property in the event of a divorce or death of the husband.¹⁰

In terms of the Local Courts (Amendment) Act of 1991 as amended the law now gives Local courts the jurisdiction to make maintenance orders.

Section 35 of the Local Courts Act states under subsection (d) that “the Court can make an order for payment of a monthly sum of maintenance of a divorced spouse as the court may consider just and reasonable, having regard to the means and circumstances of the parties for a period not exceeding three years from the date of divorce or until remarriage whichever is earlier.”

1.1 STATEMENT OF THE PROBLEM.

Marriage attaches important legal consequences to both the person and property of the parties. A serious problem has been existing in Zambia, i.e. Zambia has in the past not had its own Matrimonial property system and has been solely relying on England to regulate proprietary rights of parties to a marriage. As a result parties to a

⁹ ZAMBIA: “Landmark judgment for Women in Customary marriages”
<http://www.irinnews.org/report.aspx?reportid=57641>.(accessed on 29 th June 2007)

¹⁰ Landmark judgment for Women in Customary marriages”
<http://www.irinnews.org/report.aspx?reportid=57641>(accessed on 29 th June 2007)

marriage in Zambia are bound by various statutory or common law consequences of marriage that are applicable in England.¹¹

This in turn has created a conflict largely because the Zambian society has values and other conditions which are totally different and rooted in tradition than values and other conditions in the United Kingdom.¹²

Therefore the sole purpose behind this study is to assess whether Zambia should have its own matrimonial property system suitable to Zambian values and local circumstances and whether in such a system there should be a provision that provides for Prenuptial agreements as a means to allow parties to a marriage the choice to vary or exclude any of the patrimonial consequences of a marriage.

1.2 RESEARCH OBJECTIVES

(a) General Objective.

The general objective of the essay is ultimately to contribute to Family law in Zambia by providing a mechanism that may secure that grossly unfair marriage settlements in terms of the Marriage Act and Customary law are avoided by allowing parties to a marriage if they wish to be able before or during the marriage to be able to be free to enter into agreements concerning their property rights and maintenance rights and that by entering such agreements they will have greater certainty as to the control over their financial affairs.

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¹¹ Mushota "*Family Law in Zambia*" at 12.

¹² Mushota "*Family Law in Zambia*" at 13.

(b) Specific Objectives.

- To discuss Prenuptial agreements as a legal concept and to assess whether such agreements will be of benefit to parties that are about to get married in terms of the Marriage Act and Customary Law respectively.
- To conduct a case analysis to establish whether or not most of the divorce cases in Zambia have resulted in fair settlements or not.
- To conduct a comparative analysis of other countries responses particularly South Africa and the USA where prenuptial agreements are adopted and accepted.
- To look at the drawbacks of introducing prenuptial agreements in Zambia.

1.3. JUSTIFICATION OR SIGNIFICANCE OF STUDY.

This research is very important to Zambian jurisprudence as it is aimed at examining whether it is indeed fair for Zambia to heavily rely on English statutes in divorce and domestic relations and whether the current situation should be revised to allow Zambia to adopt its own marital regime that will cater for various matrimonial property systems and more importantly, whether parties must be free to choose for themselves if they wish to alter the normal consequences of marriage by means of Prenuptial agreement .

1.4. RESEARCH QUESTIONS.

- (a) Should parties to a marriage not have the freedom of choice to alter or vary the patrimonial consequences of marriage by means of Prenuptial agreements.
- (b) Can the inclusion and implementation of prenuptial agreements in Zambia be of benefit to the marital regime applicable in Zambia?
- (c) Moreover, can such agreements be of use to women married under Customary law such that it gives them greater certainty that they are entitled to get a share of property upon dissolution of the marriage.

1.5. METHODOLOGY

The major component of data collection was by way of desk research. The Laws of Zambia, journal articles and case law as well as texts on Prenuptial agreements were consulted extensively. Finally the internet which has proved to have invaluable information was employed extensively especially in respect of foreign jurisdictions like the USA and South Africa where prenuptial agreements are included and implemented in the matrimonial systems that apply in those jurisdictions.

CHAPTER OUTLINE.

The paper is divided into 6 chapters.

Chapter One - Deals with the introduction and gives background information to the context of the Research Proposal. Chapter Two - Will look at what Prenuptial Agreements are and the formalities that apply to them. Chapter Three - Looks at what provisions are applied in Zambia when it comes to divorce settlements in terms of Civil and Customary marriages and due regard will be given to case law respectively. Chapter Four - Looks at why English courts have failed to recognize Prenuptial Agreements and what are the benefits and drawbacks of Prenuptial Agreements. Chapter Five -Will provide a Comparative analysis of foreign jurisdictions where Prenuptial Agreements apply especially South Africa and North America. Chapter Six presents conclusions drawn from findings made and recommendations will henceforth be stated.

CHAPTER TWO.

1.6. What are Prenuptial Agreements and what Legal formalities apply to them?

Before one seeks to define what Prenuptial agreements are it is vital firstly to note when such agreements come into effect. If parties to a marriage wish to exclude or vary any of the patrimonial consequences of marriage they may do so by means of a Prenuptial contract.¹³ In countries such as South Africa the term used to describe such agreements is “Ante-nuptial Agreements”.

Definition of a Prenuptial Agreement.

A Prenuptial agreement or Ante-nuptial agreement commonly abbreviated to “Prenup” is a written contract entered into by two people prior to a marriage that sets out the terms of possession of assets, treatment of future earnings, control of the property of each and potential division if the marriage is later dissolved. It has been said to be a contract that typically lists all of the property each person owns as well as any debts and clearly specifies what each person’s rights will be after the marriage.¹⁴

These agreements are fairly common if either or both parties have substantial assets, children from a prior marriage, potential inheritances, higher incomes or have been taken by a prior spouse.¹⁵

It is imperative that one bears in mind that a prenuptial agreement is a **sui generis legal agreement** with unique characteristics and consequences distinguishing it from a regular contract.¹⁶

¹³ Cronje and Heaton *South African Family Law* (1999) at 108.

¹⁴ http://en.wikipedia.org/wiki/Prenuptial_agreement at 1

¹⁵ http://legal_dictionary.the_free_dictionary.com/prenuptial_agreement.

¹⁶ Cronje and Heaton “*South African Family Law*” at 108.

In the case of *Grobbelaar v Van der Vyver*¹⁷ it is clearly stated that there are no prescribed words or terms that may be included by parties to a marriage in order for it to be a true prenuptial agreement as long as the words convey their clear and express intention regarding their respective and collective proprietary rights. The parties are therefore free to include any provisions which are not contrary to the law, good morals or the nature of the marriage.¹⁸

In the case of *Milbourn v Milbourn*¹⁹ the Deputy Judge President Coetzee pointed out that to be classified as a true ante-nuptial contract such a contract must relate fully to proprietary rights of the parties and not merely stipulate that the parties were to marry each other.

It is indeed significant for one to know that prenuptial agreements are not only resorted to solely in instances where one seeks to protect their assets but that they can also be used in instances where a married couple has children from a previous marriage and therefore by using a prenup it will spell out what will happen to their property when they die so that they can pass on separate property to their children and still provide for each other if necessary.²⁰

Without a prenup a surviving spouse might have the right to claim a large portion of the other spouse's property leaving much less for the children.²¹

Couples with or without children, wealthy or not, may simply want to clarify their financial rights and responsibilities during the marriage or they may want to avoid potential arguments if they ever divorce, by specifying in advance how their property will be divided and whether or not either spouse will receive alimony.²²

¹⁷ [1954] 1 SA 248 (A) 253.

¹⁸ Cronje and Heaton *South African Family Law* (1999) at 113.

¹⁹ [1987] 3 SA 62 (W).

²⁰ S. Irving and K. Stoner "Prenuptial Agreements – An Overview" (<http://www.nolo.com/article.cfm>) at 2 (accessed on 24 th May 2007).

²¹ Irving and Stoner at 2. (<http://www.nolo.com/article.cfm>).

²² Irving and Stoner at 3. (<http://www.nolo.com/article.cfm>).

Prenuptial agreements can be used to protect spouses from each other's debts and they may address a multitude of other issues as well.

These agreements have been said to be extremely important as they direct how property will be allocated between spouses in two distinct situations that is (a) divorce and (b) on death where there is no valid will or trust spelling out how various assets are to be divided among the heirs or intended beneficiaries.²³

In California, USA as of the date of marriage, unless the parties agree otherwise in a valid prenuptial agreement anything earned by the efforts of either party is owned 50/50 between them. Often forgotten is the fact that if one of the parties dies without a valid will or living trust the law will decide what goes to a spouse, and it may not be what the parties wanted to happen but that will not matter.²⁴

If the parties list assets brought into the marriage this does nothing if it was not done in proper writing as a result of which the surviving spouse will take the share the law provides. In divorce situations the fact that one party may do all the work or be paid much more than the other does nothing to change this, however the high earner may feel it is unfair but if there is no agreement this will happen no matter how either party feels about it.²⁵

The only way to avoid unpleasant surprises when matters have reached the point of conflict and difficulty is to seek legal advice before the marriage.²⁶

It is as a result of the above mentioned that prenuptial agreements in the United States require 5 elements before they can be regarded as a valid Prenuptial Agreement.²⁷

²³ E.Straus "Prenuptial Agreements :What You need to Know" (2004) :[http:// www .divorcenet.com/states/california-art 27 at 1](http://www.divorcenet.com/states/california-art%2027%20at%201).(accessed on 31 May 2007).

²⁴ Straus "Prenuptial Agreements" at 2.

²⁵ Straus "Prenuptial Agreements" at 2.

²⁶ Straus "Prenuptial Agreements" at 3.

²⁷ [http://encyclopedia.the freedictionary.com/prenuptial agreement](http://encyclopedia.the.freedictionary.com/prenuptial%20agreement) at 1.

The agreement must be in writing, it must be executed voluntarily, there must be full and fair disclosure at the time of execution, the agreement must not be unconscionable and it must be executed by both parties not their attorneys in the manner required for a deed to be recorded termed as an acknowledgement, before a notary public.

1.7.Common provisions included in Prenuptial Agreements are:²⁸

- (i) Agreements that each of the parties retain any property they respectively own prior to the marriage and that the other party will not have any claim on that property.
- (ii) Provisions dealing with the home parties are intending to buy, setting out what share in the property each of them will have and sometimes the contributions each of them will make to the running of the home.
- (iii) What will happen to any items purchased jointly by the parties after their marriage? For example, some agreements state that each party's share in such property will depend on the amount of money each contributed at the time of purchase.
- (iv)What will happen if one of the parties dies? For example, that the survivor will not be able to make any claim against the deceased's estate. This may be important to protect the interests of children/Step-children.
- (v) Some Agreements particularly American agreements do set out the arrangements for children but as indicated above it is unlikely that such agreements would be enforced by the Courts.

²⁸ <http://www.legal-advice-centre.co.uk/private/preuptial-agreements.html> (accessed on 26 th September 2007).

However it is imperative to note that in South Africa the requirements for the creation of a valid ante-nuptial contract are more or less different to those requirements that apply in the United States.

In terms of South African Law if the formal requirements of an ante-nuptial contract are not fulfilled the ante-nuptial contract is only valid as between the parties and it is not valid between third parties.²⁹

As a result of the above said Section 87 of the Deeds Registries Act ³⁰prescribes the formalities which must be complied with for an Ante-nuptial Contract to be valid against third parties. It provides that:

(1) . An Ante-nuptial Contract executed in the republic shall be attested by a notary and shall be registered in a Deeds Registry within three months after the date of its execution or within such extended period as the court may on application allow.

(2). An Ante-nuptial Contract executed outside the Republic shall be attested by a notary or otherwise entered into in accordance with the law of the place of its execution, and shall be registered in a Deeds Registry within six months after the date of its execution or within such extended period as the court may on application allow.

The consequences of failing to comply with the formalities required for a valid ante-nuptial agreement are that the Ante-nuptial contract will only be valid between the parties themselves and thus would therefore mean that as far as third parties are concerned, the couple will be regarded as being married in community of property.³¹

In the case of *Exparte Spinazze* ³² the couple entered into an Ante nuptial contract in Italy and had it attested by an official who was not a qualified notary public . They

²⁹ D.Cronje and J.Heaton “ *South African Family Law*” (1999) at 108.

³⁰ Act 47 of 1937.

³¹ Cronje and Heaton “*South African Family Law*” [1999] at 108.

³²[1985] 3 SA 650.

later had the Antenuptial Contract registered in South Africa? After the husband's death a dispute arose as to whether the couple was validly married out of community of property on the basis that the Ante-nuptial contract did not comply with the formalities of Italian law nor did it comply with the formalities of South African law.

In this case the Court held that in terms of Section 87 of the Deeds Registries Act 47 of 1937 an Ante-nuptial contract must be attested to by a notary public or a suitably qualified person in accordance with the law of the country where it was executed before it can be registered in South Africa.

The couple in this case had failed to comply with the above requirement and therefore accordingly the ante-nuptial contract was only valid between the spouses themselves but had no force and effect against third parties.

It has always been the case and still is permissible for spouses who agreed prior to the marriage to conclude an Ante-nuptial contract but for some reason failed to comply with the formalities of notarial execution and registration, to have the contract executed and registered after the marriage, with the consent of the High Court.

This possibility is expressly provided for under Section 88 of the Deeds Registries Act.

In terms of Section 88 of the Deeds Registries Act of South Africa³³ the High Court may upon application consent to the Ante-nuptial being notarized and registered after the marriage if the following requirements have been met i.e.

- (a) the parties must clearly have agreed to the terms of the ante-nuptial before entering into the marriage.
- (b) The parties must provide good reasons of their failure to properly comply with the formalities of the Act.
- (c) The application to the High Court must be made within a reasonable time after the discovery of non compliance.

³³ Act 47 of 1937.

It is indeed significant to note that in an instance where a minor is party to an Ante-nuptial contract, she/he must sign the contract in the presence of a notary in addition to being assisted by a legal guardian.

Failure to obtain the requisite consent or assistance will render the ante-nuptial contract null and void irrespective of registration.

Such was the situation in the case of *Edelstein v Edelstein*³⁴.

In that case the applicant's parents were divorced when she was young. Her mother was awarded custody but her father remained her legal guardian. Before turning 20 she married out of community of property. She was assisted solely by her mother in executing the Ante-nuptial Contract.

The applicant's husband died several years later and she was informed that the Ante-nuptial contract was invalid because it was entered into without the assistance of her father who was in fact her legal guardian. She had therefore been married in community of property and was entitled to half of her husband's joint estate.

The court held that the Ante-nuptial contract of an unassisted minor was invalid and could not be ratified after marriage. This was said to be an exception to the general rule that a minor may ratify an unassisted contract within a reasonable period after attaining majority. As a result the Ante-nuptial contract was said to be invalid and the parties had been married in community of property.

³⁴ [1952] 3 SA 1(A).

1.8. Amendment and Termination of the Ante-nuptial Contract

An Ante-nuptial contract only comes to an end once all its obligations have been fulfilled. This means that the contract does not necessarily lapse upon divorce or death. In the event of death or divorce all provisions that have not yet been fulfilled must still be carried out. Parties are free to amend or cancel the ante-nuptial contract by mutual agreement leading up to the moment that the marriage was solemnized. Thereafter they may not generally do so without court intervention.³⁵

Furthermore, if the Ante-nuptial contract doesn't correctly express the terms of the parties agreement or if it does not properly convey their intention due to a mistake of law or otherwise it may be cancelled or amended by a High Court order depending on the circumstances.³⁶

In the case of *Ex parte Coetzee*³⁷ the applicants were married out of community of property in 1982. On the day of their marriage they entered into an ante-nuptial contract and the contract was subsequently registered. The applicants however applied to court for an order cancelling the contract. They averred that they had concluded the contract reluctantly and purely as a result of pressure exerted by the wife's father who threatened to deny them access to his home if they married in community of property.

The applicants were said to be young and inexperienced and the pressure that was exercised by the father together with the advice of a Minister of Religion had urged them to marry out of community of property to preserve the family peace and as such this led them to enter into an Ante-nuptial contract. This decision threatened the happiness of their marriage and therefore the court granted the application to cancel the ante-nuptial contract.

³⁵ D.Cronje and J.Heaton "*South African Family Law*" (1999) at 109.

³⁶ Cronje and Heaton at 110.

³⁷ [1984] (2) SA 363 (W).

Therefore it is vital that a prenuptial agreement must have terms therein that give effect to the true nature of the agreement between them. Furthermore it is imperative that Prenuptial agreements when resorted to should comply with all the legal requirements needed for its execution as failure to comply with such formalities will render the agreement null and void. Parties therefore must be fully aware of what terms and conditions they are committing themselves to in terms of a prenuptial agreement.

CHAPTER THREE.

INTRODUCTION.

This chapter will seek to examine the provisions that applied to divorce settlements prior to the enactment of the current Act now in force. At this point though it is worth emphasizing that the implementation of this Act can indeed be said to be a progressive step forward in that in the past Zambia solely relied on English statutes and this was said to be disadvantageous to the local population as they did not have sufficient knowledge of the Matrimonial Causes Act, 1973 or have any idea of the laws that governed divorce and property settlement in Zambia.³⁸

1.9. Marriage under Statute.

Property rights for parties that are married under Statute has in the past been governed by the British Matrimonial Causes Act of 1973 with the principle of equal entitlement being applied. In terms of financial relief under that Act the provisions that are deemed to be important and ought to be considered are Section 21-25A of the MCA of 1973.

Section 25, is the main provision that sets out the basic guidelines which the English Courts apply in deciding ancillary relief claims (i.e. Property and maintenance matters) in the context of divorce.³⁹

In terms of that section eight factors are looked at by the court in granting relief. In terms of Section 25(1) of the Matrimonial Causes Act it is clearly stated that “the Court has a duty to have regard to all the circumstances of the case and the first consideration is (a) the welfare of the children i.e. any child under the age of 18 years.”

16.

³⁸ L.Mushota “*Family Law in Zambia*” (2005) at 6.

³⁹ “*Principles applicable in dividing the Matrimonial Assets*” (<http://www.terry.co.uk/matcuas1.html>) accessed on 11 June 2007) at 1.

Other matters that the court has to have regard to are (b) the needs of the parties, (c) the earning capacity, property and other financial resources (d) financial obligations of each of the parties to the marriage, (e) the age of each party, (f) duration of the marriage (g) physical or mental disability of either of the parties to the marriage and lastly (h) contributions made by each of the parties etc.⁴⁰

Section 25 can be said to be sufficiently broad as to allow the courts an almost unfettered discretion while also declaring whatever rules they deem fit. Whether this is a good thing or not is subject to debate and will become clear by looking at relevant case law during the course of this chapter.

Decisions have also been made on the basis of the Law Reform (Miscellaneous Provisions) Act of England which provides that a married woman is “capable of acquiring, holding and disposing of any property in all respects as though she were a *femme sole*” and the Married Women’s Property Act 1882 also of England.⁴¹

The situation therefore is such that women married under the Marriage Act are entitled to a share in the matrimonial property including the husband’s property ; jointly owned and acquired property and property acquired with their contribution. The court has power to transfer property from one spouse to another.⁴²

However whether the share given to the woman actually amounts to 50 % is debatable. The Registrar of the High Court presides over the settlement of property after dissolution of marriage. She/ he uses their discretion in deciding what amounts to 50% which may not be viewed as such.⁴³

It is indeed significant that one looks at divorce cases that led to disputes with regard to settlement of property and by looking at the relevant provisions that the

⁴⁰Matrimonial Causes Act of England of 1973.

⁴¹ L.Hailsham “*Halbury’s Laws of England*” Volume 22 (1979) at 631.

⁴² *Chibwe v Chibwe No.38 of 2000*.

⁴³ *Tembo v Tembo*.

court applied it will then be deduced as to whether indeed the provisions have proved to be beneficial to marriages conducted both in terms of statute and customary Law respectively.

In the case of *Wachtel v Wachtel*⁴⁴ it was stated that any Court faced with the question as to how much to award each of the contending spouses in the distribution of matrimonial assets must take into account each spouses financial obligations. Lord Denning in that case evolved the principle of the one third share of the family assets for a wife because of the belief that a husband more than a wife was likely to shoulder more financial obligations towards the children of the family after the break up of a marriage.

In the Supreme Court judgment case of *Richard Musonda v Florence Musonda*⁴⁵ the petitioner the then Mrs. Florence Musonda appealed against the Local Courts order stating that the Court had erred in applying the 50/50 basis in distributing matrimonial assets. The respondent's contention was that she had contributed directly and indirectly to the welfare of the family and as such she was entitled to a fair share of all assets including the matrimonial home. Her contention was that during the marriage the petitioner (Mr.Musonda) had left his formal employment and that she was the one who was working and as such she maintained the family, thus contributing to the extension of the house indirectly.

*Hazel v Hazel*⁴⁶ was cited in that case to show that the respondent was entitled to a share in the value of and or the proceeds of the sale of the matrimonial home.

Of significant importance in the *Richard Musonda v Florence Musonda*⁴⁷ judgment is the ruling that was made and that is that the court ruled that 3/8 th of the total

⁴⁴ [1973] 1 ALL ER 113.

⁴⁵ No.53 of 1998.

⁴⁶ [1972] ALL ER 923.

⁴⁷ No.53 of 1998.

value of the matrimonial home was to be given to the respondent as her share in the matrimonial home.⁴⁸

It must be noted therefore that it is debatable whether 50 /50 basis is used when it comes to settlement of property after divorce as seen from the above case where in the respondent got 37.5% of the total value of the matrimonial home.

In the case of *Violet Kambole Tembo and David Tembo* the appellant appealed against the judgment of the High Court sitting at Lusaka in respect of property settlement following a divorce. The record of appeal reveals that in 1996 the learned Deputy Registrar entertained an application from the appellant for property settlement which was contested by the respondent.

Upon hearing the evidence of both parties the learned deputy registrar came to the conclusion that most if not all of the matrimonial property both in and outside Zambia were acquired by the respondent. Even though the appellant's contribution could be ascertained the learned deputy registrar found that her contribution compared to that of the respondent was negligible.

On the basis of the above findings the learned Deputy registrar did not go along with the argument of the appellant that the matrimonial assets be shared equally. There was some undisputed evidence that some of the assets both movable and immovable had been disposed of by the appellant and that the proceeds from those assets had never been accounted for by her.

⁴⁸ No. 53 of 1998.

The only immovable asset of substance that survived the sale was subdivision 9 of Farm No. 283 in Lusaka West. It was this property that became the focal point of the dispute in the settlement proceedings. In terms of what was said regarding the disputed property the learned trial judge ruled that the property be retained by the respondent.

It was stated in that case by the deputy registrar that it is indeed significant to focus on how the court looked at the issue of settlement of property. The Court is obliged to take into account several factors such as the history of the marriage, the conduct of the players to the marriage before arriving at the final settlement.

In terms of Section 25 of the Matrimonial Causes Act 1973 which re-enacts provisions introduced by the Matrimonial Proceedings and Property Act of 1970 it is clearly reiterated that the “ Court is obliged among other things to have regard to all the circumstances of the case and so exercise its powers as to place the parties as far as it is practicable and having regard to their conduct in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.”

Where the couple had a turbulent marriage and are compelled to part company, the conduct of the parties towards each other becomes a big factor and the proceedings for the settlement of property take a broader view. In such a settlement the court looks at the intentions of the parties and their contributions to the acquisition of the matrimonial property. If their intentions cannot be ascertained by way of an agreement then the court must make a finding as to what went through the minds of the parties at the time of acquisition of the property.

In this case Subdivision 9 of Farm 283 was said to be registered in the name of the respondent as a beneficial owner as such the improvements that were made on the subdivision fairly indicate as to what were the intentions of the respondent before the dissolution of the marriage.

The court ruled that after being awarded assets through the ruling of the learned deputy registrar the appellant was not or could not qualify for some more assets and furthermore that it was virtually impossible to provide any inventory and let alone place any value on the assets for the purposes of assessing each one's entitlement as such it was deemed necessary to reverse the learned trial order and maintain the awards as decreed by the Learned Deputy Registrar. Therefore the appeal was dismissed with no order for costs.

In terms of the current Act that was recently passed and enacted by Parliament in Zambia the following provisions apply in regard to property adjustment orders in connection with divorce proceedings and are clearly laid down under Section 55 (1) (a), (b), (c) and (d) of the Matrimonial Causes Act of Zambia No. 20 of 2007. The position under that Section states as follows:

“The court may upon granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter, whether in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute make any of the following orders i.e.

- (a) An order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as the Court may specify in the order for the benefit of such a child, such property as may be specified in the order, being property to which the first mentioned party is entitled, either in possession or reversion.
- (b) An order that settlement of such property as may be specified, being the property to which a party to a marriage is entitled, be made to the satisfaction of the Court for the benefit of the other party to the marriage and of the children of the family or either or any of them.
- (c) An order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any antenuptial settlement, including a settlement made by will or codicil, made by the parties to the marriage.
- (d) An order extinguishing or reducing the interest of either of the parties to the marriage under the settlement.”

Looking at the above provisions applied in the above case in regard to the issue of property settlement upon Divorce it is indeed evident that the law on the division of property on Divorce is highly discretionary and as such where a case goes to Court the Court has wide powers to for example reallocate property between the spouses or to order that property be sold. This system of law can be criticized on the following grounds i.e. uncertainty and lack of predictability.

Furthermore Courts in exercising their discretion in terms of property settlement may not always act in accordance with the law. Should parties therefore not be allowed to structure fair and reasonable terms that are appropriate for their own situation in life instead of submitting themselves to the whims of the divorce courts.

Should a provision not be included in the current Matrimonial Causes Act to the effect that the Court can have due regard to in addition to the said factors a consideration of prenuptial agreements?

Furthermore the fact that it has been said that the courts tend to look at the intentions of the parties upon acquiring property is extremely vague. Ascertaining the intention of the parties cannot truly be said to be easy if at all it was not provided for in writing. It would make the Courts function much easier if these intentions were clearly stated in a prenuptial agreement. Furthermore what the Court may consider to be a reflection of the parties intention may not be said to be the true and correct reflection of what the parties wanted when it came down to division of property.

2.0.Marriage under Customary Law.

Previously the situation with regard to property settlement in terms of customary marriages was that Customary law did not support maintenance of a divorced or separated wife.⁴⁹ A women was not entitled to a share of property irrespective of whether she had contributed to its acquisition or not.⁵⁰

The Subordination of women and the indulgence of men has been a feature of marriage under customary law, which stipulates that marriage is a union of a man who may or may not already be married and a woman who must be unmarried at the time of entering into matrimony.

In the event of divorce most tribes do not recognize a woman's right to a share of marital property nor are women expected to own property prior to marriages in most tribes. It has been said that women if allowed to own their own property may become too proud and undermine the husband's authority. Women are entitled to kitchen utensils, that they came with into the marriage and whatever the husband had given by way of gifts. Therefore in most instances the woman gets whatever her former husband or his family decides she can have.⁵¹

The courts have held that traditionally the wife's contribution in labor to her husband's enterprise was considered as work which every married woman was expected to do. Consequently, women would leave marriages with next to nothing.

Local Courts are supposed to be guided by the traditions and customs of Zambia's seven main tribes but because the practices and procedures remain unwritten and subjective, magistrates often use their own judgment when deciding such cases.⁵²

⁴⁹ L. Mushota "Family Law: Cases and Materials" at 368.

⁵⁰ "Zambia : Landmark Judgment for Women in Customary marriages" (<http://www.irinnews.org>.(accessed on 29 june 2007).

⁵¹ "Zambia : Landmark Judgment for Women in Customary marriages" (<http://www.irinnews.org>.(accessed on 29 june 2007) at 1

⁵² "Landmark Judgment for Women in Customary marriages"

(<http://www.irinnews.org/report.aspx?reportid=57641>.(accessed on 29 Jun 2007)

In the case of *Mwiya v Mwiya*⁵³, the parties were married under Customary law. Martha Mwiya was divorced under the customary law governing the marriage which did not entitle a wife on being divorced, to property acquired during the marriage, even if she helped acquire it. The parties were a modern couple in spite of the law governing their marriage and Martha Mwiya was of the opinion that she had contributed to the acquisition of property and was entitled to an equitable share and therefore was bound to be maintained financially.

The Local Court however decided differently and said that under Lozi Customary law, a divorced wife was neither entitled to a share of the property nor to maintenance. Martha Mwiya appealed to the Sesheke Subordinate Court, where the decision of the Local court was upheld. She appealed to the High Court presided over by Mr. Justice Ernest Sakala who sat with two Lozi assessors who unanimously agreed that there is no Lozi Custom which entitles a divorced wife to maintenance or a share of the property even if she helped to acquire it.

However worth noting is the case of *Chibwe v Chibwe*⁵⁴ which is a case that is purely illustrative of the fact that it is not possible these days based on social and economic change for a wife to be denied any property or maintenance on divorce.

In the Chibwe case, the couple were married under Ushi Customary law according to which women were entitled to an equitable share of the marital property. The Supreme Court considered principles of English law in adjudicating this case and attempted to change principles of customary law on the ground that the same was repugnant to natural justice and good conscience. The Court reiterated that as long as the spouse had contributed directly or in kind they were entitled to financial provision and that the court may reallocate family assets. The decision therefore to award Mrs. Chibwe with some family assets was based on the Matrimonial Causes Act and principles of English Law even though the marriage in question was under customary law.

⁵³[1977] ZR 113.

⁵⁴SCZ Appeal No. 38/2000.

In the judgment it was stated that it was surprising that both the local and magistrates courts which sit with assessors who are experts of Ushi customary law made no references to Ushi customary law in dissolving the marriage and in property adjustment. It was held that according to Ushi customary law which should have been invoked at the High Court level the appellant was entitled to a reasonable share in the property acquired during the subsistence of the marriage.

In the divorce case between *Martha Kembo Mwanamwalye and Collins Mwanamwalye*,⁵⁵ Magistrate Mwamba Chanda ruled that “notwithstanding that the parties in this matter were married under Customary law, justice demands that when a marriage has broken down, the parties should be put in equal position to avoid any one of them falling into destitution”.

The magistrates ruling was favorably welcomed by, Matrine Chuulu, Coordinator of the NGO, Women and Law in Southern Africa (WLSA) and she said that ‘this is an interesting and progressive judgment: interesting because this ruling came from a local court, the custodian of tradition and lore, and it bases its judgment on tribal customs; progressive because for a long time women have suffered destitution when there is a divorce.’

Furthermore she added that “it is difficult for women to get their share of matrimonial property even when they are married under the statutory law but that in terms of customary unions it is even worse in that custom does not give a woman any right to demand anything - in some customs even the children are taken away.”

In customary or traditional marriages families agree on a bride price (*Lobola*), and a verbal agreement witnessed by relatives from both families is made. The couple does not sign any legal document to prove that they are married.

⁵⁵ “Zambia : Landmark Judgment for Women in Customary marriages” (<http://www.irinnews.org/>.(accessed on 29 june 2007) at 2.

It is precisely for this reason that men are said to prefer customary unions said lawyer Manfred Chibanda however, lawyer Margaret Chinyama states that 'There is now no excuse for men not to marry under the statutes because whether they like it or not their wives can still get a share of marital property. *sic*

Referring to the Mwanamwalye case, Chuulu concluded, "that in the meantime we welcome decisions like this, as it shows that society is changing for the better."

In regard to customary marriages it is clearly evident from the above that previously women were deprived of property in instances where they were divorced. Research has shown that women were not expected to own property prior to marriage in most tribes and that it was believed that women if allowed to own property would become too conceited and undermine the husband's authority furthermore they have been instances where women have been and are still perceived as property belonging to someone and therefore could not own property in their own right.⁵⁶

However this position has and is changing and it is indeed necessary that with social and economic change women should also be given the right to acquire property when they divorce.

⁵⁶ J.Macmillan "*Women's Property Rights in Zambia*"
(www.wlce.co.za/conferenced_2005/joyce_mcmillan.pdf at 1.

CHAPTER FOUR

This chapter will focus on looking at why Prenuptial agreements are not recognized in English Courts and whether there has been a progressive move taken towards recognizing such agreements. It will also look at the benefits and drawbacks of Prenuptial Agreements and relevant case law will be looked at where applicable.

The English position with regard to Prenuptial Agreements has been said to be unusual as many other Common law countries including America, Australia and New Zealand and many non Common law European countries do regard Prenuptial Agreements as binding.⁵⁷

The English courts are of the view that it is for the Courts to decide how assets should be divided between parties in the event of a divorce or separation. The consequences of this are that : if one gets divorced say in America the parties will be bound by the prenuptial agreement however if it happens that the Prenuptial agreement is entered into abroad and the parties get divorced in England, the English Courts will not be bound by the agreement.⁵⁸

Jeremy Morley in his article called "*International Family Law*" says that it is time for the English Courts to enforce prenuptial agreements that comply with specified conditions. He asserts that the "the failure of English Courts to enforce Prenuptial Agreements has long been an anachronistic peculiarity of English law and an unfortunate example of a stubborn refusal to adapt the law to new conditions."⁵⁹

The recent Judgments of the House of Lords in *Miller v Miller* and *McFarlane v McFarlane*⁶⁰ respectively point to the urgent need for the courts to set aside the

⁵⁷ Legal Advice Centre "*Prenuptial Agreements*" <http://www.legal-advice-centre.co.uk/private/prenuptial-agreements.html>.(accessed on 26 th September 2007) at 1.

⁵⁸ Legal Advice Centre at 1.

⁵⁹ J. Morley "*Enforceable Prenuptial Agreements: Their Time Has Come*" <http://www.legal-advice-centre.co.uk/private/prenuptial-agreements> (accessed on 16th August 2006).

⁶⁰ [2006] UKHL 24 and [2006] 1FLR 1186

preposterous contention that it is “substantially uncontestable” that substantial harm to the public would arise if Pre-nuptial Agreements were enforceable.

However it is of extreme and utmost importance to note that the current law concerning Prenuptial Agreements emanates from a decision as to the status of marriage more than 75 years ago.⁶¹ It was in 1929 that *Hyman v Hyman*⁶² settled the principle that public policy should preclude enforcement of Pre-nuptial Agreements that provided for the eventuality of a divorce.

The House of Lords in that case declared that such agreements violated public policy in that (a) it would weaken the emotional sanctity of marriage if people entered into it with a view to what should happen if the marriage were to fall and (b) the parties should not be permitted to oust the jurisdiction conferred exclusively upon the courts to dissolve or alter their marital status.

The ruling in *Hyman v Hyman* against binding prenuptial agreements was based exclusively upon a judicial view of the state of public policy in 1929. Society has changed dramatically since that time such that if a court were to consider the matter afresh it would now have no choice but to conclude that (a) the old view that binding prenuptial agreements contravene public policy is unfounded and unacceptable and (b) public policy now requires that prenuptial agreements be enforced as long as they fulfill certain conditions.

Consequently in recent years there has been a judicial trend in England towards allowing Prenuptial agreements to be afforded greater significance. In the case of *N v N*⁶³ Cazalet J observed that although a Prenuptial agreement would be binding in Sweden it would be no more than a material consideration for the English Court under S.25 of the Matrimonial Causes Act of 1973.

⁶¹ J.Morley “*Enforceable Pre-nuptial agreements: the World view*”(http://www.international-divorce.com/england_prenuptial.htm)(accessed on 26 th September 2007)

⁶² [1929] AC 601.

⁶³ [1997] 1 FLR 900.

Moreover, Wall J (as he then was) in the case of *N v N*⁶⁴ stated that “as a matter of public policy prenuptial agreements are not specifically enforceable in English Law, but may have evidential weight when the court is exercising its S.25 discretion.”

Nonetheless there has not yet been a clear judicial endorsement of the binding nature of prenuptial agreements. Furthermore the time when the case of *Hyman v Hyman*⁶⁵ was decided people had little expectation of getting divorced. Divorce was regarded as sinful. People with assets were said to not require contractual protection should a divorce occur because the law did not provide for capital transfer upon divorce.⁶⁶

However none of that is said to be true any more. It would be foolish today for people contemplating marriage to deny that divorce is quite possible. Couples therefore should be able to choose for themselves the kind of marriage they want to have.⁶⁷

Increasing numbers of marriages are second or even third marriages. More and more people already have children when they marry, whether from a relationship with their new spouse, a former spouse or a relationship that did not include marriage.⁶⁸ Likewise, the assets that people have upon marriage vary much more nowadays than was the case when mostly newly weds were first embarking on their careers. It can be deduced that the responsibilities that people have upon marriage vary much more today.

Furthermore while the law concerning the financial consequences of a divorce was clear and simple in 1929 that is certainly not the case today. The legislature’s creation of an extremely ambiguous statutory framework has been rendered much more indefinite by extensive judicial law making in the past several years which has produced enormous uncertainty. Accordingly it is certainly not surprising that people want to secure their future with a prenuptial agreement. The revolutionary changes in the concept, role, status

⁶⁴ [1999] 2 FLR 745.

⁶⁵ [1929] AC 601.

⁶⁶ J.Morley “*Enforceable Prenuptial Agreements: the World View*” at 7. (http://www.international-divorce.com/england_prenuptial.htm(accessed at 26 September 2007)).

⁶⁷ J.Morley “*Enforceable Prenuptial Agreements*” at 7.

⁶⁸ J.Morley “*Enforceable Prenuptial Agreements*” at 8.

and fundamental nature of marriage and the appropriateness of allowing people to plan their own futures help to explain the fact that public opinion surveys show that close to half the population want enforceable prenuptial agreements.⁶⁹

2.1. The affirmative benefits of enforcing prenuptial agreements are therefore as follows:

Predictability

Predictability is an essential element of the Rule of Law. Lord Diplock stated in *Black Clawson International Ltd v Papierwerke Waldhof Aschaffenburg AG*⁷⁰ that “the acceptance of the Rule of Law as a constitutional principle requires that a citizen, before committing himself any course of action, should be able to know in advance what are the legal consequences that will flow from it.

In *Fothergill v Monarch Airlines Ltd*⁷¹ Lord Diplock stated that “Elementary Justice or the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him.”

Judges and commentators agree that the current law as to matrimonial financial resolutions provides little or no predictability. The governing standard of fairness has been said to be purposefully vague, almost indefinable and completely subjective.⁷²

Under the current system the Law on the Division of Property is “highly discretionary” and Courts have wide powers to do as they please. This system has been criticized for its uncertainty and lack of predictability and it is as a result of

⁶⁹ J.Morley “*Enforceable Prenuptial Agreements : the World View*” at 7.

⁷⁰ [(1975)] AC 591 at 638.

⁷¹ [1981] AC 251 at 279.

⁷² J.Morley “*Enforceable Pre-nuptial Agreements: the World View*” at 10. (accessed on 26 September 2007).

these traits that there is need for clearer guidelines as to what should happen to property on divorce.⁷³

Therefore it makes no sense to prevent the parties themselves from creating predictability and this they can do by entering into Pre-nuptial Contracts that are well drafted and reasonable. The public interest is said to be not served by preventing binding contracts that resolve these issues in advance.

Personal responsibility

Prenuptial agreements allow people to take more responsibility for ordering their own lives, helping them to build a solid foundation for their marriage by encouraging them to look at the financial issues they may face as husband and wife and reach agreement before they get married.⁷⁴

As such if the courts now insist that marriage is a partnership then why is it that the courts prevent the partners from deciding on the terms of their partnership?⁷⁵ Prenuptial agreements allow people to structure fair and reasonable terms that are appropriate for their own situation in life instead of submitting themselves to the whims of the divorce courts.

Reducing costs

Litigation Costs in divorce cases are said to be enormous and English family lawyers are said to be the current world champions in that arena.⁷⁶ Individuals who have experienced a lengthy, messy divorce realize that a considerable amount of wealth can be lost during a legal battle, including legal fees and the fees charged by appraisers and expert witnesses.⁷⁷ Prenuptial agreements are said to reduce litigation costs

⁷³ J.Rowntree "How Parents cope financially on Marriage Breakdown" (2000).

⁷⁴ .Morley "Enforceable Pre-nuptial Agreements: the World view" (http://www.international-divorce.com/england_prenuptial.) (Accessed on 26 Th September 2007) at 12.

⁷⁵ *Ibid.*

⁷⁶ J.Morley "Enforceable Pre-nuptial Agreements: the World view" at 13.

⁷⁷ B.Greenstein "Prenuptial Agreements: What they can and cannot accomplish"

<http://www.nysscpa.org/cpajournal/old/13606725.htm> - 41k) (accessed on 26 th September 2007).

dramatically since there is far less need to litigate property division when the terms have already been agreed upon.⁷⁸

Public and Professional Demand.

Almost half of the British population is said to want binding Pre-nuptial Agreements. People prefer to make their own decisions instead of leaving their future in the hands of unknown judges. It is felt that the increased demand for pre marital agreements reflects the higher number of second and subsequent marriages. The head of the Family Law Bar Association has called for legal enforceability for pre nuptial agreements with appropriate protections and has insisted that as long as they remain unenforceable there is a disincentive to marrying because couples lack certainty and security about what they are getting themselves into.⁷⁹

Inheritance Rights Protected.

A Prenuptial agreement can protect the inheritance rights of children from a previous marriage by providing for the financial well being of the children. This may be especially important in instances where one spouse intends to give up a career as part of the marriage arrangement. The agreement can also cover issues concerning custody of all children. Since the non custodial spouse is commonly the one who contributes a substantial portion of the children's support, the prenuptial agreement can be used to provide, that in the event of divorce, the custodial spouse will agree to release his or her right to claim the children as dependents.⁸⁰

⁷⁸ Greenstein “*Prenuptial agreements what they can and cannot accomplish*” at 1.

⁷⁹ J.Morley “*Enforceable Prenuptial Agreements :the World View*” (<http://www.international-divorce/England-prenuptial.htm>)(accessed on 26 th September 2007).

⁸⁰ B.Greenstein “*Prenuptial agreements what they can and cannot accomplish*” at 1.

Protection of Business.

If one has their own business or professional practice, a prenuptial agreement seeks to ensure that the business or practice is not divided and subject to the involvement of your former spouse upon divorce. Therefore it can be useful in an instance where one spouse is not an active participant in the business of the other as it will secure that the active spouse's business is protected by ensuring he or she remains the only person involved in managing and securing the business.⁸¹

Protection against creditors.

If one spouse has significantly more debt before marriage, there may be a desire to protect the assets of the new spouse from the creditors of the debtor spouse. This can be accomplished in a premarital agreement which will secure the debt-free spouse from having to assume the obligations of the other. This implies that under this regime the insolvency of one spouse will therefore not enable his or her creditors to attack the assets of the other.⁸²

Caters for details of decision making and responsibility.

A premarital agreement can address more than the financial aspects of marriage and cover any details of decision making and responsibility sharing to which the parties agree in advance. For example, in the event of death and in the absence of a Will a Prenuptial Agreement can be referred to in order to ascertain what the intention of say one spouse was and furthermore it can show how one spouse intended they

⁸¹ A. Jackson "Pros and cons: Premarital Agreements". (Accessed on 18 Th of November 2007).

⁸² B.Greenstein "Prenuptial Agreements: What they can and cannot accomplish"

<http://www.nysccpa.org/cpajournal/old/13606725.htm> - 41k) (accessed on 26 Th September 2007). 34.

property to be settled in the event of death as well as who should bear the responsibility of say looking after the children ⁸³

Protection of parties entering subsequent marriages /Parties with substantial wealth.

A premarital agreement can protect persons entering into a second or subsequent marriage, the financial interests of older persons, and persons with substantial wealth. For example: Second marriages can result in family problems caused by the fears of children over how family wealth is going to be divided. These fears can be eased by executing a prenuptial agreement that sets forth the details of property dispositions in the event of either divorce or death. As a legally enforceable contract, a prenuptial agreement can be as detailed and lengthy as necessary, and can cover as many specifics as the parties' desire. ⁸⁴

Moreover if one spouse has substantial interest in a family business, it is often the desire of that spouse, as well as the family members engaged in the business activity, to keep ownership within bloodlines. This could also be the case with family heirlooms and other assets of the family. It is not uncommon for parents and grandparents in wealthy families to be concerned about protecting family assets from the claims of an unintended heir, such as a descendant's spouse. A prenuptial agreement can be written to provide that such assets are immune from claims by the new spouse. ⁸⁵

It may spell out which assets a spouse may want to give to children or other family members in the event of death. For example in an instance where one spouse has children from a previous marriage and wishes to ensure that these children get a share of his assets it is vital that they state so in the prenuptial agreement to avoid disputes over who should get what.

⁸³ A. Jackson "*Pros and cons: Premarital Agreements*". (accessed on 18 Th of November 2007).

⁸⁴ B.Greenstein "*Prenuptial Agreements: What they can and cannot accomplish*" (accessed on 26 th September 2007)

⁸⁵ Greenstein at 1.

Elimination of Financial Disputes.

In the event of a divorce a prenuptial agreement eliminates battles over assets and finances. Frequently, disputes arise over how marital property should be allocated. Prenuptial agreements can be used to provide assurance that a couple's property will be disposed of according to their intentions. Through such an agreement, parties can designate ownership of property in the event of divorce, separation, or death of either spouse. The prenuptial agreement may provide for certain property to be transferred from one spouse to the other to create separate or joint property rights. These dispositions, and the contingencies on which they would occur, can be set forth in an organized and thoughtful manner in a properly drawn prenuptial agreement.⁸⁶

Proponents of Prenuptial Agreements cite rates of divorce that approach 50 percent in the United States and in some European countries, and its rising incidence in the Middle East and Latin America to defend the practicality of such pacts. Where recognized these agreements have been said to help assuage the turmoil of Divorce and protect the interest of those with substantial assets.⁸⁷

Elimination of Cross jurisdictional conflicts.

Prenuptial agreements are valid and enforceable throughout most of the world. Globally the trend is for more people to enter prenuptial agreements.

More people are traveling internationally and for people with assets it is increasingly common to have multiple

residences. As such parties who have long conducted their marital relationship outside the UK in conformity with a carefully drafted and reasonable prenuptial agreements that fully complied with the laws of the country or their residence, nationality and

⁸⁶ www.divorcemag.com/cgi-bin/show.cgi?template=article&article=financial/agreement - 32k -

⁸⁷ A Sullivan "Demand for Prenuptial Agreements is on the rise: Kiss me and Sign here, Darling." (<http://www.iht.com/articles/1997/02/08/mpact.t.php>.(accessed on 25 September 2007).

domicile are entitled to expect that the agreement will be afforded due recognition even if they should move to another jurisdiction.⁸⁸

The UK Courts' refusal however to enforce prenuptial agreements coupled with their refusal to apply foreign law to a prenuptial agreement entered into overseas creates confusion and unfairness. Furthermore the UK courts handle more and more international divorce cases and as such the UK's anomalous view of prenuptial agreements is said to increasingly and inappropriately create problems for international litigants.⁸⁹

2.2. The drawbacks however that have been raised against such agreements are :⁹⁰

- (a). They have been said to be unromantic in that they reduce the whole concept of marriage to a "contract" and create the impression that parties to a marriage cannot resolve their differences in a reasonable manner.
- (b). They have been said to demonstrate a lack of trust between partners to a marriage in that it creates the impression that you are admitting defeat before you even begin and as such this can cause resentment between spouses.

⁸⁸ J.Morley "*Enforceable Pre-nuptial Agreements: the World View*" at 13.

⁸⁹ J.Morley "*Enforceable Prenuptial Agreements: the World View*" at 14.

⁹⁰ Kathleen Hunt "*Love me do*" (<http://general-practice.lawyers.com/blogs/Kathleen-A-Hunt/Love-Me-Do-17.html>.(accesssed on 13 th June 2007) at 1.

Chapter Five.

INTRODUCTION.

This chapter will look at foreign jurisdictions that apply Prenuptial agreements with due emphasis been placed on jurisdictions like South Africa and America(USA) where such agreements are applied. The reason for doing this is to assess the effectiveness or viability of a prenuptial agreement system of family law.

When people who live in different jurisdictions contemplate marrying each other it is vital that they should consider the Law applicable to all jurisdictions if they plan on entering a Prenuptial agreement .⁹¹

This is of utmost importance because if for example a couple enters into a Prenuptial agreement in America but gets divorced in England the English Courts will not be bound by the agreement .⁹²

Even though the English Courts have begun to take some notice of such agreements the fact still remains the same and that is that they are not bound to follow the exact provisions as laid down in the Prenuptial agreements.⁹³

It is as a result of the aforesaid that parties to a marriage who contemplate entering a Prenuptial agreement indeed familiarize themselves with the jurisdictions that fully recognize such agreements so that in the event that they supposedly divorce they would be saved from serious repercussions that might arise.

⁹¹ J.Morley “*Prenuptial Agreements around the World*” (http://www.international-divorce.com/prenups_around_the_world.htm) (accessed on 26 September 2007).

⁹² Legal Advice Centre “*Prenuptial Agreements*” (http://www.legal_advice_centre.co.uk/Private/Prenuptial_agreements.html) (accessed on 26 the September 2007).

⁹³ Legal Advice Centre at 1.

2.3.The Republic of South Africa. (RSA)

South Africa recognizes Ante-nuptial agreements (Prenuptial Agreements). In terms of South African Law, the purpose of an Ante -nuptial agreements is to choose a variation on the normal Community of property matrimonial system.⁹⁴

Couples have three options i.e.

(a) The Accrual System.

Background.

Prior to the commencement of the Matrimonial Property Act 88 of 1984 being married out of community of property generally meant a complete separation of property and profit and loss. This was usually very prejudicial to spouses, especially wives with no independent source of income who spent most of their married lives as financially dependent housewives and mothers. On dissolution of the marriage such wives were usually left financially bereft with no claim of maintenance against their spouse's estate.⁹⁵

The legislature stepped in and introduced the **Accrual system** in Chapter 1 of the Act as a fair way of protecting spouses married out of community who would otherwise have no claim to the growth of the marital estate despite having contributed to it through direct or indirect assistance and support.⁹⁶

The system of accrual is premised on the idea that both spouses ought to share in the wealth amassed by their mutual efforts, financial and otherwise during the marriage despite the absence of a joint estate. It is significant to bear in mind that all marriages

⁹⁴ D.Cronje and J. Heaton "*South African Family Law*" (1999) at 107.

⁹⁵ Cronje and Heaton at 118.

⁹⁶ Cronje and Heaton at 119.

concluded out of community of property after the commencement of the Act, are automatically subject to the accrual system unless the parties expressly contract out of it in the Ante-nuptial Contract.⁹⁷

The object of the accrual system is to give the spouse whose estate shows a smaller increase a claim to share in the greater increase of the other spouse upon dissolution of the marriage.⁹⁸

(b) Exclusion of Community of Property and Community of Profit and Loss.

The old standard form of Ante nuptial agreement in South Africa was that the parties remained in the same financial position as they were before the marriage. Each retained the estate he or she had before the conclusion of the marriage and also retained everything he or she acquired during the marriage. In other words, the old ante-nuptial contract in South Africa was such that it provided for complete separation of property. Each spouse had full capacity to act and contract without each other's consent or assistance. Neither Spouse was liable for the debts incurred by the other spouse nor did either party have full capacity to litigate.⁹⁹

However since the Matrimonial Property Act came into operation, marriages entered into in terms of an Ante-nuptial Contract which excludes community of property and community of profit and loss are automatically subject to the accrual system. However for now it is imperative to note that if either spouse does not wish the accrual system to apply to their marriage they have to expressly stipulate their intention in their ante-nuptial agreement.¹⁰⁰

The ante-nuptial agreement which incorporates the accrual system has therefore become the new standard form of ante nuptial contract in South Africa.

⁹⁷ Cronje and Heaton at 117.

⁹⁸ Cronje and Heaton at 118.

⁹⁹ Cronje and Heaton at 116.

¹⁰⁰ Cronje and Heaton at 117.

(C). Exclusion of Community of Property with the retention of Community of profit and loss.

As community of property is excluded this means that each spouse retains his or her pre-marital assets and remains separately liable for his or her pre-marital debts. Donations, bequests and inheritances received during the marriage also remain separate. However any profit or loss that arises during the marriage becomes merged into the joint estate which the parties own in equal shares. However this system is rarely adopted by parties to a marriage.¹⁰¹

In the case of *Ex Parte Burger*¹⁰² a couple had originally been married with a complete separation of property and applied for permission to change their matrimonial regime in order to make the accrual system applicable to their marriage. The reason advanced for the proposed change was that the husband's estate had grown considerably more than the wife's during the marriage and he wanted her to have a fair share of this growth at the dissolution of the marriage. The Court granted the change and said there were sound reasons that existed for the proposed change.

Furthermore, in the case of *Ex parte Coetzee*¹⁰³ a couple were young and inexperienced and entered into an ante-nuptial agreement mainly under pressure from the bride's father. However, they felt that their marriage would be much happier if they were married in community of property and applied to the court to cancel the ante-nuptial agreement.

However, imperative to note that this case occurred before the commencement of the Matrimonial Property Act (MPA) but the court allowed the cancellation.

¹⁰¹ Cronje and Heaton at 117.

¹⁰² [1995] 1 SA 140.

¹⁰³ [1984] 2 SA 363.

It is widely accepted that this type of a situation would constitute “*Sound Reasons*” for an application to change the matrimonial property system in terms of Section 21(1) of the Matrimonial Property Act.

(2.4.) UNITED STATES OF AMERICA.

In the United States of America, Prenuptial agreements are recognized in all fifty states as well as in the District of Columbia.¹⁰⁴ It is vital however to bear in mind that under Californian Law each spouse upon divorce owns half the interest of what was acquired from the date of marriage to separation and that includes income earned during the subsistence of the marriage unless a Prenuptial agreement states otherwise.¹⁰⁵

It is imperative to note that it is vital that parties that intend having a prenuptial agreement must familiarize themselves with the formalities that apply to such agreements or else the Prenuptial agreement will be declared null and void.

This is imperative especially for Celebrities.

For Example: Steven Spielberg (a movie director) was married to actress Amy Irving. It has been stated that she received a US \$ 100 million settlement from Steven Spielberg (which at the time of the divorce was estimated to be half of his earnings).

¹⁰⁴ “*Prenuptial Agreement*” ([http://encyclopedia.thefreedictionary.com/Prenuptial agreement](http://encyclopedia.thefreedictionary.com/Prenuptial+agreement)). (accessed on 24 May, 2007).

¹⁰⁵ “*California Divorce and Family Law: Prenuptial Agreements*” (<http://oc-divorce.typepad.com/california>) (accessed on 31 May 2007).

In their divorce a judge controversially vacated a prenuptial agreement which was written on a napkin. Their divorce was recorded as the third most costly divorce in history. Furthermore in that case it was argued that the Prenuptial agreement was not witnessed by a lawyer nor was Amy Irwin legally represented by an attorney and therefore it could not be said to be valid. Therefore in that case it was agreed that since the prenuptial agreement did not adhere to the strict formalities required for it to be enforced it was null and void and as such Californian Law applied and the consequence of that was Amy Irwing got \$100 million dollars.¹⁰⁶

Therefore, it is imperative to bear in mind that in order for a prenuptial agreement to be enforced it is of utmost importance that it must be legally correct or else it will be of no force or effect whatsoever. The circumstances under which a prenuptial agreement may be set aside vary from state to state. However the most general requirements that apply to most states are:¹⁰⁷ The agreement was not executed voluntarily, the agreement was unconscionable when it was executed. Before the agreement was executed, one of the parties failed to fully disclose his or her assets or liabilities or their values- unless the full disclosure requirement was voluntarily and expressly waived in writing. The prenuptial was executed as a result of duress, fraud, or undue influence. One or both of the parties to the agreement lacked capacity to enter into a contract (e.g., mental incompetence).

¹⁰⁶ "Blueberry Weddings" "*Got Prenup*" (<http://www.blueberryweddings.com/Prenup.html>)(accessed on 30 June 2007).

¹⁰⁷ H.Taylor "*Circumstances to set aside a Prenuptial Agreement*"

"[http://divorce.lovetoknow.com/Prenuptial Agreements: Interview with Helene Taylor](http://divorce.lovetoknow.com/Prenuptial%20Agreements%20Interview%20with%20Helene%20Taylor)(accessed on 10 th December 2007).

Prenuptial agreements as earlier reiterated during the course of this paper are extremely useful among the rich and famous and even though they can be also of use to ordinary people, it is indeed true to say that they seek to be effective amongst people with a substantial amount of wealth .

For example in the United Kingdom divorce case of Paul McCartney(a 63 year old Beattle)and his former wife Heather Mills it was stated that they lacked a prenuptial agreement and the consequence of such an arrangement was that Paul McCartney was at a great risk of losing a huge sum of his massive fortune estimated to be 825 million Pounds. Mills McCartney however maintained that she volunteered to sign a prenuptial agreement, but that it was the former Beattle's idea not to support such pacts.

Summing up the above since the laws governing prenuptial agreements vary from state to state, and because prenuptial agreements must be drafted in strict compliance with applicable laws, anyone considering a prenuptial agreement should seek the assistance and advice of a competent lawyer and familiarize themselves with the formalities required in order to enforce such pacts because failure to adhere to these formalities would indeed be disastrous.

CHAPTER SIX.

2.5. CONCLUSIONS AND RECOMMENDATIONS.

The research brought out the following findings:

First and fore mostly in terms of Zambia's matrimonial property system it is indeed evident that the situation is such that parties to a marriage lack the freedom of choice to decide on their own matrimonial property system or to be more precise the situation is such that parties cannot choose how they wish their marriage to be governed neither can they choose to be married in either community of property or out of community of property .

Indeed, it is an attitude which is shared by Parliament and this paternalistic approach is very different from the more "free market" approach which prevails in the United States and which allows the parties to a marriage more freedom to regulate their own financial affairs in the event of divorce.¹⁰⁸

It can be said that the reason why Zambia has been so rigid with regard to matrimonial matters is because it has in the past solely relied on English statutes and the statute of relevance that was heavily relied upon in relation to matrimonial matters is the Matrimonial Causes Act of 1973. In terms of the Law on Division of Property in the Matrimonial Causes Act of 1973 the Courts have wide powers and these powers are highly discretionary. Moreover in terms of the current Act that applies in Zambia i.e. the Matrimonial Causes Act no.20 of 2007 the situation still remains the same i.e. Courts have the right to exercise their almost unfettered discretion while also declaring whatever rules they may deem fit when dealing with divorce settlements.

¹⁰⁸J.Morley "*English Divorce Law: Divorced from reality*" (2006) at 1.

It is indeed imperative to acknowledge the effect of vesting wide discretionary powers in the Courts. Not only is there an inherent tendency for power to expand itself but also judges in deciding cases may lose sight of the objective or essence of power vested in them and become tyrannical.¹⁰⁹ Therefore in dealing with divorce settlements it is indeed difficult to ensure that the discretionary power vested in the judges is not abused but used for the purpose it is conferred. Sometimes personal factors may also come to play and therefore judges may decide cases not using their best judgment.

Furthermore marital property rights law is not always clear. Generally, married women are considered to be under the guardianship of their husbands. The Legal consequence of marriage throughout history was that women lost much of their previously unenviable legal capacity and this state of affairs has remained the same in a number of countries.¹¹⁰

Most women in Southern African are married under customary law. Under Customary law the status of women was usually that of a minor whereby she was always under the control of a male either her father, brother or husband. This meant that in terms of real property i.e. whether communal or clan property a women had no capacity to exercise ownership rights over it.

Under Customary Law all the property acquired by the spouses except personal goods belonged to the husband who was entitled to retain all of it at the dissolution of the marriage. At divorce in most cases the situation was previously that the wife was often entitled only to her personal goods and no more than a handful of kitchen utensils.¹¹¹

In most African countries i.e. (Nigeria, Ghana, Burundi and Zaire) the husband controlled his wife's property in particular property acquired by her after the marriage and she could not enter into contracts in any way that would jeopardize her husband's rights in such property.¹¹²

¹⁰⁹ J.Sangwa "*Discretionary Power Notes 2007*" at 14.

¹¹⁰ K.Tomaseuski "*Women and Human Rights* (1991) at 37.

¹¹¹ K.Tomaseuski "*Women and Human Rights*" (1991) at 37.

The marital property rules under custom are similar to the rules of persons married out of community of property. The property a man comes with into the marriage is to be used for the benefit of the family. The property the wife comes with is hers as is that which she acquires during the marriage. However, while men will acquire immovable and larger kinds of property including housing, women acquire smaller property and seldom housing. After the marriage is dissolved the woman may take her smaller property but is not entitled to the larger property acquired during the marriage. Women have experienced difficulties in accessing marital property, especially upon dissolution of marriage and often solely depend on the good will of their former husbands. Even where the customary law court has awarded property settlements to women, the High Court and Supreme Court have over turned such judgments.¹¹³

In some countries, for instance Swaziland and Lesotho, women are **still** regarded as legal minors. Husbands have the marital power to administer the joint property and represent their wives in civil proceedings. In Botswana, a couple married under customary law can actually choose to be exempt from customary rules to an extent that a customary law marriage can either be in or out of community of property. However a woman married under customary law is held to be a legal minor and requires her husband's consent to buy land or enter into contracts. The position of women married under customary law is summed up in the Zimbabwe High Court decision in *Khoza v Khoza* where a woman was deprived of the parties' communal land and marital home built jointly and maintained by her for 23 years because the marriage was patrilocal.

Therefore it can be submitted based on the research findings that customary laws pertaining to land have in the past not been so helpful to women.

¹¹² *Comparative Study of National Laws on the rights and Status of Women in Africa UN .Doc. (1989) at 9.*

¹¹³ <http://209.85.129.104/search?q=cache:2dewghSvsj8J:ww2.unhabitat.org/programmes/landtenure/documents/ZambiaFinal.doc+weakness+of+zambia%27s+matrimonial+property+system&hl=en&ct=clnk&cd=8&gl=zm>.

2.6. RECOMMENDATIONS.

Government should give parties to a marriage the option to choose their own matrimonial property system i.e. either in or out of community of property or subject to the accrual system as evidenced in the law applicable in South Africa .

In deciding whether or not there is a need to introduce prenuptial agreements I strongly recommend that there is ample room within the broad scope of the listed factors available under Zambia's matrimonial property system to include a consideration of Prenuptial agreements. I am of the view that there is no statutory reason preventing the courts from upholding prenuptial agreements especially where such agreements are not significantly unreasonable in light of the factors that are clearly laid down under Section 55(1) (a),(b),(c),and (d) of the Matrimonial Causes Act of Zambia.

Furthermore courts should recognize that the institution of marriage is entirely different today from what it was a generation ago as such it is time for common law countries to indeed recognize that prenuptial agreements do not violate public policy.

It may be argued in some quarters that these agreements are not suitable in a country like Zambia that suffers economic difficulties and where individuals are not as substantially wealthy as celebrities that we find in Hollywood for instance but I see no harm in the government considering such agreements . Furthermore in terms of division of property I am of the view that the current law as to matrimonial financial resolutions provides little or no predictability and as such it can truly be said that the standard of fairness is vague and almost indefinable.

Looking at Zambia for example, it is indeed evident that most divorce cases that go to court are not speedy and are not cost effective therefore to avoid such calamities prenuptial agreements would indeed be effective in that they would reduce not only litigation costs but would be speedy and would spell out the couples intentions clearly as opposed to the Court decisions that are constrained by the difficulty of ascertaining the intentions of parties to a marriage. Parties to a marriage moreover must be free to enter into agreements concerning their property and maintenance rights and set standards that are fair and suit their needs. It is therefore important to reiterate the fact that not only are prenuptial agreements resorted to in terms of dealing with propriety rights but also in instances where parties do not have a valid will.

Furthermore, Women need to be forced to take a more assertive stance with regard to their right to property. Most of them are ignorant of their entitlements and therefore there is need for mass sensitization and reform of customary law property rights. Information pertaining to rights ought to be taught in schools because of the socialization process that still retains a bias against women and girls. Women married under Customary law must be vigilant and assertive and indeed be aware of the fact that they are entitled to a share of marital property upon dissolution of marriage. Furthermore women should be able to challenge their unequal positions if need be under Customary law.

In terms of the Constitution and with regard to women's rights there are contradictory provisions specifically Article 11 of the Constitution guarantees the equal status of women whereas Article 23(4) permits discriminatory laws to exist in the area of personal laws and Customary law.¹¹⁴

Consequently, both Customary law and Statutory provisions govern the area of property rights in a disparate manner the government must indeed seek to address these disparities in the law. However it is indeed evident that women married and divorced under Customary law have been exposed to grave injustices and hardships as compared to women married under Statutory law.

¹¹⁴ J.Macmillan "*Women's Property Rights*" (2005) at 1.

Zambia's Customary law is neither codified nor unified as such the term Customary law denotes not a single or common system of law governing the entire indigenous population of the country but different laws regulating the rights, liabilities and duties of the various ethnic or tribal groups.

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