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**TRACING THE DEVELOPMENT  
OF SPOUSAL PROPERTY RIGHTS  
IN GHANA: AN EXAMINATION OF  
GHANAIAN JUDICIAL DECISIONS  
AND A PROPOSAL FOR  
LEGISLATION IN THAT REGARD**

Juliet Buntuguh\*

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# TRACING THE DEVELOPMENT OF SPOUSAL PROPERTY RIGHTS IN GHANA: AN EXAMINATION OF GHANAIAAN JUDICIAL DECISIONS AND A PROPOSAL FOR LEGISLATION IN THAT REGARD

Juliet Buntuguh\*

## ABSTRACT

*This article examines the historical development of the distribution of spousal property rights in Ghana, focusing on the changes that have occurred over time, using case law. It begins with the case of *Quartey v Martey*<sup>1</sup> where women were considered the property of men; consequently, they were unable to own property. Additionally, the article highlights the various principles applied by the courts over the years in deciding matters pertaining to the distribution of spousal property.*

*Specifically, the article draws upon the principles applied in landmark cases such as *Mensah v Mensah*<sup>2</sup> (hereafter referred to as *Mensah v Mensah No.1*) and *Gladys Mensah v Stephen Mensah*,<sup>3</sup> (hereafter referred to as *Mensah v Mensah No.2*), *Fynn v Fynn*<sup>4</sup> as well as *Adjei v Adjei*,<sup>5</sup> to emphasise the need to harmonise such principles. These cases serve as significant milestones, underscoring the progressive transformation of judicial decisions toward upholding spousal property rights. The paper discusses the customary law principle, the substantial contribution principle, and the equality is equity principle, highlighting their profound impact on the equitable distribution of spousal assets. It concludes by suggesting*

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<sup>1</sup> [1959] GLR 377.

<sup>2</sup> 1997-98] 2GLR 193.

<sup>3</sup> [2012] 1 SCGLR 391.

<sup>4</sup> [2013-2014] 1 SCGLR 727.

<sup>5</sup> *Adjei v Adjei* (J4 6 of 2021) [2021] GHASC 5 (21 April 2021).



*the enactment of legislation, specifically to regulate the distribution of spousal property in Ghana as prescribed by the Constitution.*<sup>6</sup>

*Overall, this paper provides a comprehensive understanding of judicial decisions on the distribution of spousal property rights in Ghana and its evolution over time.*

## 1.0 INTRODUCTION

Spousal property rights in Ghana have undergone substantial transformations throughout the years. Prior to attaining independence, the legal system in Ghana was heavily influenced by English Common Law, which imposed limitations on spousal property rights. For instance, under Common Law, married women had restricted rights and were unable to own property, enter into contracts, or sue in their own name. These privileges were exclusively reserved for men, and married women during that era were subject to their husband's authority, lacking autonomy in making independent decisions.

Through case law, the landscape of spousal property rights in Ghana has undergone a transformative journey, evolving from the historical precedent set by the case of *Quartey v Martey*<sup>7</sup> and finding its way to more recent decisions such as *Gilbert Anyetei v Sussana Anyetei*.<sup>8</sup> This article reflects a journey from traditional and restrictive viewpoints to a more inclusive and equitable approach. It calls for a dedicated statute to provide clarity and consistency in addressing disputes related to spousal property. The article also notes that despite legal advancements emanating from case law throughout the years, the absence of a clear statutory framework governing spousal property rights remains a significant challenge to the full enjoyment of spousal property rights.

The call for a comprehensive statutory framework underscores the need for legal norms to align with constitutional mandates, ensuring a fair and predictable resolution of spousal property disputes in the diverse context of Ghanaian marriages.

## 2.0 PRINCIPLES FOR DISTRIBUTION OF SPOUSAL PROPERTY

### 2.1 The Customary Law Principle

The true evolution of spousal property rights in Ghana began with the case of *Quartey v Martey*.<sup>9</sup> This case marked the court's endorsement of the viewpoint that any property acquired by a man and woman during their marriage was solely owned by the man, with the woman being entitled only to maintenance after the death of the man, contingent on good behaviour. The court based its decision on the fundamental Ghanaian customary law principle, which asserts that the man is the head of the family and primary provider for his wife and children. Consequently, a wife is deemed dependent on her husband, therefore,

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<sup>6</sup> 1992 Constitution, art22(2).

<sup>7</sup> Quartey (n 1)

<sup>8</sup> [2023] DLSC16110

<sup>9</sup> [1959] GLR 377



incapable of independently acquiring property. Ollenu J (as he then was) expressed in *Quartey v Martey*,<sup>10</sup> that:

By customary law it is a domestic responsibility of a man's wife and children to assist him in the carrying out of the duties of his station in life, eg farming or business. The proceeds of this joint effort of a man and his wife and or children and any property which the man acquires with such proceeds are by customary law the individual property of the man. It is not the joint property of the man and the wife and or children. The right of the wife and children is a right to maintenance and support.

Although *Quartey v Martey*<sup>11</sup> might appear contentious in modern times, it elucidated the customary law standpoint on spousal property rights prevailing in Ghana at that time. The repercussions of this decision were far-reaching and had a profound impact on how extended family members treated widows in Ghanaian society at the time. One notable consequence was the unjust practice of driving widows out of their homes when their husbands passed away. However, the oppressive nature of this situation did not persist for long as the courts took proactive measures to establish new principles concerning spousal property.

## 2.2 The Substantial Contribution Principle

The principle of substantial contribution asserts that when a spouse makes a substantial contribution to the acquisition of property during the subsistence of a marriage, that spouse is jointly entitled to the said property.

In 1968, the court, in the case of *Clerk v Clerk*<sup>12</sup>, ruled that a woman who was married under the ordinance but remained unemployed throughout her marriage was not entitled to any interest in her matrimonial home. This decision was based on the absence of substantial contribution on the part of the woman to the property acquired. The woman argued that her moral and material support to her husband during the acquisition of the property should entitle her to a share. However, the court rejected her claim, stating that her alleged support merely constituted the duties of a good wife and did not meet the threshold of substantial contribution.

In *Yeboah v Yeboah*,<sup>13</sup> Hayfron-Benjamin J (as he then was) clarified the principle of substantial contribution by emphasising that there was no customary law prohibiting the creation of joint interests among unrelated individuals. This is due to article 18<sup>14</sup> of the 1992 Constitution, which guarantees the right of all individuals to own property, irrespective of

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<sup>10</sup> Ibid, 380.

<sup>11</sup> Ibid.

<sup>12</sup> [1968] GLR 353.

<sup>13</sup> [1974] 2 GLR 114.

<sup>14</sup> 1992 Constitution, art 18.

their relationship. Additionally, article 22<sup>15</sup> of the Constitution addresses spousal property rights as follows:

“(1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will

(2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.

(3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article,

(a) Spouses shall have equal access to property jointly acquired during marriage;

(b) Assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.”

The above-mentioned constitutional provision ensures that all individuals, regardless of the type of marriage they have contracted (monogamous marriage under Part Three of the Marriages Act,<sup>16</sup> polygamous marriage under customary law and Part One of the Marriages Act<sup>17</sup> or Mohammedan Marriages under Part Two of the Marriages Act<sup>18</sup> in Ghana), are protected.

The principle of substantial contribution was further advanced in *Abrebeseh v Kaah*,<sup>19</sup> where the court ruled that a wife who had contributed half of the land purchase price for her matrimonial home, building materials during construction, and supervised labourers, had substantially contributed to the acquisition of the property and was thus entitled to an interest in the property.

The limitations of the substantial contribution principle are evident, as it fails to recognise unquantifiable contributions made by spouses to property acquisition. This is exemplified in the *Clerk case*, where the court did not consider marital moral support substantial enough to warrant an interest in matrimonial property.

### 2.3 Equality is Equity Principle

As a general rule, the equality is equity principle posits that jointly acquired property in a marriage should be shared equally, irrespective of the quantity or quality of contributions, for that ensures equity. The principle was initially articulated in the case of *Mensah v Mensah No.*

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<sup>15</sup> 1992 Constitution, art 22.

<sup>16</sup> Marriages Act, 1884 – 1985 CAP. 127.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> [1976] 2 GLR 46.

7,<sup>20</sup> where the court held that a husband and wife were joint owners of their matrimonial home due to their contributions to its acquisition. In that case, the couple acquired certain properties during their marriage, and the wife made significant financial and labour contributions to the acquisition of the said properties. Upon divorce, the wife asserted her right to a share of those properties, highlighting her contributions to their acquisition and upkeep.

Applying the equality is equity principle, Bamford-Addo JSC stated as follows:<sup>21</sup>

The principle that property jointly acquired during marriage becomes joint property of the parties applies and such property should be shared equally on divorce; because the ordinary incidents of commerce have no application in marital relations between husband and wife who jointly acquired property during marriage...

The court's decision was influenced by article 22 (3) of the Constitution<sup>22</sup> which states that a spouse shall have equal access to property jointly acquired during marriage and that such assets should be distributed equitably between the spouses upon dissolution of the marriage.

In the case of *Boafo v Boafo*,<sup>23</sup> the court provided further clarification on what constitutes an equitable distribution of property. Dr. Date-Bah JSC referred to the decision in *Mensah v Mensah No. 1*, supra and further elaborated on the court's position, stating that:<sup>24</sup>

The spirit of Bamford-Addo JSC's judgment in *Mensah v. Mensah* appears to be that the principle of the equitable sharing of joint property would ordinarily entail applying the equitable principle, unless one spouse can prove separate proprietorship or agreement or a different proportion of ownership. The question of what is "equitable", in essence, what is just, reasonable and accords with common sense and fair play, is a pure question of fact, dependent purely on the particular circumstances of each case. The proportions are, therefore, fixed in accordance with the equities of any given case.

*Boafo v Boafo*<sup>25</sup> clarified that an equitable distribution of property is not necessarily 50 percent and is determined on a case-by-case basis. The court's intention in applying this

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<sup>20</sup> 1997-98] 2GLR 193.

<sup>21</sup> Ibid, 355.

<sup>22</sup> 1992 Constitution, art 22(3)(a)(b).

<sup>23</sup> [2005-2006] SCGLR 705.

<sup>24</sup> Ibid, 711.

<sup>25</sup> [2005-2006] SCGLR 705.



principle was to ensure fairness and justice, rather than blindly applying rules without considering the specific circumstances.

The equality is equity principle was further expanded in the case of *Mensah v Mensah No. 2*<sup>26</sup> in 2012. In that case, the court emphasised that a wife's contribution to the joint property of the family includes performing household chores, such as cleaning, cooking, raising children, and providing peace of mind to her husband, allowing him to pursue economic activities.

Jones Dotse JSC stated:

We believe that, common sense, and principles of general fundamental human rights require that a person who is married to another, and performs various household chores for the other partner like keeping the home, washing and keeping the laundry generally clean, cooking and taking care of the partner's catering needs as well as those of visitors, raising up of the children in a congenial atmosphere and generally supervising the home such that the other partner, has a free hand to engage in economic activities must not be discriminated against in the distribution of properties acquired during the marriage when the marriage is dissolved.

This is so because, it can safely be argued that, the acquisition of the properties was facilitated by the massive assistance of the other spouse.

*Mensah v Mensah No.2*<sup>27</sup> has had a significant impact on spousal property rights in Ghana. It has contributed to a shift in the way spousal property is shared, emphasising the importance of spousal support and the contributions of both spouses to the acquisition and maintenance of spousal property.

Not long after *Mensah v Mensah No. 2*, the courts employed the equality is equity principle in *Quartson v Quartson*.<sup>28</sup> Here, Dr. Date-Bah JSC emphasised that the courts were bound to adhere to the precedent set by the Supreme Court in *Mensah v Mensah No. 2* since marital property could be understood as property acquired jointly by spouses during their marriage, irrespective of whether the other spouse has made a contribution to its acquisition.

The preceding cases clearly demonstrate that the principle of equality is equity has profoundly reshaped the manner in which Ghanaian courts approach the sharing of marital property and the entitlements of spouses to such acquired assets. *Mensah v Mensah No.2* in

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<sup>26</sup> [2012] 1 SCGLR 391.

<sup>27</sup> [2012] 1 SCGLR 391.

<sup>28</sup> [2012] 2 SCGLR 1077.

particular has clarified the value of domestic work within a marriage and its recognition as a contribution to marital property.

## 2.4 The Right to Own Individual Property

It should be noted that the equality is equity principle does not diminish one's right to own personal property even in a marriage. This is guaranteed by article 18 of the 1992 Constitution of Ghana which states:

(1) Every person has the right to own property either alone or in association with others.

(2) No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."

The right to own property is fundamental and inherent. In line with this reasoning, the court in *Quartson v Quartson (supra)*, cautioned that the Supreme Court's decision in *Mensah v Mensah No.2* was not to be taken as a blanket rule that affords spouses unwarranted access to property when it is clear on the evidence that they are not so entitled. Its application and effect were intended to be shaped and defined on a case-by-case basis.

This underscores the principle of the presumption of joint ownership of property which could be rebutted by adducing evidence to support individual ownership of property.

In the case of *Grace Fynn v Stephen Fynn & Another*,<sup>29</sup> the court advanced the position that spouses in a marriage are capable of acquiring and owning individual property.

It stated that:<sup>30</sup>

Indisputably, during the existence of the marriage union, it is most desirable that the couple pool their resources together to jointly acquire property for the full enjoyment of all members of the nuclear family in particular. But, the decided cases envisage situations where within the union, parties may still acquire property in their individual capacities as indeed is their guaranteed fundamental right as clearly enshrined under article 18 of the 1992 Constitution, in which case they would also have the legal capacity to validly dispose of same by way of sale, for example, as happened in this instant case. No court in such clear cases would invalidate a sale transaction on the sole legal ground that the consent and concurrence of the other spouse was not

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<sup>29</sup> [2013-2014] 1 SCGLR 727.

<sup>30</sup> *Ibid*, 10.

obtained. We would however subject these views we have expressed to this sound caution. Since, the peace, tranquility, harmony, stability and indeed the health and general wellbeing of any marriage union thrives best in the environment of mutual affection, trust and respect for each other as well as transparency; we think a spouse in such a case is under a moral obligation at any given time, (indeed it is most expedient and fair) to apprise the other spouse of the intention to acquire and dispose of self-acquired properties at all material times.

From the foregoing, it is evident that the equality is equity principle was not intended to be applied indiscriminately and universally, but rather on a case-by-case basis, depending on the unique facts and details of each case.

### 3.0 RECENT JUDICIAL POSITIONS ON THE DISTRIBUTION OF SPOUSAL PROPERTY

Over the years, many new cases requiring the distribution of jointly acquired spousal property have arisen, leading to a further nuanced development of the “equality is equity” principle. To provide context for the prevailing trend of judicial determinations on this matter, two cases will be expounded upon.

First is *Adjei v Adjei*<sup>31</sup> where the Petitioner lodged an appeal against the trial court's decision, which ordered the settlement of the matrimonial residence in favour of the Respondent. The trial court based its judgment on the fact that the Petitioner acquired the property during the course of marriage and that during that time, the respondent supposedly fulfilled the responsibilities typically associated with a stay-at-home partner, such as cooking, cleaning, and other domestic duties, without receiving any compensation.

However, the Court of Appeal overturned the trial court's decision, and subsequently, the Supreme Court upheld the reversal. In a majority opinion delivered by Appau, JSC (as he then was), it was determined that the matrimonial property could not be considered jointly acquired by the couple, and thus did not qualify for distribution based on the principle of "equality is equity." This conclusion was reached because the land on which the property was built was solely acquired by the Petitioner before entering into marriage, and the construction of the property itself was funded solely through an outstanding loan obtained by the Petitioner alone. The Court concluded that the Respondent/Appellant failed to demonstrate how she had contributed to the property and, therefore, was not entitled to any claim on it.

From *Adjei v Adjei*,<sup>32</sup> it becomes evident that the courts do not mechanically invoke the "equality is equity" principle established in *Mensah v Mensah No.2* and as upheld in *Quartson*

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<sup>31</sup> *Adjei v Adjei* (14 6 of 2021) [2021] GHASC 5 (21 April 2021).

<sup>32</sup> *Ibid.*

*v Quartson* when distributing marital assets. An individual asserting contribution to the acquisition of jointly held property bears the onus of substantiating such contribution, be it through financial means or spousal support during the marital duration.

Similarly, in *Gilbert Anyetei v Sussana Anyetei*<sup>33</sup> (“the Anyetei case”) the court deliberately prioritised the equitable distribution of property procured by the parties. Pwamang JSC stressed that the only property available to be distributed by parties upon the irreparable breakdown of a marriage was jointly acquired property and such property had to be shared equitably to conform to the requirements of article 22(3)(b) of the Constitution. In an attempt to distinguish equitable distribution from equal distribution, Pwamang, JSC stressed that equitable distribution of spousal property in some cases was 50/50 but in other cases, it could be 60/40 or less.

From the *Anyetei case* and the other cases above, it is clear that the position of the courts evolve with time and evolve based on the circumstances of each case. There is still no absolute position of the courts when it comes to distributing spousal property in Ghana.

#### 4.0 THE WAY FORWARD

Spousal property rights in Ghana have evolved since the 1950s, yet there remains substantial room for improvement in this crucial area of family law. Despite the progress, a glaring issue persists: the absence of a clear statutory framework to govern spousal property rights. This gap in legislation is particularly puzzling given the explicit directive in article 22(2) of the Ghanaian Constitution, which assigns the responsibility to Parliament to establish such a framework.

In the absence of a dedicated statute, Ghana's courts have been compelled to rely on their own interpretations and judgments to address disputes related to spousal property rights. Consequently, the landscape of judicial decisions in this regard have evolved over time, reflecting the dynamic nature of legal interpretation and the evolving societal context.

One must appreciate the complexity and diversity of Ghanaian marriages to understand the urgency of rectifying this situation. Ghanaian marriages come in various forms, influenced by a myriad of customs, traditions, and cultural values. These factors significantly impact the determination of property ownership within a marital union.

An Act, specifically promulgated to regulate spousal property rights would be a fitting remedy to the inconsistencies that have emerged in judicial decisions. Such legislation would provide much-needed clarity, helping both the judiciary and individuals involved in disputes navigate the intricate terrain of the distribution of spousal property rights within the context of diverse Ghanaian marriages. Furthermore, it would bring legal norms in alignment with the constitutional mandate and create a more equitable and predictable framework for addressing these vital issues in Ghanaian family law.

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<sup>33</sup> CA/J4/67/2021.

The author recommends that the suggested statute to regulate the distribution of spousal property should provide a precise definition of what constitutes spousal property. It should also clearly outline the types of marriages that fall under its purview and establish specific conditions or criteria under which concubines may be entitled to spousal property rights, if ever. This is imperative due to cases, such as *Essilfie v Quarcoo*<sup>34</sup> and *Rene Gorleku v Justice Pobe*<sup>35</sup> which have demonstrated instances where concubinage could be equated to valid traditional marriages under customary law. For example, in a situation where a man and a woman cohabit, have children, and are recognised as husband and wife by their community, as exemplified in *Essilfie v Quarcoo supra*, the court holds them as husband and wife.

Another crucial aspect of spousal property rights legislation is a clear specification of the proportion of marital property to which a spouse is entitled and the circumstances under which they may receive a greater or lesser share of such property.

In foreign jurisdictions such as Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin, all in the United States, spousal property is treated as community property and subject to equal division upon marriage dissolution.<sup>36</sup> In contrast, the legal landscape in Ghana lacks such clarity, and currently, the courts must handle spousal property distribution on a case-by-case basis.

A novel addition to the law would be the introduction of home rights, a practice in the UK where property is owned by one party to a marriage but the other party has equal rights to the property, meaning that they have the right to live in the family home and not be made to vacate same unless there is an occupation order stating that vacation is mandatory.<sup>37</sup>

This would empower more women in marriages, particularly those who do not directly contribute financially to the acquisition of spousal property.

## 5.0 CONCLUSION

The evolution of spousal property rights in Ghana has witnessed significant changes throughout the years, marked by notable judicial decisions that have paved the way for greater justice. Beginning with the landmark case of *Quartey v Martey*<sup>38</sup> and progressing

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<sup>34</sup> [1992] 2 GLR 180.

<sup>35</sup> [2012] 42 GMJ 53 CA.

<sup>36</sup> Internal Revenue Service, 'Community Property' (2020), Publication <555><https://www.irs.gov/pub/irs-pdf/p555.pdf>> Accessed 11 October 2023.

<sup>37</sup> E Booker, 'What are Home Rights?' [2023] <<https://www.stephens-scown.co.uk/family/divorce-and-separation/what-are-home-rights/>> Accessed 11 October 2023.

<sup>38</sup> [1959] GLR 377.

through the two pivotal *Mensah v Mensah*<sup>39</sup> cases, and culminating in the *Anyetei case*<sup>40</sup>, substantial strides have been taken towards achieving fairness.

In tandem with these legal shifts, the guiding principles applied by the courts in determining spousal property distribution have also evolved. Recent instances show a predominant reliance on article 22(3) of the Constitution, tempered only by the principles of equity.

The next step in the evolution of the distribution of spousal property rights, hinges on parliamentary enactment of a comprehensive law. It is proposed that the legislation should explicitly outline guiding principles for equitable distribution of spousal property Ghana, offering a clear framework for anticipating and predicting judicial decisions relating to spousal property.

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<sup>39</sup> 1997-98] 2GLR 193.

<sup>40</sup> CA/J4/67/2021.

