

Expert Group Meeting
Good practices in realizing women's rights to productive resources, with a focus on land
Geneva, Switzerland
25-27 June 2012

**Respect, protect and fulfill:
legislating for women's marital property rights in the context of HIV**

Expert paper prepared by:

Sandra Ka Hon Chu *
Canadian HIV/AIDS Legal Network
Canada

* The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.

In many communities, gender disparities with regard to land are linked to notions of men being its sole stakeholders for multiple reasons, including presumptions that land given to women is lost to another family in the event of marriage or divorce, and that women are incapable of managing property; or expectations that men in the family or community will support the women.¹ Despite international recognition of women's rights to equality and to administering and owning property, the property law regimes of many countries continue to support these often false presumptions. As the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has noted, some countries do not acknowledge a woman's right to own an equal share of property with her husband during a marriage or when that marriage ends.² Where countries do recognize that right, the practical ability of women to exercise it may nevertheless be limited by legal precedent or custom.³

Increasingly, there is recognition of property and housing as key social determinants of health, and research evidence affirms the importance of housing in preventing the transmission of HIV as well as in maintaining health and wellbeing.⁴ In particular, research demonstrates the linkage between the growing prevalence of HIV/AIDS among women and "laws that inhibit the full enjoyment of women's rights to land ownership and inheritance."⁵ In general terms, protecting women's property rights has both *preventive* and *mitigating* impacts in the context of the HIV epidemic.⁶ On the *preventive* side, security of tenure over housing and land provides women with economic security, livelihood and dignity. Numerous studies have demonstrated how the threat of poverty and insecurity drive women to remain in violent relationships or to engage in behaviours, such as unprotected sex, that put them at increased risk of contracting HIV.⁷ As the UN Commission on Human Rights has affirmed, "the lack of adequate housing can make women more vulnerable to various forms of violence, including domestic violence, and in particular ...

¹ See, e.g., C. Sweetman, "How title deeds make sex safer: women's property rights in an era of HIV," *From Poverty to Power*, Background Papers, Oxfam International, 2008; L. Farha, *Women and Housing Rights*, COHRE, 2000, p. 11; CEDAW Committee, "Responses to the List of Issues and Questions with Regard to the Consideration of the Combined Second and Third Periodic Reports: Cameroon," pre-session working group, 42nd session, CEDAW/C/CMR/Q/3/Add.1, 10 November 2008, p. 30; and V. Bennett et al, "Inheritance law in Uganda: the plight of widows and children," *Georgetown Journal of Gender and the Law* 7 (2006): 451–520 at 457.

² CEDAW Committee, "General Recommendation No. 19: Violence Against Women," UN Doc. A/47/38, 1993. See, e.g., Zimbabwe, *Married Person's Property Act of 1929*; Tanzania, *Law of Marriage Act of 1971*; and Botswana, *Married Persons Property Act of 1971*.

³ CEDAW Committee, "General Recommendation No. 21: Equality in Marriage and Family Relations," UN Doc. A/49/38, 1994, para. 30.

⁴ See, e.g., Knowledge Network on Urban Settings, *Our cities, our health, our future: Acting on social determinants for health equity in urban settings (Report to the World Health Organization Commission on Social Determinants of Health)*, 2008 and R. J. Wolitski et al., "HIV, homelessness, and public health: Critical issues and a call for increased action," *AIDS and Behavior* 11(S) (2007): S167-S171.

⁵ UN Commission on Human Rights, "Women's Equal Ownership, Access to and Control over Land and the Equal Rights to Own Property and to Adequate Housing," Res. 2005/25, UN Doc. E/CN.4/2005/RES/25, 15 April 2005

⁶ R. Strickland, *To Have and To Hold: Women's Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa*, ICRW Working Paper, 2004, p. 10.

⁷ See, e.g., S. White, "Extreme poverty and its impact on women's vulnerability to HIV transmission: a rights issue," *The International Journal of Human Rights* 14:1 (2010): 75–91; Human Rights Watch, *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda*, Vol. 15, No. 15(A), 2003, p. 32; T. Lindgen et al, "Malawi women and HIV socio-cultural factors and barriers to prevention," *Women & Health* 41(1) (2005): 69–86, at 8; J. Simmons et al, "A global perspective," in P. Farmer et al (eds), *Women, Poverty and AIDS* (Monroe: Common Courage Press, 1996), p. 73; and M. Hattori and F. Ni-Amoo Dodoo, "Cohabitation, marriage, and 'sexual monogamy' in Nairobi's slums," *Social Science & Medicine* 64(5) (2007): 1067–1078.

the lack of housing alternatives may limit many women's ability to leave violent situations."⁸ Moreover, when women are dispossessed of their property (as may be the case at the dissolution of marriage), they may be forced to return to their natal homes (where they may not be welcome), to move to urban slums or to become homeless, experiences that disrupt women's social relationships and further increase the risk of HIV infection.⁹ Women who are forced to leave their matrimonial homes and live in precarious housing situations may engage in sex for survival, or rely on situations of lodging or work that expose them to sexual abuse or violence. Ostensibly, women with access to resources (including land, financial resources and supportive social networks) are better able to negotiate condom use in their sexual relationships, to leave abusive partners, and to provide for their own and their children's needs.

In terms of *mitigation*, property rights can help ease the impact of HIV and AIDS on individuals and families.¹⁰ Access to shelter, clean water and services helps to keep those infected with HIV healthy.¹¹ For example, secure housing facilitates women's access to HIV-related care, treatment and support provided through formal health care systems and informal community networks. As the Inter-Parliamentary Union (IPU), UNAIDS and UNDP have noted, women's "exclusion from full property rights carries particularly harmful consequences for divorced or widowed HIV-positive women, who may be forced into poor or unsanitary living conditions or may no longer be able to afford treatment."¹² Land access and ownership in agricultural communities also has direct ties to increased food security and nutrition, which is important in mitigating the impact of the disease and keeping HIV-positive people well.¹³ In addition, a woman property owner's ability to access rental income may be particularly important when her ability to participate in agricultural activity is limited as a result of falling ill.¹⁴ Another important aspect of mitigation is the ability to plan for the future of one's children. Women are better able to secure their children's future when they have secure property rights.¹⁵ Conversely, homelessness has been found to increase mortality for people impacted with HIV.¹⁶ Failing to recognize women's interest in marital property can have particularly harsh consequences for women affected by HIV, who are often blamed for bringing HIV into the household, and may face stigmatization and forced eviction as a result. In households affected by HIV/AIDS, it has

⁸ UN Commission on Human Rights, "Women's Equal Ownership" (supra).

⁹ Huairou Commission, *Women, Land and Secure Tenure: The HIV/AIDS Connection*, 2010.

¹⁰ See, e.g., R. Strickland, *To Have and To Hold* (supra), who provides at p. 1, "There is growing evidence to suggest that where women's property and inheritance rights are upheld, women acting as heads and/or primary caregivers of HIV/AIDS-affected household are better able to mitigate the negative economic and social consequences of AIDS."

¹¹ For example, Human Rights Watch's investigations in Kenya found that living in squalor was one of the common consequences of women's property rights violations, and that for women with HIV, these conditions can lead to earlier deaths: Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya*, 2003, p. 30.

¹² Inter-Parliamentary Union (IPU), UNAIDS and UNDP, *Taking Action Against HIV and AIDS: A handbook for parliamentarians*, 2007 at p. 140.

¹³ Huairou Commission, *Women, Land and Secure Tenure* (supra).

¹⁴ *Ibid.*

¹⁵ N. Duvvury, "Women's property rights, HIV and AIDS, and domestic violence: emerging findings from sub-Saharan Africa and South East Asia," ICRW, paper presented at Technical Consultation on Gender, Property Rights and Livelihoods in the Era of AIDS, FAO, 2007, Rome, Italy.

¹⁶ See, e.g., D.P. Culhane et al., "The co-occurrence of AIDS and homelessness: results from the integration of administrative databases for AIDS surveillance and public shelter utilisation in Philadelphia," *Journal of Epidemiology and Community Health* 55 (2001): 515-520 and A. Aidala et al., "Housing need, housing assistance, and connection to HIV medical care," *AIDS and Behavior* 11 (2007): 101-115.

been estimated that household incomes can drop by 80 percent, food consumption by 15 to 30 percent, and primary school enrolment by 20 to 40 percent.¹⁷ The impact of HIV/AIDS on poorer rural households with small land holdings is even harsher than on wealthier ones.¹⁸

Comparative overview of marital property law regimes

How the property of married couples (including the matrimonial home) is administered, used, owned and distributed during and at the end of a relationship has considerable relevance for women's rights. In the context of HIV, the laws governing women's property rights take on even more significance. Accordingly, the IPU, UNAIDS and UNDP have called for legislative and policy changes to ensure equality "in respect of property and inheritance rights of women and girls"¹⁹ and both the recently adopted *East African Community HIV and AIDS Prevention and Management Bill* and the *Model Law on HIV & AIDS in Southern Africa* mandate equal legal rights for women in the areas of marriage, divorce, inheritance and property,²⁰ language that is reflected in some national HIV/AIDS policies.²¹

Traditionally, the basic proposition accepted by the common law was that a woman, during marriage, had no independent legal existence from that of her husband.²² As a consequence of the husband's "marital power" over his wife, a married woman lost her property and her legal personality, both of which were subsumed by her husband, who became seized of all land and acquired absolute title to property held by their wives and had the sole right to dispose of it.²³ In order to improve the fate of married women in the relatively rare position at the time of having an income and property of their own, a regime of "*separation of property*" or "*out of community of property*" was subsequently introduced in a number of common law jurisdictions.²⁴ Under this regime, each spouse retains the property he or she owned before the marriage, and property acquired during marriage also belongs solely to the spouse who acquired it.²⁵

In spite of the benefits the separation of property regime may have provided for women with significant assets, there was increasing recognition that a separation of property regime worked

¹⁷ A. Whiteside, "Poverty and HIV/AIDS in Africa," *Third World Quarterly* 23(2) (2002): 313–332.

¹⁸ S. Drimie, *The Impact of HIV/AIDS on Land: Case Studies from Kenya, Lesotho and South Africa: A Synthesis Report Prepared for the South African Regional Office of the Food and Agricultural Organization of the United Nations (FAO)*, Integrated Rural and Regional Development, Human Sciences Research Council, 2002, p. 4; K. Izumi (ed.), *Reclaiming Our Lives: HIV and AIDS, Women's Land and Property Rights and Livelihoods in Southern and East Africa* (Cape Town: HSRC Press, 2006), p. 14.

¹⁹ IPU, UNAIDS and UNDP, *Taking Action Against HIV and AIDS* (supra) at p. 140.

²⁰ See s. 35(1)(c) of the *East African Community HIV and AIDS Prevention and Management Bill*, 2012 and s. 28(1) of the *Model Law on HIV & AIDS in Southern Africa*, SADC Parliamentary Forum, 2008.

²¹ See, e.g., s. 5.2.1 of Malawi's *National HIV/AIDS Policy*, June 2003.

²² See W. Blackstone, *Commentaries on the Law of England*, 1756; G. Williams, "The Legal Unity of Husband and Wife," *Modern Law Review* 10 (1947): 16–31; and H.R. Hahlo, "Matrimonial Property Regimes: Yesterday, Today and Tomorrow," *Osgoode Hall Law Journal* 11 (1973): 455–478.

²³ *Ibid.*

²⁴ In England, this regime was introduced with the *Married Women's Property Act 1882*; in Australia, see, e.g., *Law of Property Act 1936* (South Australia); in Canada, see, e.g., *The Married Women's Property Act, 1884* (Ontario).

²⁵ D. Hambly & J. N. Turner, *Cases and Materials on Australian Family Law* (Sydney: The Law Book Company, 1971), p. 350.

to the disadvantage of many married women in the event of marriage dissolution.²⁶ Under this regime, courts have virtually no power to readjust the entitlement of spouses to marital property upon the dissolution of marriage; and further, questions of entitlement are to be solved by reference to the ordinary laws of property in which the fact of marriage is irrelevant.²⁷ Where a separation of property regime persists, it has been criticized for failing to take into account women's non-economic and indirect contributions to marriage and the hardships and injustices that the regime is capable of producing.²⁸ In a number of countries, women have sued for interest in property that they have been denied upon marriage dissolution,²⁹ and law reform towards an approach of equalization of marital assets has been urged.³⁰ In numerous jurisdictions, a marital property approach reflecting an equalization of marital assets upon marriage dissolution has been implemented in recognition of women's non-economic and indirect contributions to marital property.³¹ In the four countries described below, distinct approaches have been applied to remedy the deficiencies of the separation of property regime.

1. South Africa

In South Africa, the *Matrimonial Property Act 88 of 1984* prescribes a default marital property regime of “**community of property**” for all civil marriages, in the absence of an ante-nuptial contract stating otherwise. Under a community of property regime, all of a couple's assets and liabilities are pooled and shared equally by the spouses, irrespective of whether they were acquired before or during the marriage, unless expressly excluded by a donor or testator.³² All

²⁶ See, e.g., A. Kiralfy (ed.), *Comparative Law of Matrimonial Property* (Netherlands: A.W. Sijthoff Intl Publishing Company, 1971), p. 180; R. Sackville, “The Emerging Australian Law of Matrimonial Property,” *Melbourne University Law Review* 7 (1970): pp. 354–356 at 353; and M.S. Clapton, “Murdoch v. Murdoch: The Organizing Narrative of Matrimonial Property Law Reform,” *Canadian Journal of Women and Law* 20 (2008): 197–230, at 211.

²⁷ S.M. Cretney & J.M. Masson, *Principles of Family Law: Sixth Edition* (London: Sweet & Maxwell, 1997), p. 116.

²⁸ “Non-economic” and “indirect” contributions refer to a spouse's unpaid contributions to the family, such as providing support, childcare and household labour. See, e.g., A. Kiralfy (ed.), *Comparative Law of Matrimonial Property* (supra), p. 180; D. Hambly & J. N. Turner, *Cases and Materials on Australian Family Law* (supra), p. 400; and R. Bartke, “Marital Property Law Reform: Canadian Style,” *American Journal of Comparative Law* 25 (1977): 46–85 at 52.

²⁹ See, e.g.: Law Reform Commission of Tanzania, *Inquiry and Report on the Law of Marriage Act, 1971*, 1986, pp. 6–12; A. Kiralfy (ed.), *Comparative Law of Matrimonial Property* (supra), pp. 180–216; D. Hambly & J. N. Turner, *Cases and Materials on Australian Family Law* (supra), pp. 359–400; R. Bartke, “Marital Property Law Reform: Canadian Style” (supra), pp. 52–55; and the monumental Canadian case *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423 that provoked widespread legislative reform to ensure more equitable distribution of property upon marriage dissolution.

³⁰ See, e.g., A. Kiralfy (ed.), *Comparative Law of Matrimonial Property* (supra), p. 180; S.M. Cretney and J.M. Masson, *Principles of Family Law* (supra), pp. 219–234; R. Bartke, “Marital Property Law Reform: Canadian Style” (supra); H.R. Hahlo, “Matrimonial Property Regimes” (supra), p. 466; G. Sheehan and J. Hughes, *Division of matrimonial property in Australia Research Paper No. 25*, Australian Institute of Family Studies, March 2001; and Law Reform Commission of Tanzania, *Inquiry and Report on the Law of Marriage Act, 1971* (supra), pp. 6–12.

³¹ See, e.g., H.R. Hahlo, “Matrimonial Property Regimes: Yesterday, Today and Tomorrow” (supra), pp. 466–469; C. Forder, “Might and Right in Matrimonial Property Law: A Comparative Study of England and the German Democratic Republic,” *International Journal of Law, Policy and the Family* 1(1)(1987): 47–71; B. Rešetar, “Matrimonial Property in Europe: A Link between Sociology and Family Law,” *Electronic Journal of Comparative Law* 12 (2008): 1–18; N. Bala, “Family Law in Canada and the United States: Different Visions of Similar Realities,” *International Journal of Law, Policy and the Family* 1(1)(1987): 1–46 at 16–17; Legal Assistance Centre [Namibia], *Marital Property in Civil and Customary Marriages: Proposals for Law Reform*, 2005, pp. 138–145.

³² COHRE, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women*, 2004, p. 119.

profits and losses are borne equally by the spouses, and each spouse assumes joint control with his or her partner over the estate.³³ While a spouse in a marriage subject to a community of property regime may perform “any juristic act with regard to the joint estate without the consent of the other spouse,” a number of restrictions apply, and a spouse shall not without the consent of the other spouse perform certain acts, such as the sale of immovable property (including the matrimonial home) forming part of the joint estate.³⁴ Upon divorce or death, each spouse or the surviving spouse of a marriage subject to a community of property regime is entitled to half the joint estate.³⁵ If the *Matrimonial Property Act 88 of 1984* is effectively applied, a woman under a community of property system is essentially guaranteed that she will receive half of the joint estate upon dissolution of the marriage.

Significantly, even where couples choose to opt out of the default marital property regime of community of property by ante-nuptial agreement, they are automatically subject to a default marital property regime of “*accrual*” (also referred to as a “*community of gains*”), unless they also expressly exclude such a regime.³⁶ Under a regime of accrual, each spouse retains and administers his or her own assets and liabilities during marriage. However, when a marriage subject to an accrual regime dissolves by death or divorce, the growth in value of assets accumulated by the two spouses during the marriage is automatically divided equally.³⁷ According to one commentator, the rationale for the introduction of an accrual regime was to mitigate “the harsh consequences that ensue from a system that excludes all sharing.”³⁸ Nevertheless, couples are free to have a regime of complete separation of property by explicitly excluding accrual in their ante-nuptial contract, and a significant proportion of couples marrying in the years immediately following the passage of the *Matrimonial Property Act 88 of 1984* opted to do so.³⁹

The *Matrimonial Property Act 88 of 1984* radically reformed South Africa’s law of marital property.⁴⁰ Prior to its passage, a husband’s “marital power” and both the community of property and separation of property regimes existed in South Africa.⁴¹ As the South African Law Reform Commission clarified, under this system, “Courts were thus given a discretion in

³³ S. 14 of the *Matrimonial Property Act 88 of 1984* provides, “a wife in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act”; and s. 15(1) provides, “[a] spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.”

³⁴ See s. 15 of the *Matrimonial Property Act 88 of 1984*.

³⁵ Upon death, the other half is awarded to the heirs of the deceased spouse. See H.R. Hahlo, *The South African Law of Husband and Wife, Fifth edition* (Wynberg, South Africa: Juta & Co., Ltd., 1985), p. 326.

³⁶ See s. 2 of the *Matrimonial Property Act 88 of 1984*.

³⁷ See s. 3 of the *Matrimonial Property Act 88 of 1984*: “The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.”

³⁸ J. Sinclair, *The Law of Marriage, Volume 1* (Kenwyn, South Africa: Juta & Co., Ltd., 1996), p. 142.

³⁹ *Ibid*, pp. 199–200.

⁴⁰ See, e.g., H.R. Hahlo, *The South African Law of Husband and Wife* (supra), p. 153 and J. Sinclair, *The Law of Marriage* (supra).

⁴¹ H.R. Hahlo, *The South African Law of Husband and Wife* (supra), p. 153.

distributing marital estates to avoid the inequity (*that is especially likely to arise in cases of separation of estates*) of one spouse leaving the marriage empty-handed.” [emphasis added]⁴²

The *Matrimonial Property Act 88 of 1984*, which abolished the marital power and mandated the equal power of spouses with respect to the joint estate, was “developed in recognition of the inability of women, especially those divorced with child-care responsibilities, to achieve some degree of financial security” and was intended “to ensure that, on divorce, women share assets built up during marriage.”⁴³ As one human rights organization has noted, women in South Africa who have married in community of property generally feel more secure and empowered than those who marry under other marital property regimes.⁴⁴

2. Ethiopia

Ethiopia’s approach to marital property is delineated in the *Revised Family Code of 2000*, which — in contrast to a community of property regime — only renders property acquired *during* marriage “**common property**.” Common property includes all income, all property acquired either jointly by the spouses or by either spouse during marriage, and “[u]nless otherwise stipulated in the act of donation or will, property donated or bequeathed conjointly to the spouses.”⁴⁵ “Personal property,” which is defined as any property possessed on the day of marriage, or acquired after marriage by succession or donation, is excluded from common property, and can be administered freely by the spouse who owns it.⁴⁶ Article 63 of the *Revised Family Code of 2000* reinforces the joint nature of common property by stipulating that “[a]ll property shall be deemed to be common property even if registered in the name of one of the spouses unless such spouse proves that he is the sole owner thereof.”

In contrast to an accrual regime, common property is jointly administered pursuant to Article 66 of the *Revised Family Code of 2000*, and Article 67 mandates equal rights in decisions related to common property, such that “[t]he spouse who performs an act of management in respect of common property is duty-bound to inform the other spouse thereof.” Further, the *Revised Family Code of 2000* requires the agreement of both spouses for the performance of certain acts such as the sale of common immovable property,⁴⁷ and empowers a court to revoke the act if one of the spouses entered into such obligations without the other spouse’s agreement.⁴⁸ Upon divorce, the *Revised Family Code of 2000* permits each spouse to reclaim his or her personal property.⁴⁹ Common property is to be divided equally between the spouses,⁵⁰ and where this is

⁴² South African Law Commission, *Project 90: The Harmonisation of the Common Law and the Indigenous Law, Discussion Paper 74 Customary Marriages*, August 1997, p. 117.

⁴³ J. Sinclair, *The Law of Marriage*, (supra), p. 141.

⁴⁴ COHRE, *Bringing Equality Home* (supra), p. 120. Another reason cited for this feeling is because women married pursuant to the *Recognition of Customary Marriages Act of 1998* are able to register their marriages and have proof of them.

⁴⁵ See Article 62 of the *Revised Family Code of 2000*.

⁴⁶ Article 57 of the *Revised Family Code of 2000* provides, “The property which the spouses possess on the day of their marriage, or which they acquire after their marriage by succession or donation, shall remain their personal property.”

⁴⁷ See Article 68 of the *Revised Family Code of 2000*.

⁴⁸ See Article 69 of the *Revised Family Code of 2000*.

⁴⁹ See Article 86(1) of the *Revised Family Code of 2000*, which provides, “Each spouse has the right to retake his personal property in kind where he shows that he is the sole owner thereof.”

not possible, “the inequality of the shares in kind shall be set off by the payment of sums of money.”⁵¹ Upon the death of one spouse, women have a *de jure* right to an equal portion of common property.⁵²

Civil, customary and religious marriages in the Addis Ababa and Dire Dawa Administrations of Ethiopia are governed according to the *Revised Family Code of 2000*, thus providing coherency and consistency by addressing all forms of marriage and by setting basic conditions that all marriages must meet in order to be recognized as valid. While there are a number of challenges related to implementation of the property provisions in the *Revised Family Code of 2000*,⁵³ the fact that married women need not prove their monetary contribution to property acquired during marriage before they are entitled to a share of it ensures they receive half of the value of common property upon divorce or the death of their spouse.

3. England

In England, the powers of the courts in determining the allotment of property on the breakdown of marriage is governed by the *Matrimonial Causes Act 1973*, as amended by the *Matrimonial and Family Proceedings Act 1984*. Although these Acts do not establish a specific marital property regime, the landmark House of Lords decision in *White v. White* set out the basic principle of fairness, non-discrimination and a “**yardstick of equality**” — the standard against which determinations regarding the division of marital assets upon marriage breakdown are to be checked.⁵⁴ In *White v. White*, Lord Nicholls described the implicit objective of matrimonial property law to be “to achieve a fair outcome,” which requires that “the division of labour chosen by the husband and wife, or forced upon them by circumstances ... should not prejudice or advantage either party.”⁵⁵ As such, “equality [in the division of property] should be departed from *only if, and to the extent that, there is good reason for doing so.*” [emphasis added]⁵⁶ The subsequent House of Lords decision in *Miller v. Miller* reaffirmed that when a marriage partnership ends, “each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. *Fairness requires no less.*” [emphasis added]⁵⁷ The exceptional

⁵⁰ See Article 90 of the *Revised Family Code of 2000*.

⁵¹ See Article 91(2) of the *Revised Family Code of 2000*.

⁵² See Article 689 of the *Civil Code of Ethiopia Proclamation No. 165 of 1960*. See also COHRE, *Bringing Equality Home* (supra), p. 52.

⁵³ For example, customary laws pertaining to divorce and inheritance that discriminate against women in regards to property ownership and control continue to be applied in some communities. According to Ashenafi and Tadesse, “in the absence of sustained advocacy and monitoring of its implementation, most rural and urban women continue to operate under the customary laws, remaining to this day, outside the ambit of the state initiated civil code.” M. Ashenafi & Z. Tadesse, *Women, HIV/AIDS, Property and Inheritance Rights: The Case of Ethiopia*, 2005, p. 17.

⁵⁴ *White v. White*, [2000] U.K.H.L. 54; 3 W.L.R. 1571, para. 25.

⁵⁵ *Ibid.* at paras. 23–24.

⁵⁶ *Ibid.* at para. 25. Lord Nicholls held that the “yardstick of equality” did not mean a legal presumption of equality or equality of result, but that equality should be a “general guide” to which deviations should be the exception and must be justified.

⁵⁷ *Miller v. Miller, McFarlane v. McFarlane*, [2006] U.K.H.L. 24, para .16. In *Miller*, the House of Lords affirmed the reasoning in *White v. White*.

financial earnings of one party, for example, would not normally be considered a factor diverting away from equality of division of assets.⁵⁸

The *Matrimonial Causes Act 1973* as amended also enumerates factors which a court has a duty to consider when dividing matrimonial property. First, it specifies that a court must have regard for all of the circumstances of a case with “first consideration” being given to the welfare of any children of the family.⁵⁹ This emphasis on the interests of children was a statutory ratification of the existing trend towards protecting the custodial parent, which in the vast majority of cases is the mother.⁶⁰ The Act also expressly directs a court to assess the “contributions of the parties to the welfare of the family, including any contribution by looking after the home or caring for the family.”⁶¹ This was affirmed in *White v. White*, where the court held that “there is no place for discrimination between husband and wife and their respective roles There should be no bias in favour of the money-earner and against the home-maker and the child-carer.”⁶² Further, the Act stipulates that a court should take into consideration the present and probable future financial situation of both spouses.⁶³ As such, where a woman’s earning capacity has been reduced by her time spent in the care of children and in the home, she has recourse to a division of matrimonial property that addresses this reality. English courts today will normally exercise these powers so that a woman will have a claim to the property, which she also earned by her contributions to the welfare of the family, and actual title to property is rarely relevant anymore.⁶⁴

A number of marital property systems distinguish between property acquired *during* the marriage and property acquired *before* the marriage or *via inheritance*, and subject only the former to division. In England, however, the House of Lords in *White v. White* held that equal division of the latter assets may also be fair and should be considered, and that such a distinction carries little or no weight where the claimant’s needs cannot be met without recourse to these other types of property.⁶⁵ A woman may, therefore, be entitled to her spouse’s inheritance or property acquired prior to marriage if this is required in order to meet her financial needs.

⁵⁸ According to the court in *Miller*, “Parties should not seek to promote a case of ‘special contribution’ unless the contribution is so marked that to disregard it would be inequitable. A good reason for departing from equality is not to be found in the minutiae of married life.” See *Miller v. Miller*, *ibid.* at para. 67.

⁵⁹ See s. 25(1) of the *Matrimonial Causes Act 1973*.

⁶⁰ M.A. Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* (Chicago: Chicago University Press, 1996), p. 205.

⁶¹ Other considerations governing the court’s exercise of discretion in the division of matrimonial property include the income, earning capacity and resources of the parties; their financial needs and obligations; the standard of living enjoyed before the breakdown of the marriage; the age of the parties and the duration of the marriage; any disabilities; the conduct of the parties if it would be inequitable to disregard it; and any possible lost benefits. See Section 25(2) of the *Matrimonial Causes Act 1973*.

⁶² *White v. White* (supra), at para. 24.

⁶³ S. 25(2) of the *Matrimonial Causes Act 1973* provides, “...the court shall in particular have regard to the following matters — (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire; (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future....[and] (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family.”

⁶⁴ S.M. Cretney and J.M. Masson, *Principles of Family Law* (supra), p. 116.

⁶⁵ *White v. White* (supra), at para. 43.

Upon the death of a spouse, the law of either wills or intestacy governs. The *Inheritance (Provision for Family and Dependents) Act 1975* gives a court powers to redistribute the estate of a deceased person to make “reasonable financial provision” for a surviving spouse.⁶⁶ In particular, section 3(2) of the Act mandates a court to consider, in making an order to redistribute the estate of a deceased spouse, “the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.” Where a spouse dies without a will, the *Administration of Estates Act 1925* provides a framework for the division of the estate depending on whether the deceased left a surviving spouse and children. One salient feature of this law is “the generosity with which it treats the surviving spouse.”⁶⁷ For example, where a deceased leaves a surviving spouse but no children or other immediate relatives, the surviving spouse is entitled to the whole estate.⁶⁸ Where a deceased leaves a spouse and children, the surviving spouse is entitled to all personal chattels, a “statutory legacy” of a fixed amount, and a life interest in one-half of the balance of the estate.⁶⁹

4. Canada

In Canada, each province governs its citizens with respect to marriage and the division of marital property, although provincial laws pertaining to the division of marital property universally operate on the overarching presumption of an equalization of marital property upon marriage dissolution, notwithstanding the formal title on such property. Marital property is equalized on the basis that spouses contribute equally to the fulfillment of joint responsibilities inherent to marital relationships. Whether this contribution is financial or otherwise is largely irrelevant to a spouse’s entitlement upon marriage dissolution.

For example, in the Canadian province of British Columbia, the property of each spouse is separately administered and owned during marriage, but pursuant to the *Family Relations Act*, each spouse upon marriage breakup is entitled to an undivided half interest in “**family assets**,” defined as “property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose.”⁷⁰ It is therefore irrelevant how or when the asset was acquired; if it was used for a family purpose, it is a family asset and should be shared by the spouses. Where the equal division of family assets would be “unfair,” having regard to, amongst other considerations, “the duration of the marriage ..., the duration of the period during which the spouses have lived separate and apart ... [and] the needs of each spouse to become or remain economically independent and self sufficient,” section 65(1) of the *Family Relations Act* allows courts discretion to reapportion property.

Upon the death of a spouse, a surviving spouse may be entitled to a share in the deceased spouse’s property under succession law. Where there is a will, the deceased’s estate is governed by the British Columbia *Wills Act*.⁷¹ While this law makes no provision for the surviving spouse to inherit a share of the deceased’s estate, the British Columbia *Wills Variation Act* allows a

⁶⁶ See ss. 1(2) and 2 of *Inheritance (Provision for Family and Dependents) Act 1975*.

⁶⁷ S.M. Cretney & J.M. Masson, *Principles of Family Law* (supra), p. 203.

⁶⁸ See s. 46 of the *Administration of Estates Act 1925*.

⁶⁹ See s. 46 of the *Administration of Estates Act 1925*.

⁷⁰ See ss. 56 and 58(2) of the *Family Relations Act*, R.S.B.C. 1996, Ch. 128.

⁷¹ *Wills Act*, R.S.B.C. 1996, Ch. 489.

court to vary the provisions of a will to allow for the “adequate, just and equitable” maintenance and support of a surviving spouse or children.⁷² This provision has been applied by the Supreme Court of Canada to vary a testator’s will to provide a greater portion of his estate to his surviving spouse on the basis of the length of their marriage, the surviving spouse’s contributions to the family assets, and the fact that she would have been entitled to maintenance and a share in the family assets had the parties separated.⁷³ Where there is no will, the deceased’s estate is administered and distributed in accordance with the British Columbia *Estate Administration Act*.⁷⁴ Section 83 of the Act provides that when the deceased leaves a surviving spouse but no children, the deceased’s entire estate goes to the surviving spouse. If a deceased leaves a surviving spouse and children, a formula is applied mandating a preferential spousal share.⁷⁵

In the Canadian province of Ontario, the *Family Law Act*, which is premised on the recognition of “the equal position of spouses as individuals within marriage,” a slightly different approach to marital property applies, involving a “community of gains” or “*accrual*” approach to dividing property upon marriage breakdown.⁷⁶ During marriage, the property of each spouse is separately administered and owned. Upon divorce or the death of a spouse, Ontario’s *Family Law Act* mandates the equalization of net family property, which is defined as the value of all the property (with the exception of certain excluded property such as property acquired by gift or inheritance) that a spouse owns on the date of divorce or the date before death, after deducting the spouse’s debts and other liabilities and the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage.⁷⁷ A spouse with lower net family property is entitled to one-half of the difference between his or her net family property value and that of their spouse. Section 5(3) of the *Family Law Act* permits a spouse to apply to have the net family property divided as though their marriage had terminated if there is serious danger that the other spouse will “imprudently deplete” his or her net family property. Section 5(6) of the Act also allows a court to award less than half the difference between the net family property if in the court’s view it would be unconscionable, having regard to, for example, a spouse’s failure to disclose his or her existing debts and liabilities during the marriage, or a spouse’s reckless depletion of his or her net family property. If the deceased spouse leaves a will, section 6(1) of the *Family Law Act* requires the surviving spouse to choose between receiving his or her entitlement under the will or through the equalization of net family property.

The impetus for the shift away from a separation of property regime across Canadian provinces towards the equalization of marital assets upon marriage breakdown has been attributed by many to a 1973 decision of the Supreme Court of Canada, in which the Court rejected Irene Murdoch’s claim to a one-half interest in a ranch under her husband’s title.⁷⁸ The Court’s treatment of the case was at odds with the “increasingly common attitudes of the day, which demanded equality for women, economic recognition of women’s traditional role and contribution, and acceptance

⁷² See s. 2 of the *Wills Variation Act*, R.S.B.C. 1996, Ch. 490.

⁷³ *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807.

⁷⁴ *Estate Administration Act*, R.S.B.C. 1996, Ch. 122.

⁷⁵ See s. 85 of the *Estate Administration Act*, R.S.B.C. 1996, Ch. 122.

⁷⁶ See preamble to *Family Law Act*, R.S.O. 1990, Ch. F.3

⁷⁷ See ss. 4 and 5 of *Family Law Act*, R.S.O. 1990, Ch. F.3.

⁷⁸ See, e.g., M.S. Clapton, “*Murdoch v. Murdoch*” (supra); N. Bala, “Family Law in Canada and the United States” (supra), p. 18; and *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423.

of women's changing status in society."⁷⁹ Consequently, in the six years following the widely criticized decision, Canadian provinces enacted legislation imposing some form of equitable distribution regime.⁸⁰ Such reforms effectively enhanced the rights of married women to property acquired in their husbands' names during marriage. Today, provincial laws governing marital property explicitly recognize marriage as a form of partnership, the equal position of spouses within marriage, and the need to provide for the orderly and equitable settlement of the affairs of the spouses on the breakdown of the marriage.⁸¹

Conclusion

Each of the approaches described above recognizes, to varying degrees, women's economic and non-economic contributions to marriage and allows for an equalization of marital assets upon marriage dissolution. While women are still entitled, in each of these jurisdictions, to own property independently or in association with others, legislators have recognized the inadequacy of ordinary laws of property in the administration and distribution of marital property and have enacted specific statutory regimes governing marital property in recognition of the economic partnership and interdependence between spouses.⁸²

However, a regime that is premised on the equalization of marital assets upon marriage dissolution is more protective of women's right to marital assets, than a regime premised on judicial discretion for the re-allocation of property between spouses, as is the case in England. While the English approach to marital property provides a number of factors for judges to consider in the exercise of their discretion,⁸³ the outcome will often be unpredictable. This may in turn affect parties' negotiating positions. As one commentator has contended, the bargaining power on division of assets upon marriage dissolution of a woman married under English law, who *prima facie* owns nothing (unless it is her separate property), is less than her counterpart married under a regime in which she is presumed to own half the marital assets.⁸⁴ Moreover, a marital property framework premised on judicial discretion requires women to pursue an equitable distribution of matrimonial property in court, involving additional time and expense to litigate in an uncertain area, as opposed to a statutory regime that more clearly and directly

⁷⁹ See M.S. Clapton, "*Murdoch v. Murdoch*" (supra), p. 203. For example, in 1967 a Royal Commission on the Status of Women was established and in 1970, the Commission recommended that provinces and territories amend their law "in order to recognize the concept of equal partnership in marriage so that the contribution of each spouse to the marriage partnership may be acknowledged and that, upon dissolution of the marriage, each will have the right to an equal share in the assets accumulated during marriage otherwise than by gift of inheritance received by either spouse from outside sources." See M.S. Clapton, "*Murdoch v. Murdoch*" (supra), pp. 210 and 215.

⁸⁰ N. Bala, "Family Law in Canada and the United States" (supra), p. 18. See also M.S. Clapton, "*Murdoch v. Murdoch*" (supra), pp. 226–228.

⁸¹ See, e.g., preambles to Ontario's *Family Law Act*, R.S.O. 1990, Ch. F.3 and Nova Scotia's *Matrimonial Property Act*, R.S. Ch. 275, s. 1.

⁸² D. Hambly and J. N. Turner, *Cases and Materials on Australian Family Law* (supra), p. 352.

⁸³ Considerations governing the court's exercise of discretion in the division of matrimonial property include contributions of the parties to the welfare of the family, including any contribution by looking after the home or caring for the family; the income, earning capacity and resources of the parties; their financial needs and obligations; the standard of living enjoyed before the breakdown of the marriage; the age of the parties and the duration of the marriage; any disabilities; the conduct of the parties if it would be inequitable to disregard it; and any possible lost benefits. See s. 25(2) of the *Matrimonial Causes Act 1973*.

⁸⁴ C. Forder, "Might and Right in Matrimonial Property Law" (supra), p. 49.

defines how a division is to be calculated. This is a serious practical consideration for women in contexts where few will have the resources to pursue such litigation, particularly those living with or widowed by HIV, many of whom will also be deterred from litigation because of the common belief that family and property issues are of a private nature — to be addressed within the home or community without state involvement. Not surprisingly, the inaccessibility of legal services has been cited as a key reason why women do not assert their rights in terms of family and property law.⁸⁵

Equality is but an illusion where the law recognizes a woman's right to an equitable distribution of property upon marriage dissolution only if she has the resources to pursue a case in court. Given the inaccessibility of litigation, particularly for women and people living with HIV, and the possibility for uncertainty and unfairness where broad judicial discretion is permitted, women are more likely to acquire an equitable portion of marital assets if their marriage is governed by a marital property framework that is based on a statutory assumption of an equalization of marital assets upon marriage dissolution.

⁸⁵ See, e.g., Canadian HIV/AIDS Legal Network, *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Vol. Two: Family and Property Issues, Mod. 6-8*, 2009.