

**THE IMPACT OF CHILD CUSTODY ON PROPERTY ADJUSTMENT IN ZAMBIA**

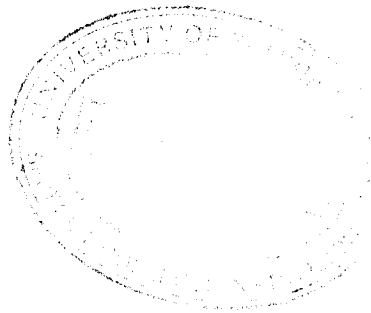
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Being a Directed Research essay submitted to the University of Zambia Law Faculty in Partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.



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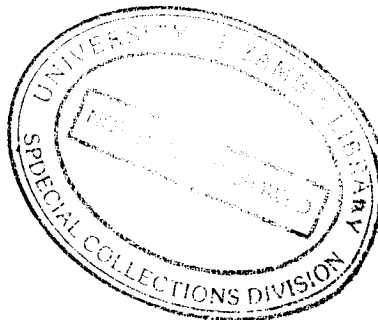
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## **ABSTRACT**

Child custody and property adjustment are fundamental issues to be dealt with when a marriage breaks down. This paper has set out to investigate the impact of child custody on property adjustment particularly with regard to the matrimonial home. The questions that the study has set out to answer are how the best interest of the child principle is upheld in child custody issues, what the relationship between child custody and property adjustment is, what the factors that are considered by the courts in property adjustment issues particularly the matrimonial home are and how the best interest of the child principle is infused into the law regulating property adjustment in Zambia.

This research is a qualitative one and it embraces both desk research and occasional field investigations. The desk research includes the use of books, dissertations and journals. The field research is in the form of open ended interviews. The study has found that the overriding principle that relates to child custody is the 'best interests of a child' principle which is provided for in the United Nations Convention on the Rights of the Child. The research has also found that custody of children being granted to one parent affects property adjustment particularly the matrimonial home.

The paper has revealed that in Zambia, the custodial parent is in most instances given preference with regards to the matrimonial home in order to uphold the best interests of the child. The study has also found that legislation in Zambia that deals with child custody and property adjustment is scattered in a number of statutes. The paper has also revealed that South Africa has a comprehensive Children's Act dealing with child related issues. The paper has recommended that Zambia should consider enacting a comprehensive statute to deal with child custody and that the best interest of the child principle should be expressly stated in the Constitution of the Republic of Zambia.

## ACKNOWLEDGEMENTS

First and foremost, my sincere gratitude goes to the Lord, God Almighty. Without his favour, shining amour, guidance and abundant blessings on me the successful completion of this dissertation would not have been tenable.

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To my friends, Malunga Pangani, Misozi Mtonga, Chenela Mwale, Joshua Kabwe and Mwiza Nyasa, I would like to say thank you for your support, encouragement, guidance and valid criticisms. I could not have done this on my own.

To all the staff at the Zambia Law Development Commission, the National Legal Aid Clinic for Women, Women and Law in Southern Africa and all the other places I visited, I would say I really appreciate your guidance and support.

## **DEDICATION**

This paper is dedicated to my mum Mrs Theresa Cheupe and my late father Mr. Peter Cheupe. Losing you has never been easy. You are the reason I try my level best to work hard and achieve my goals. You are the reason I have endured the pressure of being in law school and I know I make you proud every single day. You taught me to always set the right objectives and take steps to fulfill those objectives in a disciplined manner. Thank God mum is here to witness on your behalf.

To the love of my life, friend and source of inspiration Daniel Chisenga, I dedicate this piece of art of you. You have always set an example for me and motivated me to aim higher. Without your love and care all through my years at University, I would not have pulled through.

I also dedicate this paper to my siblings Florence, Gregory, Jones, Clara, Gwendoline and Peter. It is a blessing to have you as my family and I would not ask for anything more. You are simply wonderful.

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The Affiliation and Maintenance of Children Act No. 55 of 1995

The Children's Act No. 38 of 2005

The Local Courts Act, Chapter 29 of the Laws of Zambia

The Matrimonial Causes Act No. 20 of 2007

The Constitution of the Republic of South Africa 1996

## **INTERNATIONAL INSTRUMENTS**

African Charter on the Rights and Welfare of the Child 1999

United Nations Convention on the Rights of the Child 1989

## TABLE OF CASES

A v A [1995] 1 FLR 345, FD

Brixey v Lynas [1996] 2 FLR 499, HL

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Delaney v Delaney [1990] 2 FLR 457, CA

E v S 1995 (3) SA 571 (A) at 581 A

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M v B [1998] 1 FLR 53, CA

McCall v McCall (1994) 3 SA 201 (C)

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R v R [1994] 2 FLR 1044

Re KD [1998] 1 All ER 577 (HL)

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Slater v Slater [1982] 3 FLR 364, CA

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## **CHAPTER 1**

### **IMPACT OF CHILD CUSTODY ON PROPERTY ADJUSTMENT IN ZAMBIA**

#### **1.0 INTRODUCTION**

This study is about child custody and how it influences property settlement upon the divorce of two parties. When two parties divorce, they move into issues of child custody and division of property. This study gives the reader a better understanding of the concepts and theories that surround child custody and property settlement paying particular attention to the matrimonial home. This research also gives the reader an all round understanding of the law that governs child custody and property adjustment.

This particular chapter gives an introduction to the entire research and in accustomed terms gives the overview of the research. It also tackles the basic tenets of the research. These include the methodology, statement of the problem, objectives of the research, research questions and the significance of the study.

#### **1.1 OPERATIONAL DEFINITION OF TERMS**

**A child of the family** is defined in the Matrimonial Causes Act as, a child adopted since the marriage by the husband and wife or by either of them with the consent of the other, a child of the husband and wife born before the marriage, whether legitimized by the marriage or not; and a child of either the husband or wife, including a child born outside wedlock to either of them and a child adopted by either of them.<sup>1</sup>

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<sup>1</sup> Matrimonial Causes Act No. 20 of 2007, section 5.

**Matrimonial home:** Is every property in which a person has an interest and that is or, if the spouses have separated, was at the time of the separation ordinarily occupied by the person and his or her spouse as their family residence.<sup>2</sup>

**Custodial parent:** Is a parent who has been granted custody of the children of the family by an order of the court.<sup>3</sup>

## **1.2 STATEMENT OF THE PROBLEM**

There is legislation in Zambia that addresses both child custody and property adjustment after divorce. The law that governs custody of children is the Affiliation and Maintenance of Children Act No. 55 of 1995. Section 15 provides that where the court makes a maintenance order in respect of a child, the court shall also have power to make whatever order it thinks fit with respect to the custody of the child and the right of access of either parent. In making an order regarding child custody or access the court shall regard the welfare of the child as the paramount consideration.<sup>4</sup>

However when the courts are deciding on the issue of custody, the best interests of the child principle is overridden by awarding custody to the parent who has the financial means to cater for the children. This disadvantages the other party who may be suitable to raise the children but only lacks financial means. The court may not adequately consider child custody as a factor when dealing with property adjustment. In order to uphold the 'best interests of the child' principle, custody should be awarded to the most suitable parent.

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<sup>2</sup> Lillian Mushota, *Family Law in Zambia: Cases and Materials* (UNZA Press, 2005), 281.

<sup>3</sup> Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 9<sup>th</sup> ed. (Butterworths, 1998), 351.

<sup>4</sup> Affiliation and Maintenance of Children Act No. 55 of 1995, section 15.

The non custodial parent may neglect his duty to provide maintenance and may be resistant to giving up the matrimonial home. This leads to problems but the courts have wide discretion to re-distribute family property between the parties and the children and give property adjustment orders when certain factors are proved.<sup>5</sup>

### **1.3 OBJECTIVES OF THE STUDY**

1. To determine how legislation addressing child custody in Zambia upholds the best interest of the child in line with the United Nations Convention on the Rights of the Child.
2. To determine the role of the courts in upholding the best interests of the child principle.
3. To examine the factors that the courts consider when settling issues of property adjustment between divorced spouses.
4. To determine whether child custody plays a role in determining property adjustment issues.
5. To make recommendations based on the fact that child custody is a critical factor when it comes to property adjustment.

### **1.4 RESEARCH QUESTIONS**

1. How is the principle of best interests of the child upheld in child custody matters?
2. What is the relationship between child custody and property adjustment?
3. What factors do the courts consider when settling property adjustment issues? Should the party awarded child custody be given the matrimonial home and should they be maintained?
4. How should the best interest of the child principle be infused into the law regulating property adjustment?

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<sup>5</sup> Mushota, 277.

## **1.5 SIGNIFICANCE OF THE STUDY**

The importance of this study cannot be overemphasized. The research is pertinent and timely. It provides a means to infuse the best interests of the child principle which underpins all decisions affecting children into the law regulating property adjustment, in particular the matrimonial home. The study will thereby contribute to the development of Zambian law.

There is a practice by the courts before awarding child custody, to order a social welfare report on the suitability of the residence of the parties, and the ability to provide for the children, as basis for giving custody to one parent. This overshadows the best interest of the child. The best interest of the child must compel the courts to order the parent with means to provide the other party and the children with adequate accommodation, as well as maintain them. The study will contribute to law reform in Zambia in this regard.<sup>6</sup>

## **1.6 METHODOLOGY**

This research is a qualitative one. It embraces both desk research and occasional field investigations. In this regard the desk research was through the collection of secondary data in the form of books, journals, dissertations as well as the internet and primary data in the form of law reports. Field investigations were in the form of open ended interviews conducted with the relevant people with expertise in family law like lawyers. The places where the research was conducted include the Zambia Law Development Commission, the National Legal Aid Clinic for Women, the National Assembly of Zambia, Women and Law in Southern Africa and the Ministry of Justice.

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<sup>6</sup> Mushota, 317.

## **CHAPTER 2**

### **CONCEPTUAL FRAMEWORK OF CHILD CUSTODY**

#### **2.0 INTRODUCTION**

Chapter one gave a general introduction to child custody. This chapter discusses child custody in detail and examines how the 'best interests of the child' principle manifests in child custody issues. This chapter also makes a comparison to child custody in South Africa.

#### **2.1 CHILD CUSTODY**

When parties divorce, they move into issues of child custody. The court which hears an application for maintenance also has jurisdiction to make orders with respect to custody of the children of the family.<sup>1</sup> There are different types of child custody and these include joint, sole, alternating and split custody.

Joint custody is an arrangement whereby both parents have legal custody and physical custody.<sup>2</sup> Sole custody is an arrangement whereby only one parent has physical and legal custody of the child. Alternating custody is an arrangement whereby the children live for an extended period of time with one parent, and then for a similar amount of time with the other parent. While the children are with the parent, that parent retains sole authority over the children.

Split custody is an arrangement whereby one parent has full time custody over some children, and the other parent has full custody over the other children. The courts in Zambia usually give one parent care and control of the infant in the matrimonial home while the other is given reasonable access and a say in the upbringing of the child.

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<sup>1</sup> Mushota, 377.

<sup>2</sup> Nolo, "Types of Child Custody", <http://www.nolo.com/legal-encyclopedia/types-of-child-custody-29667.html> (accessed 26<sup>th</sup> January 2012).

In the case of *Wesson v Stroud*<sup>3</sup>, custody, care and control of the child was awarded to the mother while the father was given access on terms to be agreed upon by the parties as it was in the best interest of the child. The matrimonial home was also awarded to the mother. The parent having custody makes all of the major decisions affecting the child and the child's principal residence is usually with that parent.

Clearly, if the child's parents are living apart, only one of them can have actual physical possession of the child. This is the parent who remains in the matrimonial home. If the court gives custody to the mother but all other parental rights are vested in both parents jointly, the father will have an equal right to decide on the child's welfare. This turns out to be a source of conflict between the two parties.<sup>4</sup>

## **2.2 BEST INTERESTS OF THE CHILD PRINCIPLE**

The paramountcy principle is one of the four pillars of the United Nations Convention on the Rights of the Child which states that, 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'<sup>5</sup>

The best interests of the child principle is also included in the African Charter on the Rights and Welfare of the Child. Article 4 states that, 'In all actions concerning the child, the best interest of the child shall be the primary consideration.'<sup>6</sup> In the African Charter on the Rights and Welfare of the Child, the best interests of the child is not only a primary consideration, but the primary consideration setting a higher standard than the United Nations Convention on the Rights of the Child.

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<sup>3</sup> SCZ No. 35 of 1998

<sup>4</sup> Matterson Mdlalo, "*Child welfare and law in Zambia. Are there adequate legal safeguards?*" (An obligatory essay submitted in the partial fulfilment for the award of Bachelor of Laws Degree, 1989).

<sup>5</sup> United Nations Convention on the Rights of the Child, Article 3(1).

<sup>6</sup> African Charter on the Rights and Welfare of the Child, Article 4(1).

The principle of best interests of the child has been in existence for a considerable period of time in domestic laws of many countries. The principle that the best interest of the child should be a key consideration in taking actions that affect the child did not originate with the United Nations Convention on the Rights of the Child.<sup>7</sup>

Zambia ratified the United Nations Convention on the Rights of the Child on the 6<sup>th</sup> of December, 1991. The Convention recognises the right of the children to participate in making decisions that directly affect their lives by expressing their views in those matters. The law in Zambia reflects these rights to a limited extent with regard to child custody proceedings.<sup>8</sup>

It is a well established practice that whenever a court considers a question relating to the upbringing of the child, the paramount consideration is the welfare of the child. Whenever there is a serious conflict between the interests of the child and one of his or her parents which can only be resolved to the detriment of one of them, the child's interests must prevail.<sup>9</sup>

When the custody of a child is in issue, the court deciding the question regards the interests of the child as paramount. These interests have not been demarcated with any precision. In the case of *Van Deijil v Van Deijil*<sup>10</sup>, Young J attempted to define what is meant by the interests of the child and he stated that, 'The interests of the minor means the welfare of the minor and the term welfare must be taken in the widest sense to include economic, social, moral and religious considerations. Emotional needs and ties of affection must also be regarded and in the case of older children their wishes in the matter cannot be ignored.'

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<sup>7</sup> Mushota ,407.

<sup>8</sup> Kamo Msimuko, "*The rights of a child in a family – An analysis of law pertaining to child neglect*" (An obligatory essay submitted in the partial fulfilment for the award of Bachelor of Laws Degree, 2002).

<sup>9</sup> Michael Freeman, *Understanding Family Law*, 1<sup>st</sup> ed. (Sweet & Maxwell, 2007), 210.

<sup>10</sup> (1996) 4 S.A. 260 (R)

Lord MacDermott explained in *J v C*<sup>11</sup> that paramourcy of the child's welfare means, '...more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. The words denote a process whereby, when all 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 interests of the child's welfare. It is the paramount consideration because it rules upon or determines the course to be followed.'

Simply put, the best interest of the child principle means considering the child before a decision affecting his or her life is made. This is a principle that has established itself through all matters and legislation affecting the well-being of the child. It is an overarching common law principle that has been used to assist, primarily, courts and other institutions in the decision-making process.<sup>12</sup>

It should be borne in mind that courts are the upper guardians of minor children and, if the need arises, have a final say in determining the overall welfare of the child. This they do through a relatively delicate balancing of interests. These interests themselves are particularly sensitive as they often relate to family status matters in terms of divorce, property settlement particularly with regard to the matrimonial home, maintenance, custody and control of the children.<sup>13</sup>

These definitions are however not exhaustive. Consequently, the courts have devised some additional criteria to determine the best interests of children. When applied correctly, the principle does yield the required results in that the interest of the child is taken care of.

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<sup>11</sup> [1970] AC 688

<sup>12</sup> Yvonne Dausab, "*The best interest of the child*," (October 2009), 147. [www.kas.de/./Children-h.pdf](http://www.kas.de/./Children-h.pdf) (accessed 25<sup>th</sup> January 2012).

<sup>13</sup> Dausab, 147.

However, the consistency in applying this principle correctly each time there is a matter that requires the determination of the best interest of the child may require some form of uniform guidelines from the courts, without imposing a standard that disregards the uniqueness and merits of each individual case. There is a general rule that custody of children of tender age should be given to the mother who remains in the matrimonial home in most instances. Guilt or innocence is rarely a determinant as to custody of children unless the conduct is of such gravity.<sup>14</sup>

### **2.3 FACTORS IN DETERMINING BEST INTERESTS OF CHILDREN**

The court will consider the child's needs. Children need different things at different stages of their development. Children whose parents divorce have additional needs thus the importance of maintaining a relationship with an absent parent and the emphasis on reducing conflict. It is important that needs are looked at objectively. It is natural for young children to be with their mother.<sup>15</sup>

In *Brixey v Lynas*<sup>16</sup>, Lord Jauncey explained that, 'The advantage to a very young child of being with its mother is a consideration which must be taken into account when deciding where its best interests lie. It is neither a presumption nor a principle but rather recognition of a widely held belief based on practical experience and the workings of nature'

Innes CJ in *Tabb v Tabb*<sup>17</sup> stated that the reason for the rule that children of tender age should be given to the mother is that, 'A mother's love induces her to give that personal attention and supervision to the children's physical and moral welfare which a mother can most effectively supply.'

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<sup>14</sup> Re L (Infants) [1962] 3 ALL ER 1

<sup>15</sup> Freeman, 218.

<sup>16</sup> [1996] 2 FLR 499, HL

<sup>17</sup> (1973) SA 90

The reason for this rule does not depend on the physical love or care which a mother can provide the child. The father could possibly provide more expert care by hiring a nurse who is professionally trained in child care. It depends to a great extent on the emotional needs the child of tender age requires of its mother.<sup>18</sup>

A parent's capacity to bring up a child may be impaired by mental illness, by substance abuse and by having formed the wrong sort of relationship. The court will also consider the risk of future corruption of the child. It has to decide for instance, whether one act of adultery can make a mother a non-fit person to look after a child. In the case of *Roshane Joule v Sidney Joule*<sup>19</sup>, an application for custody of the children was made. Custody was awarded to their father because the mother was bound to corrupt the children's morals.

Another consideration that the court will take into account is the effect of separating young children, moving children away from the matrimonial home and refusing to give custody of the girl child to the mother and that of the boy to the father.<sup>20</sup> The assumption is that a parent of the same sex as a child can provide better guidance. This assumption contradicts the usual practice of awarding child custody to mothers generally. Courts have long emphasised the importance of maintaining the child's residential status quo. The child will already have been suffering from stress as a result of parental separation, having to change schools and living arrangements will exacerbate this.<sup>21</sup>

Courts also consider the capacity of the parents to provide a safe home and adequate food, clothing, and medical care, the mental and physical health needs of the child, the mental and physical health of the parents and the presence of domestic violence in the home.

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<sup>18</sup>Matterson Mdlalo, "*Child welfare and law in Zambia. Are there adequate legal safeguards?*" (An obligatory essay submitted in the partial fulfilment for the award of Bachelor of Laws Degree, 1989).

<sup>18</sup> Freeman, 218.

<sup>19</sup> 2007/HPD/0162

<sup>20</sup> Freeman, 221.

Establishing what the child's needs are and how they should be met is not straightforward and can reveal the influence of cultural and social perceptions. Material considerations may appear to carry little weight and one parent may not obtain the care of his child simply because he can provide a better standard of living than the other.<sup>22</sup> This is in order to uphold the best interests of the child principle

In the case of *Stoyke v Stoyke*<sup>23</sup>, it was argued that in considering the welfare of children, it is not monetary or physical comfort that should be considered but rather the moral and religious welfare of the children and their physical wellbeing. The rights and wishes of the parents must be weighed against the welfare of the children. The court held that the question for the judge to ask is not what the essential justice of the case requires but what the best interests of the child require.

The wishes and feelings of the child are also considered.<sup>24</sup> The personal preferences of the child are relevant particularly if the child is mature enough to have formed likes and dislikes.<sup>25</sup> It may well be the case that the more informed the court is about the child's emotions towards what is happening to their family; the better it will be able to ascertain where the best interests of the child lie. The older the child, the more weight his or her views may carry. However, it is clear that the child's opinions cannot dictate the court's decision. Ultimately, the test is what will be best for the child, not what will best satisfy the child.<sup>26</sup>

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<sup>22</sup> Gillian Douglas, *An Introduction to Family Law* (Oxford: Clarendon Press, 2004), 169.

<sup>23</sup> SCZ Appeal No. 67 of 1998

<sup>24</sup> Freeman, 215.

<sup>25</sup> *Ivaldy v Ivaldy* [1956] WLR 586

<sup>26</sup> Douglas, *An Introduction to Family Law*, 168.

In considering the best interests of the child, the court is empowered to call for evidence of a welfare officer. Each parent should be able to demonstrate why the best interests of the child are best met by them using the principles outlined. If a parent fails to prove that he or she is the best option for the welfare of the child, a judge may decide against that parent. Thus, in custody battles, it is important for parents and their lawyers to focus primarily on the best interests of the children involved.<sup>27</sup>

#### **2.4 THE BEST INTEREST STANDARD IN SOUTH AFRICA**

Intensive debate about the best interest standard has taken place in many reported judgments in South Africa. What is best for a specific child cannot be determined with absolute certainty. The courts are left with the task of determining the best interests of the child, yet there is no simple and easily applicable way of establishing these interests.<sup>28</sup> The problem remains whether the court should attend to everything that affects the child or whether certain considerations should be disregarded.

In custody disputes the South African court has the duty to award custody on the basis of what it believes to be in the best interests of the child. When dealing with the concept best interests of the child, the first question that needs to be addressed is whether the child's interests should be viewed from a short-term, medium-term or long-term perspective.

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<sup>27</sup>The Baker Law Firm, "In Child Custody Cases, What Constitutes Best Interest of the Child?" <http://knowledgebase.findlaw.com/kb/2011/May/321652.html> (accessed 17<sup>th</sup> January 2012).

<sup>28</sup> Elsje Bonthuys, "Epistemological Envy: Legal and Psychological Discourses in Child Custody Evaluations" 118 South African Law Journal 329(2001), [http://www98.griffith.edu.au/xmlui/bitstream/handle/10072/13740/41915\\_1.pdf/sequence=1](http://www98.griffith.edu.au/xmlui/bitstream/handle/10072/13740/41915_1.pdf/sequence=1) (accessed 25<sup>th</sup> January 2012).

<sup>28</sup> J Heaton, "Some General Remarks on the Concept Best Interests Of The Child" Tydskrif vir Romeins-Hollandse Reg 96(1990), [http://www98.griffith.edu.au/xmlui/bitstream/handle/10072/13740/41915\\_1.pdf/sequence=1](http://www98.griffith.edu.au/xmlui/bitstream/handle/10072/13740/41915_1.pdf/sequence=1) (accessed 25<sup>th</sup> January 2012).

The second question is whether these interests should be viewed from a subjective or objective point of view.<sup>29</sup> Although the Convention on the Rights of the Child does not define these best interests, it would appear that adult decision-makers should determine them, based on objective criteria rather than the child's subjective wishes.<sup>30</sup> It thus becomes clear that the best interests of the child cannot be determined with absolute certainty, but that they rest largely on speculation.

Unfortunately, during divorce proceedings, children can become the victims, since the adversarial legal process itself exacerbates their suffering in the sense that it can focus on the rights of the parents instead of the needs of the children.<sup>31</sup> This can happen if the matrimonial home is awarded to the spouse who does not have custody of the children.

The fundamental importance of the best interests of the child is clear and prioritizing the best interests of the child seems straightforward. However, what does the 'best interests' mean? Prior to the Children's Act of 2005, In *McCall v McCall*,<sup>32</sup> the court set out guiding factors that a court must take into account when granting an application concerning custody of children. The applicant must satisfy the court that he or she has the intelligence, character, sense of responsibility and understanding to exercise the custody of the child in a manner that will be in the best interests of the child. The parent should thus possess the necessary skills and responsibility to fulfil the role as custodian parent in all respects.<sup>33</sup>

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<sup>30</sup> A Barratt, "*The Best Interests of the Child – Where is the Child's Voice? The Fate of the Child: Legal Decisions on Children in the New South Africa*" Burnam ed. (2002), 150.

<sup>31</sup> Elsje Bonthuys, (accessed 25<sup>th</sup> January 2012).

<sup>32</sup> (1994) 3 SA 201 (C)

<sup>33</sup> Joy Cumming, "*The Best Interests of the child. A comparative analysis of the United States of America, South Africa and Australia.*"

[http://www98.griffith.edu.au/xmlui/bitstream/handle/10072/13740/41915\\_1.pdf/sequence=1](http://www98.griffith.edu.au/xmlui/bitstream/handle/10072/13740/41915_1.pdf/sequence=1) (accessed 25<sup>th</sup> January 2012).

In McCall, the court was concerned with two separated parents who competed for the custody of their 12-year-old son. Custody was awarded to the father because the child stated a clear preference to be placed in his father's care. The court held that if the child has the necessary intellectual and emotional maturity to express his or her preference and to make an informed and intelligent judgment, weight should be given to the child's preference. What should therefore be considered is what is in the best interests of the child.

The McCall list was not exhaustive, it was not a closed list of factors and the court could consider any other factors it deemed relevant. The Children's Act of 2005 does not state that the court may consider any other factors, nor does it list the other factors that may be considered.<sup>34</sup> However, the Constitutional Court of South Africa once held that the principle of the best interest of a child should not be applied to a 'predetermined formula'.<sup>35</sup>

It may be argued then, that interpreting the relevant section of the Children's Act to indicate a closed list of factors to be considered when determining the child's best interest would amount to a predetermined formula contrary to the Court's finding. In light of this argument a further argument can be made that a court sitting in a matter as upper guardian of a minor must consider all the relevant factors including but not limited to those listed in the Children's Act when determining the best interest of the child.

In essence the Constitutional Court of South Africa has observed that although the best interest principle is not absolute and not without problems its purpose is to safeguard the interests of children individually and collectively. Thus the best interest principle is a child-centred approach aimed at protecting the needs and entitlements of children. The unique circumstances of a particular child determine the different factors to consider in securing the best interest of that child.

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<sup>34</sup> Children's Act of 2005, section 7.

<sup>35</sup> S v M (Centre for Child law as Amicus Curiae) (2008) 3 SA 232

## **2.5 CRITICISMS OF THE BEST INTEREST PRINCIPLE**

There is considerable scepticism about the best interests of the child principle. It is said to be vague and unpredictable. This makes it difficult for parents to negotiate settlements about arrangements for children. More cases may, as a result, end up in court. Consequently, money which might be better spent on children is expended on litigation.<sup>36</sup>

The best interest standard has also received considerable criticism from certain groups within the privacy rights and family law reform movement, particularly with regard to how it unfairly marginalizes children from one of their parents.<sup>37</sup> The parent in the matrimonial home who has been granted child custody may deny access to the other parent.

The principle is also said to embody values which may not be those of the parents or their community. What counts as the child's best interest may be nothing more than professional prejudice, for instance what social welfare considers as being in the child's best interest. The principle may also be culturally biased. Different cultures have different understandings of best interests.<sup>38</sup>

One scholar argues that the notion of 'best interests' has inherent problems, which may be described as the problem of indeterminacy and the problem of culture. By the former, he argues that we cannot know incontrovertibly what is in the best interests, nor always agree on what values are important. In the latter, he argues that standards of best interests only exist in a cultural framework, and one cultures' version may simply not be accepted by another and that children have an interest in being an accepted part of their inherited culture which may have to be balanced against their other interests.<sup>39</sup>

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<sup>36</sup> Freeman, 227.

<sup>37</sup> Fathers' Rights Movement, "Best Interests." [http://en.m.wikipedia.org/wiki/Best\\_interests](http://en.m.wikipedia.org/wiki/Best_interests) (accessed 16<sup>th</sup> January 2012).

<sup>38</sup> Freeman, 227.

<sup>39</sup> N Thomas, *Decision-making and child participation* (Bristol: The policy press, 2000), 63.

## **2.6 CONCLUSION**

This chapter has dealt with child custody in its conceptual context. The chapter has given a detailed analysis of the best interests of the child principle and how it manifests in child custody matters. The chapter has also discussed the factors that are used by courts as guidelines in determining the best interest of the child. The chapter has discussed that in usual circumstances, child custody is awarded to the parent who remains in the matrimonial home. The chapter has also made a comparison with child custody in South Africa.

## **CHAPTER 3**

### **ANALYSIS OF ZAMBIAN LEGISLATION DEALING WITH CHILD CUSTODY, MAINTENANCE AND PROPERTY ADJUSTMENT**

#### **3.0 INTRODUCTION**

This chapter reviews and analyses the relevant Zambian laws which govern child custody, maintenance and property settlement with regard to the divorced spouses and children of the family. These laws include the Matrimonial Causes Act No. 20 of 2007, the Affiliation and Maintenance of Children Act No. 55 of 1995 and the Local Courts Act, Chapter 29 of the Laws of Zambia. It highlights the relevant provisions in these pieces of legislation and analyses how effective these provisions are in providing fair and just outcomes. The chapter also makes a comparison to South African legislation.

#### **3.1 THE AFFILIATION AND MAINTENANCE OF CHILDREN ACT NO. 55 of 1995**

The Affiliation and Maintenance of Children Act No. 55 of 1995 governs child custody in Zambia. During the parliamentary debates for the enactment of this Act, it was argued by the then Minister of Legal Affairs that, ‘The purpose of the bill is to codify and update the law relating to affiliation and maintenance of children. Zambia has no law on these matters and relies on English laws which are outdated and do not represent modern thinking on the subject nor reflect our national commitment to the welfare of children.’<sup>1</sup>

Section 15 (1) provides that where the court makes a maintenance order in respect of a child, the court shall also have power to make whatever order it thinks fit with respect to the custody of the child and the right of access of either parent.<sup>2</sup>

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<sup>1</sup> Zambia, National Assembly, Debates. 1995, 2<sup>nd</sup> Reading.

<sup>2</sup> Affiliation and Maintenance of Children Act No. 55 of 1995, section 15(1).

This particular provision entails that whenever custody of the child is in issue, the paramount consideration is the best interest of the child. This is in conformity with Article 3 of the United Nations Convention on the Rights of the Child. Section 15 (2) provides that in making an order as to custody or access, the court shall regard the welfare of the child as the paramount consideration, and shall not take into account whether from any other point of view the claim of the father in respect of custody is superior to that of the mother.<sup>3</sup>

Section 15(3) provides that, if the court is satisfied that the mother or father of a child is not a fit and proper person to have custody of the child, the mother or father of a child has died or become of unsound mind or is serving a term of imprisonment of more than six months or there are exceptional circumstances making it impracticable for the child to be entrusted to the custody of either of its parents; the court may, at the time of making a maintenance order or at any time thereafter, appoint any other person as custodian of the child.<sup>4</sup>

Section 16 provides that, where the court grants or makes absolute a decree of divorce, it may include in the order or decree a declaration that either party to the proceedings is unfit to have custody of a child.<sup>5</sup> The foregoing provisions of the Affiliation and Maintenance of Children Act entail that when it is declared by the courts that one of the parents of the child is unfit to be granted custody of that child, a suitable custodian will be appointed as this is in the best interests of the child.

Sections 15 and 16 comply with Article 3 of the United Nations Convention on the Rights of the Child. The specific mention of the courts' consideration that the child's welfare is paramount confirms that the best interest of the child will be taken into account.

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<sup>3</sup> Affiliation and Maintenance of Children Act No. 55 of 1995, section 15(2).

<sup>4</sup> Affiliation and Maintenance of Children Act No. 55 of 1995, section 15(3).

<sup>5</sup> Affiliation and Maintenance of Children Act No. 55 of 1995, section 16.

### **3.2 THE MATRIMONIAL CAUSES ACT NO. 20 OF 2007**

The Matrimonial Causes Act is an Act to make provision for matrimonial causes, to provide for maintenance of children of the family, to provide for the settlement of property between parties to a marriage on dissolution of the marriage and to provide for the custody of children of the marriage to which the matrimonial proceedings relate.

Section 75 provides that in proceedings in which an application has been made with respect to custody or education of children of a marriage, the court shall regard the interest of the children as the paramount consideration.<sup>6</sup> It also provides that the court may adjourn any proceedings relating to child custody until a report has been obtained from a welfare officer.<sup>7</sup>

Section 75 also states that in proceedings with respect to the custody of children of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the children in the custody of a person other than a party to the marriage.<sup>8</sup> Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include a provision as it thinks proper for access to the child by the other parties.<sup>9</sup>

Article 3 of the United Nations Convention on the Rights of the Child sets out the principle of best interest of the child as already discussed. In any proceedings affecting the child, the paramountcy of the child's best interest should be considered. In this regard, Section 75 of the Matrimonial Causes Act No. 20 of 2007 conforms to Article 3 of the United Nations Convention on the Rights of a Child.

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<sup>6</sup> Matrimonial Causes Act No. 20 of 2007, section 75.

<sup>7</sup> Matrimonial Causes Act No. 20 of 2007, section 75.

<sup>8</sup> Matrimonial Causes Act No. 20 of 2007, section 75.

<sup>9</sup> Matrimonial Causes Act No. 20 of 2007, section 75.

### **3.4 A COMPARATIVE STUDY OF SOUTH AFRICA**

The concept that the interests of the child are of paramount consideration is contained in Article 3(1) of the United Nations Convention on the Rights of the Child. The convention was adopted unanimously by the general assembly of the United Nations on the 20<sup>th</sup> of November 1989. South Africa became a signatory to the convention on the 29<sup>th</sup> of January 1993 and it was ratified by South Africa on the 16<sup>th</sup> of June 1995.

When South Africa ratified the International Convention on the Rights of the Child in June 1995, it contracted an international obligation to bring the laws of South Africa into conformity with the provisions of the Convention, since there is a general rule of treaty law that, upon ratification, a State Party assumes an obligation to give effect to that treaty's provisions in domestic law.<sup>29</sup>

The significance of the Convention concerns the heightened status that it enjoys in the South African legal framework due to major features of the Convention that are guaranteed in section 28 of the Constitution. One of the foundational rights of the Convention, that the best interests of the child should be of primary importance in all matters affecting the child, has been enshrined in section 28(2) of the Constitution of the Republic of South Africa.<sup>30</sup>

Section 28 stipulates that in all matters concerning a child, it is the child's best interests which are paramount and that every child has the right to parental care. This provision recognises and moreover dictates that the court as an upper guardian of all minor children must place the interests of the child and the rights of the child above those of his or her parents.<sup>31</sup>

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<sup>29</sup> Joy Cumming , (accessed 25<sup>th</sup> January 2012).

<sup>30</sup> Joy Cumming , (accessed 25<sup>th</sup> January 2012).

<sup>31</sup> Constitution of the Republic of South Africa, section 28.

Section 28 plays a major role in relation to the matrimonial home in that the parent with custody of the children remains in the matrimonial home and the ‘innocent’ spouse can be ejected from the matrimonial home if it is in the best interests of the children.<sup>32</sup>

In some court cases the South African courts have held that the reach of the best interests principle cannot be limited to the rights specified in s 28(1) and that they must be interpreted to extend beyond those specific rights. It follows that the best interests of the child principle can potentially affect a vast arena of judicial activity.<sup>33</sup>

The ‘best interests of the child’ principle has underpinned both statutory provisions pertaining to children as well as case law and is retained in the Children’s Act No 38 of 2005. In fact, the Children’s Act goes further and places significant emphasis on child participation in decisions in respect of their care and well-being.

Section 7 stipulates that whenever it is required that the best interests of the child standard is to be applied, certain factors must be taken into consideration where relevant and these include the nature of the personal relationship between the child and the parents, or any specific parent and the child and any other care-giver or person relevant in those circumstances, the attitude of the parents, or any specific parent, towards the child, and the exercise of parental responsibilities and rights in respect of the child.<sup>34</sup>

Other factors are capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs, the likely effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from both or either of the parents, or any brother or sister

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<sup>32</sup>Bertus Preller, *“Divorce and Eviction from the Matrimonial Home,”* <http://edivorce.co.za/blogs/index.php/Divorce-Attorney-Cape-Town-Blog/family-law/divorce/eviction-from-the-matrimonial-home> (accessed 2<sup>nd</sup> April 2012).

<sup>33</sup>Joy Cumming , (accessed 25<sup>th</sup> January 2012).

<sup>34</sup>Children’s Act No. 38 of 2005, section 7.

or other child, or any other care-giver or person, with whom the child has been living, the practical difficulty and expense of a child having contact with the parents, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents on a regular basis.<sup>35</sup>

The need for the child to remain in the care of his or her parent, family and extended family, and to maintain a connection with his or her family, extended family, culture or tradition, the child's age, maturity and stage of development, gender, background and any other relevant characteristics of the child, the child's physical and emotional security and his or her intellectual, emotional, social and cultural development, any disability that a child may have are also factors to be considered.

Further factors include any chronic illness from which the child may suffer, the need for the child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment, the need to protect the child from any physical or psychological harm that may be caused by subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour, or exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person, any family violence involving the child or a family member of the child, and which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.<sup>36</sup>

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<sup>35</sup> Children's Act No. 38 of 2005, section 7.

<sup>36</sup> Children's Act No. 38 of 2005, section 7.

The way section 7 of the Children's Act No 38 of 2005 has been written with such detailed precision suggests that it is a step in the right direction to prevent South African courts from misinterpreting the best interest of the child principle. The courts are properly guided by the factors listed in the Act.

In the case of *Mankalemeng and Another v Ramathe* in determining the question relating to primary residence of minor children, it was argued that it is necessary to apply the standard of best interest of the child insofar as the best interest of the child is of paramount importance in all matters concerning the well-being of the child as stipulated in section 9 of the Children's Act No. 38 of 2005. The brief facts of the case were that the parties were going through a divorce and the applicant was contending that the primary residence of the minor children should be awarded to her.<sup>37</sup> This case entails that the matrimonial home is a key factor in child custody issues.

In the case of *Terblanche v Terblanche*, it was stated that the court has 'extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.'<sup>38</sup>

In the case of *September v Karriem*, Herbststein A J P stated that 'If the court is of the opinion that it should interfere with the rights of the parents because the interests of the children demand such interference, it should be at large to act in the manner best fitted to further such interests.'<sup>39</sup>

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<sup>37</sup> (2011) ZAFSHC 101

<sup>38</sup> 1992 (1) SA 502 (W) at 504C-D

<sup>39</sup> 1959 (3) SA 687 (C) at 689A

### **3.5 CONCLUSION**

This chapter has looked at the relevant pieces of legislation in Zambia that deal with child custody, property adjustment and maintenance. The chapter has analysed the relevant provisions in the Affiliation and Maintenance of Children Act No. 55 of 1995, the Matrimonial Causes Act No. 20 of 2007 and the Local Courts Act, chapter 29 of the Laws of Zambia. The chapter has also drawn a comparison with the South African legal framework.

## **CHAPTER 4**

### **FINANCE AND PROPERTY ON DIVORCE**

#### **4.0 INTRODUCTION**

This chapter discusses the factors that the courts consider in property adjustment cases. These include the needs factor, age and state of health, sources of income and children's welfare. The chapter also discusses child custody as a factor and how it affects property adjustment particularly with regard to the matrimonial home. The chapter gives a comprehensive insight on how the matrimonial home is dealt with after divorce.

#### **4.1 FACTORS IN PROPERTY ADJUSTMENT CASES**

The legislation that is applied by the Zambian courts in property distribution and financial provision to a spouse on divorce as already alluded to is contained in the Matrimonial Causes Act No 20 of 2007 and, the Local Courts Act Chapter 29 of the Laws of Zambia. The Matrimonial Causes Act applies to marriages that are contracted under statute while the Local Courts Act applies to marriages contracted under custom.

Prior to the divorced spouse getting a share in the family estate, there are certain factors that have to be considered. Section 56 of the Matrimonial Causes Act provides that the court may in any matter or cause in which application is made for the maintenance of a party to a marriage, or of children of the family make an order having regard to the income, earning capacity and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future.<sup>1</sup>

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<sup>1</sup> The Matrimonial Causes Act No. 20 of 2007, section 56 (1) (a).

The court also considers the duration of the marriage.<sup>10</sup> Short-term marriages get short-term relief. However, if there are children involved, even a short-term marriage will attract a substantial proportion of the property or capital to purchase a house for the spouse and the children.<sup>11</sup>

The English and the Zambian courts take into account the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family. Contributions made by the wife, by doing domestic work, can be taken into account in the same way that the husband's financial contribution is given leverage by the court.<sup>12</sup> This simply entails that it does not really matter which spouse provides for the family financially as the other spouse also contributes in kind by running the affairs of the home and making sure that everything in the home is in a well placed position.

In the case of *Gissing v Gissing*,<sup>13</sup> it was stated that contributions are not limited to those made directly in part payment of the property or to those made at the time when the property is conveyed into the name of one of the spouses. A wife can claim an interest in the house as a result of indirect contributions. This contribution may be by labour rather than cash.

In the case of *Vicary v Vicary*,<sup>14</sup> the couple had five children, including the wife's two daughters from her previous marriage. The wife did not contribute directly to husband's business, but was an excellent wife and mother. When the marriage broke down because of the husband's adultery, the wife left the matrimonial home with the youngest child and the husband bought a house for them to live in.

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<sup>10</sup> The Matrimonial Causes Act No. 20 of 2007, section 56 (1) (d).

<sup>11</sup> Mushota, 280.

<sup>12</sup> Paynes Solicitors, (accessed 22<sup>nd</sup> February 2012).

<sup>13</sup> [1971] AC 886

<sup>14</sup> [1992] 2 FLR 271, CA

A consent order for further financial provision was subsequently set aside because the husband had not made full disclosure of his assets, and the judge ordered the husband to pay the wife a lump sum because the wife's contribution in the home had enabled the husband to work hard, prosper and accumulate his wealth and she was therefore entitled to share in the result.

In the case of *White v White*,<sup>15</sup> it was held that where one party to a marriage primarily looks after the home and the children and the other is the money-earner, the court should not discriminate between those roles when making financial provisions on divorce. Where the resources of a couple exceed their needs, there is no reason why the money-earner should retain the surplus. Rather, the courts should depart from equality only where there are good reasons to do so. The brief facts of the case were that the two parties were married for thirty-three years before their divorce and Mrs White was seeking an equal distribution of their assets based on the fact that she was the one who primarily brought up the children in the home.

Another factor that is considered by both English and Zambian law is the physical or mental disability of either of the parties to the marriage.<sup>16</sup> In taking this factor into account, individual and personal circumstances of each party must be considered.<sup>17</sup> The court also considers the value to either of the parties to the marriage of any benefit such as pension which as a result of the dissolution of the marriage that party will lose the chance of acquiring.<sup>18</sup>

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<sup>15</sup> [2000] 3 WLR 1571

<sup>16</sup> The Matrimonial Causes Act No. 20 of 2007, section 56 (1) (e)

<sup>17</sup> A Viklund, "The Matrimonial Causes Act" <http://www.sfla.co.uk/section25mca.htm> (accessed 21<sup>st</sup> February 2012).

<sup>18</sup> Mushota, 278.

In Zambian law, when making the orders, the court shall seek to place the parties, so far as it is practicable and just to do so, having regard to their conduct in the financial position in which they would have been if the marriage had not broken down and each party had properly discharged their financial obligations and responsibilities towards the other.<sup>19</sup> Other factors include the financial needs of the child, the income, earning capacity, if any, property and other financial resources of the child, any physical or mental disability of the child, the standard of living enjoyed by the family before the breakdown of the marriage and the manner in which the child was being expected to be educated and trained.<sup>20</sup>

#### **4.2 THE MATRIMONIAL HOME**

The most crucial of women's rights after divorce is property settlement. In Zambia, women married under customary law have had hardships in claiming a share of the matrimonial property in the past because they did not contribute financially. Statutory marriage is said to give women better entitlements upon divorce in terms of property settlement. Following developments in the courts of law, property settlement may now be equivalent to a fifty-fifty share.

For most divorcing couples, the matrimonial home is their most valuable capital asset. There is often disagreement as to its disposition, one party may want to remain living in the home with the children, if there are any, while the other may want to see it sold and part of the proceeds made available to set up another home with a new partner.<sup>21</sup>

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<sup>19</sup> The Matrimonial Causes Act No.20 of 2007, section 56(2).

<sup>20</sup> The Matrimonial Causes Act No. 20 of 2007, section 56(3).

<sup>21</sup> St. Brendan's Sixth Form College, "*Financial Matters after Divorce*" <http://www.lawteacher.net/family-law/cases/financial-matters-on-divorce.php> (accessed 21<sup>st</sup> February 2012).

In both English and Zambian law, it is common for the marital home to be the most substantial marital asset, both in terms of value and emotional significance. This emotional significance is especially prominent when the issue becomes whether the children will continue to be able to live in the same home environment.<sup>22</sup>

The consequence of divorce is that the courts have extensive discretionary powers to make financial and property orders. Strict legal entitlements have been treated as of only limited relevance. Courts powers are often used to achieve what Thorpe LJ in *Dart v Dart*<sup>23</sup> described as a remedy of equitable distribution of a couple's property. The first consideration the court has to give is the welfare of the minor child.

In English law as articulated in *M v B*,<sup>24</sup> the courts will be concerned with providing a home for both parties. However, the welfare of minor children and the provision of a suitable home for them will be at the forefront of the court's consideration. The court will nevertheless consider all the circumstances of the case in order to maintain a home for the minor children and the parent who has been granted custody of the children.<sup>25</sup>

The significance of having a matrimonial home is that both spouses have an equal right to possession, regardless of ownership. This means that one spouse may legally own the home, but, both spouses will be equally entitled to live in it and this is part of matrimonial unity which means by marriage, the husband and the wife are one person in law.

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<sup>22</sup> J Melamed, "Mediating Divorce Agreement" <http://www.mediate.com/divorce/pg1003.cfm> (accessed 17<sup>th</sup> February 2012).

<sup>23</sup> [1966] 2 FLR 286, CA

<sup>24</sup> [1998] 1 FLR 53, CA

<sup>25</sup> JMW Solicitors, "The Matrimonial Home in a Financial Settlement on Divorce" <http://www.jmw.co.uk/services-for-you/family-law/articles/matrimonial-home-financial-settlement> (accessed 17<sup>th</sup> February 2012).

The legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.<sup>26</sup> When the couple divorces and ceases to be in matrimonial unity, the court might preserve the property for the benefit of one spouse to live in while the other spouse is not deprived of his or her interest in it.

The court has a wide discretion to determine what should happen to the home and the share that each spouse will receive when it is sold. The home will not be looked at in isolation from the other family assets and the future earning power of the spouses. In both English and Zambian law, the court may make an order for the immediate sale of the home and divide the money in a specific way, an outright transfer from one or both spouses to the other, put off the sale until a point in the future and then divide the money in a specific way.<sup>27</sup>

When the parties divorce, the court's option is usually to sell the house and divide the proceeds of the sale. The court will take into account the financial contributions made by both spouses to buy the house. The court will look at the housing needs of both spouses and the needs of any children. The court will also look at the pensions of the spouses. In most instances it does not matter in whose name the matrimonial home is registered. If the intention of the parties at the time of purchasing it was for it to benefit the family, then the court will base their decision on that particular intention.

In the case of *Violet Kambole Tembo v Lastone Tembo*<sup>28</sup> which was an appeal against the judgement of the High Court in respect of the property settlement after a divorce, it was stated that, the court looks at the intentions of the parties and their contributions to the acquisition of the matrimonial property before a settlement is made. If their intentions cannot

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<sup>26</sup> Kerr Maxine, "Family Law: Matrimonial Home" <http://maxinemkerr.ca/matrimonial.html> (accessed 26<sup>th</sup> February 2012).

<sup>27</sup> Mushota, 281.

<sup>28</sup> SCZ No. 8 of 2004

be ascertained by way of an agreement then the court must make a finding as to what was going on in their minds at the time of the acquisition of the property.

When the court orders that the home should be sold immediately in both English and Zambian law, it will also order that the proceeds should be divided between the parties in such proportions as it thinks right. If this will produce sufficient capital to allow both parties to find new accommodation suitable to their needs and the needs of the children, it offers the possibility of a clean break, particularly if the surplus allows a lump sum to replace periodical maintenance.<sup>29</sup>

Sometimes, the best option is to sell the matrimonial home immediately and split the proceeds of the sale. This is often the best plan financially as it allows each spouse a flow of cash with which they can purchase a smaller home and it allows the spouses to start over their lives in new homes where there are no painful memories.<sup>30</sup> In the case of *A v A*,<sup>31</sup> a judge imposed a lump sum order to be paid on the sale of the matrimonial home. The judge stated that in light of the violence between the spouses, it would be unwise to perpetuate a financial relationship between the husband and the wife over the years to come.

Usually, it is the woman who is the victim of violence and who has no alternative accommodation in the event of violence. A woman is now frequently a wage earner making a contribution to the common expenses of buying and running the home and justice demands that, even though the property is in the man's name, she should be given some credit for the help.<sup>32</sup>

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<sup>29</sup>St. Brendan's Sixth Form College, (accessed 21<sup>st</sup> February 2012).

<sup>30</sup>Feldstein Family Law Group, "Matrimonial Home" <http://www.familylawnews.ca/familylaw/matrimonial-home.php> (accessed 22<sup>nd</sup> February 2012).

<sup>31</sup> [1995] 1 FLR 345, FD

<sup>32</sup> Mushota, 281.

In the case of *Harwood v Harwood*,<sup>33</sup> in ancillary proceedings following divorce, the husband's business partnership had a beneficial interest in the house he owned jointly with his wife. The Court made an order for the sale of the house. Half the proceeds had to go to the wife immediately and the other half had to be paid into court pending a determination of the partnership interest.

As divorce, almost by definition, suggests that parties will no longer be living together, this does not necessarily mean that parties need to separate their ownership of the marital home immediately. For example, parties may decide to play the market and delay the placement of a home on sale until a better selling period or until a child reaches a certain age, a degree is completed, or simply for an agreed-upon period of time. The parties have to consider who has maintenance responsibility for the home prior to sale and how major the maintenance costs incurred in readying the home for sale are.<sup>34</sup>

The court can rule that one parent maintains a financial interest in the property, until the children become independent. This applies to both English and Zambian law. When the house is sold, the proceeds, after paying off any mortgage, could be divided on a fifty-fifty basis.

The court can also arrange for a lump sum to be made to one party in lieu of an interest in the property. The court can also rule that the deeds of the house are transferred in full to one party. When it is impossible to secure any other assets, the matrimonial home is sometimes the only security the court can give to a parent with care of the children.<sup>35</sup>

Often times, one spouse is permitted to continue living in the home without purchasing the other spouse's share of the home. This is mostly the case in instances where one parent is

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<sup>33</sup> [1991] 2 FLR 274, CA

<sup>34</sup> J Melamed, (accessed 17<sup>th</sup> February 2012).

<sup>35</sup> Divorce Aid, "*The Family Home in Divorce*" <http://www.divorceaid.co.uk/financial/family-home.htm> (accessed 17<sup>th</sup> February 2012).

granted child custody and is permitted to remain in the home, or if there has been an abusive relationship, restraining orders are involved, and the victim wishes to remain in the matrimonial home.<sup>36</sup>

If it is decided that one spouse should be permitted to remain in the matrimonial home, the spouse retaining possession can in some cases buy out the property interest of the other spouse. This can be done by paying the other spouse the fair market value of the home. If the parties decide to maintain joint ownership of the home, they can do so until a set event occurs. Such events may include the remarriage of the custodial parent or the children reaching a certain age.<sup>37</sup>

The parent with whom the child lives most of the time will inevitably benefit from the matrimonial home. In many cases, young children as already discussed in chapter two will live with their mother who will continue to live in the matrimonial home because no other options are practical.

In the case of *Delaney v Delaney*,<sup>38</sup> after divorce, the wife applied for financial provision for herself and the three children of the marriage. The wife lived in the former matrimonial home with the children, while the husband lived with another woman in a one-bedroomed flat. The husband and the other woman entered a scheme to purchase a three-bedroomed house in order that the children would be able to visit them from time to time; this left very little surplus even from their combined incomes. The registrar nevertheless ordered the husband to pay maintenance for the children and the judge affirmed this order. Ward J said that a former husband can balance his obligations to his former family against his aspirations for a new life.

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<sup>36</sup> Feldstein Family Law Group, (accessed 22<sup>nd</sup> February 2012).

<sup>37</sup> Feldstein Family Law Group, (accessed 22<sup>nd</sup> February 2012).

<sup>38</sup> [1990] 2 FLR 457, CA

In the case of *Richard Musonda v Florence Musonda*,<sup>39</sup> the matrimonial home was registered in the petitioner's name. At the time the couple moved into the matrimonial home, it was a three-bedroomed house. The house was extended during the subsistence of the parties' marriage. When the parties divorced, the respondent's contention was that she contributed directly and indirectly to the welfare of the family and as such she was entitled to have a fair share of all the assets including the matrimonial home. The court held that considering the earning capacity of both parties and the financial resources which each party was likely to have in the foreseeable future, three-eighth of the total value of the matrimonial home should be given to the respondent as her share in the matrimonial home.

In the case of *R v R*,<sup>40</sup> the husband moved out to set up a new home with another woman, while the wife remained in the matrimonial home. On divorce, the husband argued that the matrimonial home should be sold and the proceeds divided, the house being much larger than what the wife now needed. The judge said the wife's wish to remain in the home was not unreasonable, and refused to make an order for sale. He ordered that the house be transferred to her along with a lump sum.

The different case law cited only shows that the courts try to strike a balance between the needs of the divorced spouses, their aspirations for a new life and the welfare of the children. It is not easy to do this as each spouse will be putting up different claims in order to have the court's favour. To reach a just and fair decision, the court will look at all the circumstances of the case including child custody which plays a major part in property adjustment cases.

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<sup>39</sup> SCZ No 53 of 1998

<sup>40</sup> [1994] 2 FLR 1044, FD

### **4.3 CONCLUSION**

This chapter has addressed the factors that the courts consider when making property adjustment orders. The chapter has also discussed the significance of the matrimonial home and how it is dealt with after divorce to cater for the needs of the divorced spouses and ensure that the welfare of the children is upheld. It is the opinion of this chapter that the matrimonial home plays a major role in the distribution of property between parties after divorce. The matrimonial home being a valuable asset involves different factors coming into play before it is awarded to one party. These factors include the needs of the children of the family and the contributions made by each party to the marriage.

## **CHAPTER FIVE**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **5.0 INTRODUCTION**

This chapter gives general conclusions of the whole paper and its findings. It also gives recommendations and possible areas of reform in the law relating to child custody and property adjustment in Zambia.

#### **5.1 CONCLUSIONS**

This paper has set out to determine the significance of the matrimonial home in property adjustment issues. The paper has set out to examine the different types of legislation that deal with child custody and property adjustment after divorce in Zambia. The paper has also set out to determine the role that child custody plays as a factor in property adjustment cases.

The paper has revealed that there are different types of child custody and the party who remains in the matrimonial home usually has actual physical possession of the children of the family. The paper has revealed that it is a well established practice that whenever a court considers a question relating to the upbringing of the child, the paramount consideration is the best interest of the child. The paper has found that the best interests of the child have not been demarcated with any precision and the courts have come up with guidelines to help them in determining what is best for the child. The paper has revealed that the guidelines used include the needs of the child and the effect of separating the child from the matrimonial home. The paper has also revealed that in most instances, custody of children of a tender age is awarded to their mother because the children's mother is in a better placed position to provide for the emotional needs that the children have.

The paper has drawn a comparison with the South African jurisdiction with regard to determining the best interests of the child, which has also pointed out that there is no precise definition of best interests of the child hence the need for the courts to be innovative. The paper has also drawn a comparison with South Africa concerning the legislation that deals with child custody. The paper has found that South Africa has a Children's Act and the best interest of the child principle is entrenched in the Bill of Rights of the South African Constitution. The paper has revealed that in South Africa, the courts have held that when awarding the matrimonial home to a spouse, the best interests of the child should be considered. The paper has also found that there are some criticisms that have been levelled against the best interest of the child principle by some scholars. The criticisms include unfair marginalisation of children from one of their parents when the parent in the matrimonial home denies access of the other parent to the children.

The paper has given an analysis of the legislation in Zambia dealing with child custody, property adjustment and maintenance. The legislation that has been looked at is the Affiliation and Maintenance of Children Act No. 55 of 1995, the Matrimonial Causes Act No. 20 of 2007 and the Local Courts Act, Chapter 29 of the Laws of Zambia. The paper has concluded that child related legislation is scattered in a number of statutes. The paper has revealed that the different pieces of legislation provide that upon divorce, property should be shared by the spouses in such a way as to uphold the best interest of the child principle. This entails that the matrimonial home is usually awarded to the party who has child custody. Both English and Zambian law has revealed that it does not really matter which spouse provides for the family financially as the other spouse also contributes in kind by running the affairs of the home and making sure that everything in the home is in a well placed position.

## **5.2 RECOMMENDATIONS**

Currently the laws relating to children's rights are not found in any single comprehensive legislation but they are found in a broad range of statutes like the Affiliation and Maintenance of Children Act No.55 of 1995 and the Matrimonial Causes Act No. 20 of 2007. One of the major problems associated with the enforcement and implementation of the laws affecting the rights, best interest and welfare of children in Zambia is due to the fact that the laws are not found in a single comprehensive legislation. The recommendation to be made is that Zambia should enact a comprehensive Children's Act because there is need to harmonise the various existing child related pieces of legislation in accordance with the international standards enshrined in the United Nations Convention on the Rights of the Child.<sup>1</sup> The Children's Act should be produced and without considerable delay. This would no doubt effectively promote and protect children from having their rights violated or unfulfilled.<sup>2</sup>

An adequate and well planned legal and institutional framework is cardinal to forestall the adverse effects on the child, of a modern society which is depicted by sophisticated social, economic, political and scientific advancements brought about by the forces of globalisation. It is particularly encouraging to see South Africa taking a lead in the region, by looking at its landmark Children's Act. Zambia might do well to learn how South Africa has dealt with emerging issues affecting children rights and welfare visa- vie the Children's Act.<sup>3</sup>

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<sup>1</sup> Victor Kachabe, "Review of child related legislation in Zambia: Implications for research" (Paper presented at the 11<sup>th</sup> Annual Child and Family Law Conference, Cape Town: South Africa, 12<sup>th</sup> March, 2009).

<sup>2</sup> CHIN, "Zambia: UN Convention on the Rights of the Child Monitoring Report" (25<sup>th</sup> September, 2008), <http://www.africafiles.org/article.asp?ID=19063> (accessed on 26<sup>th</sup> January, 2012).

<sup>3</sup> Victor Kachabe, (12<sup>th</sup> March, 2009).

Zambia has a dual legal system which consists of statutory law, common law and customary law. The problem is further compounded by the pluralist nature of the legal system, where common and civil law co-exist with customary and religious law. Advocates of child rights have to deal with the complexities and challenges posed by the plurality of the legal system arising from the power and prevalence of customary laws across the many different tribes in Zambia with varying cultures and customs. The recommendation to be made is that research is needed into customary law in order to make the customary laws more child-centred and complementary with the United Nations Convention on the Rights of the Child. Any effort at enhancing the rights and welfare of children cannot ignore and indeed must reckon with the operation of customary law.<sup>4</sup> Customary law has to state clear objective guidelines that are to be used in incorporating the best interests of the child principle in the different customs as this happens to be a specific gap in child-related legislation.

The Constitution of the Republic of Zambia does not offer enough protection to the child under the Bill of Rights. The best interest of the child is indicated as 'interest of the child' in the Constitution of Zambia, based on what decision makers and administrative authorities think is in the child's interest. The principle of 'best interest of the child', unlike in the United Nations Convention on the Rights of the Child is worded in relative terms.<sup>5</sup> This means a decision which is in the interest of the child may be made but that decision may not be in the best interest of that child. The key word in the principle which has been left out in the Zambian Constitution is 'best' which means that in all matters affecting the welfare of the child the best interests of that child should be the paramount consideration. The recommendation to be made is that the best interest of the child principle should be explicitly

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<sup>4</sup> Victor Kachabe, (12<sup>th</sup> March, 2009).

<sup>5</sup> Victor Kachabe, (12<sup>th</sup> March, 2009).

stated in the Constitution under the Bill of Rights as a constitutional right of every Zambian child.

**5.3 CONCLUSION**

This Chapter has highlighted the possible areas of reform in child-related legislation and has proposed recommendations where need be. Child custody after divorce is an important issue that always has to be addressed in order to uphold the best interest of the child principle as it is stated in the United Nations Convention on the Rights of the child. Child custody affects property adjustment and the custodial parent should in usual circumstances be granted the matrimonial home. This is regardless of which spouse purchased the home because even indirect contribution like house chores is also considered. It is in the best interest of the child for the matrimonial home to be granted to the custodial parent because the child may have become emotionally attached to the home that they live in, and in most instances custody of children of a tender age is granted to their mothers.

## **REPORTS**

BEMVI Associates. “*Report on Review of Child Related Legislation in Zambia submitted to Zambia Law Development Commission.*” 10<sup>th</sup> January 2008.

Women and Law in Southern Africa Research Project. “*Pilot Study Report on the Existing Law Relating to Maintenance by the Zambian Research Group.*” February 1990.

## **PAPERS**

Kachabe, Victor. “*Review of Child Related Legislation in Zambia: Implications for Research.*” Paper presented at the 11<sup>th</sup> Annual Child and Family Law Conference, Cape Town: South Africa, 12<sup>th</sup> March, 2009.