

**SINGLE PARENT FAMILIES AFTER DIVORCE :  
A DISCUSSION OF THE CAUSES OF  
AND POSSIBLE LEGAL SOLUTIONS TO THE  
'FEMINISATION OF POVERTY'**

by

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**SUMMARY**

**OF**

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In recent times, the incidence of single-parent families has increased rapidly with the principle cause being the rising divorce rate. The vast majority of these single-parent families are headed by women and a predominantly common factor in these households is the extent to which they are financially impoverished after divorce. This situation has given rise to the phenomenon known as the feminisation of poverty, where women are seen to make up the majority of the poor. This study examines the many varied factors contributing to this phenomenon and discusses some of the general solutions offered world-wide to address these poverty-stricken households. An assessment is then made of those legal solutions most appropriate for South Africa.

**KEY TERMS**

Single-parent families ; Women ; Poverty ; Divorce ; Maintenance ; Matrimonial Property; Social Security ; Constitution ; Gender Inequality ; Customary Marriages.

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## INTRODUCTION

The family, in one form or another, is the recognised basic social unit of all societies and women are seen to be inseparable from it. Most functions assigned to the family are allocated to the women within it; women are usually the carers, the nurturers, the educators, the source of stability, and increasingly, they are the major cash contributors.<sup>1</sup>

There is no simple view of the family, nor can there be a universally applicable definition, for there is great diversity and divergence of family types. Furthermore, the family is a living, evolving institution, affected by socio-economic factors as well as by changes that shape the social environment in which it functions. Consequently, families are undergoing constant change, due to numerous factors, including the quest for equality between men and women, equality on the grounds of sexual orientation and the widening opportunities for women as well as shifts in values, particularly those supporting individualism.<sup>2</sup>

New family types have been seen to emerge. We have witnessed the support structure of the extended family giving way to that of the nuclear family<sup>3</sup>, which has also recently been seen to diminish in importance, with one-parent families becoming increasingly prevalent.<sup>4</sup>

There are various causes of one-parent families, an important source being births to childless mothers outside a marriage or consensual union. The *major* driving force, world-wide, behind the rapid increase in the incidence of one-parent families, has however been the rising divorce rate<sup>5</sup> and the emphasis in this discussion will be on these post divorce households.

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<sup>1</sup>O'Connell H *Women and the Family* at 10.

<sup>2</sup>*Ibid.*

<sup>3</sup>Described as consisting of a couple and their dependent children.

<sup>4</sup>Between 1971 and 1986 the number of one-parent families in Great Britain increased by nearly 80%. See Ermisch JF *Lone Parenthood An Economic Analysis* at 1. However, it is the United States, where the two parent household with the husband the sole breadwinner constitutes less than 10% of American families (Sinclair J *The Law of Marriage* at 6 fn 5), which has the highest incidence of one-parent families in the world. Ermisch *ibid.*

<sup>5</sup>In USA, Weitzman L "The Divorce Law Revolution and the Illusion of Equality : A view from the United States" in Freeman(ed) *Essays in Family Law 1985 - Current Legal Problems* notes at 106 that only 18% of the nearly 10 million female-headed families are headed by an unwed mother, whereas over 50% are headed by divorced mothers and the remaining 31% by separated mothers. See also Ermisch *ibid* who comments at 7 that of the total increase in one-parent families in Britain between 1971 and 1984, 71% is attributable to the increase in the number of divorced or separated mothers. Furthermore, according to the Market Research Africa's March 1996 Report as quoted in "Failed by their Fathers"

Although definitions vary, according to common usage, a one-parent family may be described as a "parent with her (his) dependent children, either living as a separate household or living in the household of others"<sup>6</sup>. The vast majority of these single parent families are headed by women,<sup>7</sup> and this discussion will accordingly focus on these female-headed households.

The increase in female-headed households has been the major cause of the phenomenon known as the "feminisation of poverty" which describes a situation where women make up the majority of the poor<sup>8</sup>. The feminisation of poverty has been noted by analysts since the early 1980s and sociologist Diana Pearce, who coined the phrase, was one of the first to point to the critical link between poverty and divorce for women.<sup>9</sup> Indeed, a common factor in female-headed households after divorce, where, most commonly, the woman has custody of the minor children, is the extent to which they are financially impoverished<sup>10</sup>.

Indeed, the feminisation of poverty is a major social problem that desperately needs to be addressed. In the United States where 90% of single-parent families are headed by women, half of these families remain below the poverty line.<sup>11</sup> In South Africa too, within all race groups, female-headed households are significantly poorer than average households.<sup>12</sup>

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*Tribute* newspaper 03-06-96 at 39, almost half of South African marriages end in divorce and over half of all township homes are now run by women.

<sup>6</sup>Ermisch *ibid* at 5.

<sup>7</sup>This fact is reflected in Hahlo's definition, namely that "it is one where the child lives with its mother while the Father's parental obligations are reduced to the duty to make appropriate financial contributions to the child's maintenance." Hahlo HR "Recent trends in family law: a global survey" 1983 *Acta Juridica* at 16.

<sup>8</sup>O'Connell *supra* n1 at 60.

<sup>9</sup>Diana Pierce, "The Feminisation of Poverty: Women, Work and Welfare," *Urban and Social Change Review*, February 1978; and Diana Pierce and Harriette McAdoo, "Women and Children: Alone and in poverty" (Washington DC: National Advisory Council on Economic Opportunity, September 1981) at 1.

<sup>10</sup>Ermisch *supra* n4 concludes at 19 that one-parent families are clearly poorer than two parent families and Weitzman *supra* n5 at 106 notes further that after divorce, single parent households headed by women, experience a 73% decline in their standard of living in the first year after divorce, while their former husbands experience a 42% rise in their standard of living.

<sup>11</sup>Rhode DJ *Justice and Gender: Sex Discrimination and the Law* at 126. She also notes that studies have shown that women are twice as likely as men to be poor and that female single parents are five times as likely as men to be poor. Furthermore, in England, Eekelaar J and Maclean M *Maintenance After Divorce* 1986 at 68, 90-9 report that only 11% of divorced single mothers enjoyed incomes above the poverty line compared with 71% of the general population.

<sup>12</sup>The project for statistics on the living standards and development of 1993 found that the average total household income for female-headed households was R1 141.00 per month compared to R2 089.00 for all households, although women now constitute nearly 40% of all employees in formal employment in South Africa. Clark C "Gender Issues" *Family Law Service* at 10.

Some of the poorest households, however, are those found in the rural areas of South Africa.<sup>13</sup> These households are headed by *Black* women and accordingly it becomes apparent that race is a factor that must be taken into account when analysing poverty trends. Sinclair<sup>14</sup> confirms that Black women heading single-parent families in South Africa suffer more acutely than their white counterparts and she attributes this especially to the hardships experienced as a result of apartheid.<sup>15</sup>

While this discussion focuses on poverty-stricken *women* heading one parent families, it is necessary to draw attention to the plight of the children living within these structures for there is a clear and inevitable link between the feminisation of poverty and the "paedonisation of poverty".<sup>16</sup> Certainly, a woman's income has been shown to be vital to the well being of a child, for while a child's nutrition has been shown to correlate positively with the size of the mother's income; this is not the case for the father's.<sup>17</sup>

Major health problems have also been seen to plague the poverty-stricken female-headed family and studies have shown that the majority of infant and child deaths are related to poor socio-economic conditions and could be prevented.<sup>18</sup>

In order to fully understand the nature and causes of the feminisation of poverty within single parent households headed by women, it is necessary, from a women's rights perspective, to reflect upon the disadvantageous position of women in the family and in society as a whole.

Furthermore, while this discussion focuses on the economic problems facing single-parent families, one needs to bear in mind that in addition to financial concerns, single parenthood and its heavy responsibilities also inevitably results in physical and emotional stress, loneliness and isolation. This further mitigates against any attempts to improve the position of the impoverished mother and her dependants.

Impoverished single parent families in South Africa are highlighted and Africa's "special conditions of poverty, ignorance, disease and lack of political

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<sup>13</sup>Refer to "General Political Structure" in *First South African Report to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee 1997* (Hereafter referred to as SA CEDAW Report) at 6.

<sup>14</sup>*Supra* n4 at 141.

<sup>15</sup>See *infra* at 17 and 18 for a discussion of such hardships.

<sup>16</sup>De Jong M "New trends regarding the maintenance of spouses upon divorce" 1999 THRHR at 81; Hahlo *supra* n7 at 16.

<sup>17</sup>O'Connell *supra* n1 at 60.

<sup>18</sup>Article 12 SA CEDAW Report *supra* n13 at 1.

sophistication”<sup>19</sup> borne in mind as contributing towards female impoverishment within these households. The many cultural, social and religious factors which are seen to foster the feminisation of poverty are also discussed.

What becomes apparent, is that there is an urgent need to address the many problems facing female-headed households, and real solutions need to be found in order to alleviate their impoverishment. This discussion analyses the many varied factors contributing to this impoverishment<sup>20</sup> and canvasses some possible legal solutions which have been used world-wide in a bid to solve the poverty problem within these households.<sup>21</sup> The focus then shifts to considering those legal solutions most appropriate for South Africa,<sup>22</sup> and the Constitution<sup>23</sup> is used as a backdrop against which to measure all possible scenarios.

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<sup>19</sup>See Nhlapo “International Protection of Human Rights and the Family : African Variations on a common theme” 1989 *International Journal of Law and the Family* at 6.

<sup>20</sup>See Chapter One.

<sup>21</sup>See Chapter Two.

<sup>22</sup>See Chapter Three.

<sup>23</sup>Constitution of the Republic of South Africa Act 108 of 1996 (Hereafter referred to as “The Constitution.”)



## CHAPTER ONE

### CAUSES OF THE PHENOMENON KNOWN AS THE “FEMINISATION OF POVERTY”

#### 1.1 GENDER INEQUALITY AND THE EXISTENCE OF THE PUBLIC / PRIVATE DISTINCTION WITHIN SOCIETY.

Within society, the existence of the traditional public/private dichotomy, which involves a clear distinction being made between the male public world of work, legal activity, politics and culture and that of the private female world of the family and the home, where nurturing support is given for the separate public activities of men<sup>24</sup>, has traditionally been enforced by the state.

According to traditional liberal thinking that rejects state intrusion into private matters, there should be no state intervention into those issues falling within the private sphere. Michael Freeman<sup>25</sup>, notes however, that this ideology has denied protection to women, for “far from being a liberal stance, protecting areas of freedom, the insistence on the privacy of the family is designed to perpetuate male domination and female subordination, seen by the state as crucial to the assumed stability of the family unit.”

Zearfoss<sup>26</sup> confirms that the private sphere is that area of private relations where women are furthest from attaining equality, and yet, this is precisely the area that legal reforms have traditionally ignored. Issues such as domestic violence, child care, family planning, the marital relationship and various deeply ingrained societal perceptions and prejudices, are recognised as some of the most pressing concerns for women today, but because states have defined them as private, they are often outside the scope of government control.<sup>27</sup>

Indeed, current Western Feminist theory holds that economic and psychological discrimination are two critical factors responsible for the disadvantageous position of women in society. Both factors are seen to exist primarily within the private world of the family; economically, women are disadvantaged by their double role (as

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<sup>24</sup>See Charlesworth H “The Public/Private Distinction and the Right to Development in International Law” 1992 *Australian Yearbook of International Law* at 190.

<sup>25</sup>Quoted by Sinclair *supra* n4 at 20.

<sup>26</sup>See “Note, the Convention for the Elimination of All Forms of Discrimination against Women; Radical, Reasonable, or Reactionary” 1991 *Michigan Journal of International Law* 903 at 904.

<sup>27</sup>*Ibid.*

reproducers of children in the biological sense and of the labour force in the wider sense) of supporting and servicing their male breadwinners and psychologically, marriage and the family are seen as prisons in which the women's psychological inferiority is imbibed and ensured.<sup>28</sup> Sinclair points out that feminist writings have attributed the subordination of women mainly to their child care responsibilities and to their inability to achieve economic equality with men in employment, despite formal equality in our law.<sup>29</sup>

In the workplace, the premise is that the ideal worker is a man with no child care responsibilities whereas the accepted role for a woman is that of child-carer and homemaker. Accordingly, women are socialised into believing that any work commitment on their part is subsidiary and must be defined in such a way so as to take into account their child-care responsibilities. Indeed, Catherine O'Donovan points out that the public/private distinction fosters economic and social subordination of women by deeming the qualities necessary for success in the home unnecessary, even unsuitable for the workplace, and by entrenching the idea that women in the home are inevitable because of their different reproductive capacity.<sup>30</sup>

Marriage itself also contributes to the economic inequalities between men and women and to the different structural opportunities that the two spouses face at divorce.<sup>31</sup> With married women giving priority to their family roles and married men giving priority to their careers, women often forgo further education and occupational gain for homemaking and childcare. Married men on the other hand give priority to their careers acquiring more education and on-the-job experience. As a result, women find themselves being unable to compete on the same level as men in the employment market. Their earning capacity is also diminished, while the earning capacity of men is enhanced. Girls are also raised by their parents to assume their stereotyped role, with parents preferring to invest in the skills of their sons in order to prepare *them* for successful financial careers as adults.

The outcome of all this is that women tend to select lower paid, part time employment in order to "fit in" with their allocated household responsibilities and out

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<sup>28</sup>Nhlapo *supra* n19 Indeed, many feminist writers have drawn attention to the hierarchical and patriarchal structure of most family types.

<sup>29</sup>*Supra* n4 at 28.

<sup>30</sup>Sinclair *supra* n4 at 19.

<sup>31</sup>Brigitte Clark "History of the Roman-Dutch law of marriage from a socio-economic perspective" in Visser DP (ed) *Essays on the History of Law* (1989) at 159 highlights women's weaker financial position and notes that "women's need for financial support results frequently from the disabilities imposed on them during marriage."

of economic necessity rather than with a view to establishing careers.<sup>32</sup> Furthermore, with many of these positions offering less opportunity for advancement, the prospect of developing a stable career is drastically diminished. The low wages paid to women also weaken their position in the labour market and maintain their economic dependence on men which in turn becomes the rationale for women's ongoing responsibility for housework and liberates men for better, higher-paid and more secure positions. Sinclair describes the oppression of women as taking the form of a circle of impoverishment where

"The greater the disparity between husband and wife in economic resources, the greater the husband's dominance in decision-making is likely to be. Disadvantage is then compounded by the fact that the inferior vocational advancement, and hence financial status, and hence decision-making power experienced by a woman, fosters further unfair distribution between her and her husband of domestic burdens such as child care and care of the aged - which in turn further limits her occupational advancement."<sup>33</sup>

Paid domestic work is an example of a major area of employment for women in South Africa and one for which they have the necessary skills.<sup>34</sup> It is, however always low-paid, low-prestige and often exploitative work which isolates women from other workers, but which is chosen because it is a ready means of earning an income.

Furthermore, of those women who have employment, many are faced with continuing inequalities arising from past discrimination which is associated primarily with race and gender.<sup>35</sup>

The unfortunate consequence is that when the marriage terminates, the woman is left financially impoverished, unable to support herself or her children, and accordingly reliant on her ex-husband and the state for maintenance, being unable to attain a sufficient degree of economic independence. The above reality is often not taken into account by our judges, who have been shown to stereotype women as "Superwoman" i.e. "who despite years of unpaid labour in the home, can leap into the workforce upon divorce, fully equipped to earn a good living and care for her

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<sup>32</sup>*Ibid* at 139.

<sup>33</sup>Sinclair *supra* n4 at 24.

<sup>34</sup>Almost 20% of all employed women are in domestic service, and another 15% are in clerical jobs. See O'Regan "Equality at Work and the limits of the law: Symmetry and individualism in anti-discriminatory legislation" in Murray *Gender and the New South African Legal Order* at 65.

<sup>35</sup>In South Africa the recent Employment Equity Act No 55 of 1998 reflects the need to redress these inequalities.

children with no help from others.”<sup>36</sup> Such stereotyping disadvantages women within the judicial process for it negatively influences the financial aspects of divorce settlements for them<sup>37</sup>and therefore contributes to their impoverishment. Weitzman's research in the USA also suggests that judges are unaware of the difficulties and costs of obtaining child care, unrealistically optimistic about women's job opportunities and very concerned about the husband's need to maintain a decent standard of living (and enough income).<sup>38</sup> As a result, judges rarely order the husband to part with more than one-third of his income to support his wife and children. He therefore retains two-thirds of his income for himself, while his former wife and children are expected to live on the remaining third. As this proves impossible, other sources of state support must be sought.<sup>39</sup>

## 1.2 THE DIVORCE REVOLUTION AND THE “NO-FAULT / CLEAN-BREAK” APPROACH.

This century<sup>40</sup> has witnessed radical changes in Western society's view of marriage and divorce. Marriage was initially perceived to be a lifelong bond, with the husband universally seen as the major breadwinner. Divorce was met with social censure and when it did occur, it was fault based i.e. implying that in every divorce action there was a guilty party and an innocent party, the naive assumption being that only one spouse, the innocent one, wanted a divorce and the guilty one was to be punished for his quasi-criminal behaviour. Where the wife was innocent, the husband as the guilty party was required to pay his wife maintenance until she died or remarried. If the wife was the guilty party, she forfeited her claims to support after divorce.<sup>41</sup>

Today marriage is no longer viewed as a permanent union and divorce has become an established feature of modern life. Divorce based exclusively on fault has virtually disappeared from Western legal systems; it has been replaced by no-fault divorce. Accordingly, we have seen a shift from the matrimonial offence to marital breakdown as a ground of divorce.

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<sup>36</sup>O'Sullivan M “Stereotyping and male identification: “Keeping women in their place”” in Murray *supra* n34 at 188.

<sup>37</sup>*Ibid* at 189.

<sup>38</sup>Weitzman *Supra* n5 at 97.

<sup>39</sup>*Ibid*.

<sup>40</sup>Particularly the post World-War Two period - see Hahlo *supra* n7 at 1.

<sup>41</sup>Hahlo *ibid* at 2.

In the United States, this "legal revolution in divorce"<sup>42</sup> was launched in California, in 1970, when that state instituted the first no-fault divorce law. South African law took far longer to modernise and it was only in 1979 that the Divorce Act<sup>43</sup> was enacted in order to substitute marital breakdown for fault as the main ground for divorce.<sup>44</sup>

Weitzman<sup>45</sup> notes that these no-fault divorce laws undercut the old system of alimony and property awards for "innocent" spouses<sup>46</sup>. They also created new norms for dividing property and awarding alimony thereby treating wives as full and equal partners in the marital relationship. The object of social policy was no longer to compensate a wronged wife for the break up of her marriage, but to achieve as soon as possible self sufficiency and a clean break; where the aim was to terminate the financial obligations between the spouses as soon as possible. This approach involved making awards for *interim* maintenance if the circumstances deemed it necessary, while the possibility of permanent alimony was ruled out. Indeed, with women's growing workforce participation and formal gender equality having been attained, the very concept of support was deemed to be archaic.

In the USA the Uniform Marriage and Divorce Act of 1970 adopted the "clean break" as its primary objective. Following divorce, there would be no continuing obligation from one spouse to another. The only surviving relationship would be with the children. To the extent that one spouse needed assistance, an adjustment in the property division, rather than a support or maintenance award was preferred because the property division could be finalised with the divorce.

In its report in 1981, the English Law Commission also recommended that greater weight be given to the importance of each spouse becoming self-sufficient and achieving a once and for all settlement and the Matrimonial and Family Proceedings Act of 1984 incorporated these principles. According to Sinclair<sup>47</sup> the Act was premised on the belief that divorced women were living (parasitically) off their former husbands, when in fact there was little, if any evidence that this was happening. The aim of the Act was therefore to abolish the mythical "meal ticket for life" for divorced

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<sup>42</sup>See generally Weitzman *The Divorce Law Revolution: The unexpected Social and Economic Consequences for women and Children in America* (1985).

<sup>43</sup>Act 70 of 1979 (Hereafter referred to as the "Divorce Act").

<sup>44</sup>Section three creates two grounds for divorce: irretrievable breakdown and mental illness or continuous unconsciousness.

<sup>45</sup>*Supra* n5 at 81.

<sup>46</sup>With the shift from fault to failure as a ground of divorce, the justification for linking the duty to pay maintenance after divorce to "guilt" has disappeared. *Need* became the basis upon which maintenance is based.

<sup>47</sup>*Supra* n4 at 148.

women and it accordingly reduced the liability for maintenance by ex-husbands of their ex-wives. The effect of this was that divorced women continued to become more and more dependent on the state in order to support their one-parent families. But the curtailment of the private maintenance obligation was not compensated for by increased benefits from the state; for while women became entitled to the same National Insurance benefits as men, the value of these benefits declined for everyone and became less significant as a source of income maintenance. And so, although formal equality was attained for divorced women, this was coupled with increasing poverty.

The “clean break” principle was also applied in Germany where the right to maintenance was restricted to exceptional cases by the *Marriage Law Reform Act of 1977*.<sup>48</sup>

In South Africa, the High Court in *Beaumont v Beaumont*<sup>49</sup> held that there is no doubt that our courts will exercise their powers to impose a clean break subject to the important qualification that the circumstances permitted it.<sup>50</sup> And the way the “clean break” is probably best achieved in SA is to grant only a redistribution order in terms of section 7(3) of the Divorce Act (provided of course that the facts permit this) and grant no maintenance order in terms of sec 7(2) of the same Act.<sup>51</sup>

According to Weitzman, the major unanticipated and unintended result of the no-fault reforms and emphasis on a “clean break”, has been widespread disruption and increased poverty for divorced women and their children. In analysing the reasons therefor, Weitzman<sup>52</sup> points to the fact that when the legal system treats men and women “equally” at divorce, it ignores the very real economic inequalities that marriage creates. It also ignores the economic inequalities between men and women in larger society.

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<sup>48</sup>Sinclair *ibid*.

<sup>49</sup>1987 1 SA 976 A. See also *Archer* 1989 2 SA 885 E.

<sup>50</sup>Such circumstances as foreseen by the English Law Commission were: in a brief, childless marriage where the wife had an income or earning capacity; and also in a long marriage where there was enough capital to divide.

<sup>51</sup>See Van Zyl L “Maintenance” *Family Law Service* at 17. This is what was ordered in *Archer supra*. In *Beaumont supra* at 993 G-H it was noted that the court *a quo* had considered granting only a redistribution order but had decided against this because the payment of a capital sum by the husband would have been too onerous for him as well as being insufficient for the wife and her children’s needs.

<sup>52</sup>*Supra* n5 at 83.

Sinclair, who is also critical of the trend towards applying the "clean-break" principle, points out that "equality in theory has resulted in inequality in practice."<sup>53</sup> She comments that arguments for the abolition of maintenance "ignore the fact that the ideology of equality has not been followed by material equality...and that division of property helps only those with property."<sup>54</sup> According to Sinclair, the problem is that post-divorce maintenance is still relied on by many divorced women, not only for their own support, but for the support of the children in their custody. Indeed, many of these women have the full time job of caring for the couple's children after divorce, have also taken over many of their husband's family responsibilities and face greater burdens and greater expenses as single parents. Even if many divorced mothers wanted to be self sufficient, their economic reality compels continuing support from their former husbands. And so, as noted by Clark<sup>55</sup>, it is clear that the "clean break" principle is inconsistent with this ongoing duty of support towards children. Indeed, it may be said that the main cause of impoverishment in female-headed households is inadequate child support<sup>56</sup> and the absence of spousal support as well, makes it further impossible for divorced mothers to extricate themselves and their families from their poverty-stricken circumstances.

### **1.3 CONSEQUENCES OF THE DIFFERENT MATRIMONIAL PROPERTY SYSTEMS IN SOUTH AFRICA**

Prior to the Matrimonial Property Act 88 of 1984,<sup>57</sup> if parties to a marriage did not enter into an antenuptial contract, their marriage was deemed to be in community of property, profit and loss, and the wife was subject to her husband's marital power. Under this system the spouses shared a common estate which fell under the control of the husband. Each of the parties was entitled to an undivided half share in the joint estate. To this extent, the wife was assured of a share in the estate, although it was the husband who exercised full control of the estate during the marriage; he alone had full contractual capacity and he bound the joint estate by contracts, whether they were good or bad.

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<sup>53</sup>Sinclair J "Marriage: is it still a commitment for life entailing a lifelong duty of support?" 1983 *Acta Juridica* at 81. See also Kaganas and Murray "Law and Women's rights in South Africa: An overview" in Murray *supra* n34 at 14.

<sup>54</sup> Sinclair *ibid*.

<sup>55</sup>Clark B "Child support: Public or Private?" 1992 *THRHR* 277 at 278.

<sup>56</sup>*ibid* at 279.

<sup>57</sup>Hereafter referred to as the "Matrimonial Property Act."

By entering into an antenuptial contract, one could exclude the undesirable consequences of universal community of property. The disadvantage, however, was that while the wife was able to enjoy independent legal and contractual capacity during the marriage, she was not entitled to any share of her husband's estate on termination. This was so in spite of the essential role played by her in caring for the children and acting as housekeeper, while her husband was able to pursue a career and build up substantial assets of his own. The unfortunate consequence was that many women were seen to emerge from failed marriages, with little or no assets, no job, little or no chance of successfully entering or re-entering the labour market in middle age and the responsibility of caring for the children of the marriage, typically also battling to secure the payment of maintenance from absent fathers. This failure to ensure the equitable distribution and sharing of property on divorce resulted in tremendous hardship and was a major cause of poverty in female-headed families.

In order to mitigate the above-mentioned harsh consequences of the two systems, the Matrimonial Property Act came into force on 1 November 1984. This Act attempted to combine the advantages of both matrimonial property systems and to eliminate the disadvantages. It sought to achieve this by retaining the community system but in a modified form,<sup>58</sup> curtailing the husband's marital power so that both parties had equal rights of administration over the joint estate<sup>59</sup> and by introducing the accrual system as part of the antenuptial contract.<sup>60</sup>

The accrual system, which involves calculating the difference between the accruals in the respective estates of the spouses and sharing it equally,<sup>61</sup> amounts to a deferred sharing of profits<sup>62</sup> Sinclair notes that the introduction of the accrual system has definitely eased the plight of impoverished wives, entitling them to "share" on divorce. She does, however point out that the accrual system is frequently excluded in antenuptial contracts, in situations where for example, the wife is ignorant of what is involved and where it is the husband (or the husband's father) who has instructed the attorney.<sup>63</sup>

With regard to marriages concluded before 1 November 1994 in terms of an antenuptial contract by which the community of property, profit and loss, as well as

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<sup>58</sup>See sections 14-17.

<sup>59</sup>See sections 11 and 12.

<sup>60</sup>See sections 2-10.

<sup>61</sup>See sections 3 and 4.

<sup>62</sup>Sinclair *supra* n4 at 142.

<sup>63</sup>Where for example, the parties are young and the prospects of increased wealth for the husband are good.



accrual sharing in any form, are excluded, the court is empowered in terms of section 7(3) of the Divorce Act to grant a redistribution order. Such an order involves the ordering of one spouse to transfer certain assets, or part thereof to the other. The court's discretion is thus restricted and limited to only a small group of marriages. It will come to an end once all marriages entered into prior to these Acts have been dissolved.

The operation of the judicial discretion has saved many divorced women from financial disaster, "and society from some of its many penurious one-parent families"<sup>64</sup> But the question arises: what about those marriages entered into *after* the commencement of the two Acts which don't incorporate any form of sharing? We have already seen that the accrual system is frequently excluded by the more dominant party (frequently the husband) in whose best interests it is to do so. As a result, a group of people (mostly women) has been seen to emerge that is just as vulnerable as those people targeted by the Acts - but which is denied the relief granted to its counterparts who luckily married before the cut-off dates.<sup>65</sup>

#### 1.4 MAINTENANCE

The maintenance system in South Africa consists of the private judicial maintenance system, which is based on the legal duty to support one's dependants and the state maintenance system, which is intended to act as a safety net, supporting children and dependent persons when the private judicial system fails to do so. Many problems and shortcomings have been apparent in both systems and have undoubtedly contributed to the feminisation of poverty. In its report in 1996, the Lund Committee on Child and Family Support<sup>66</sup> identified several areas where the law of maintenance and its administration was in need of reform and also recommended changes to the state maintenance system. In July 1997, on the basis of this report, the South African Law Commission<sup>67</sup> conducted a review of the maintenance system<sup>68</sup> in order to investigate the operation of the Maintenance Act 23 of 1963 and to recommend steps

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<sup>64</sup>Sinclair *supra* n4 at 144 ft 385.

<sup>65</sup>Sinclair *ibid* criticizes the selective operation of the discretion and submits it should be extended. See *infra* at 28 for further discussion.

<sup>66</sup>Hereafter referred to as the "Lund Report."

<sup>67</sup>Hereafter referred to as the "SALC".

<sup>68</sup>Issue paper 5 project 100: "Review of the maintenance system" (Hereafter referred to as the "SALC Maintenance Report").

to try to ensure a more effective maintenance system. Their investigations led to the promulgation of the new Maintenance Act 99 of 1998.<sup>69</sup>

#### 1.4.1 PRIVATE JUDICIAL MAINTENANCE

Maintenance is regulated by the Divorce Act which makes provision for court orders relating to maintenance<sup>70</sup> and the division of assets<sup>71</sup> and the maintenance court hears all maintenance applications.

Burman and Berger<sup>72</sup> note that a great deal of patience and perseverance is required of most women when using the maintenance system; lengthy delays, lack of personnel, loss of work hours and high transport costs due to frequent appearances in the maintenance office and court increase costs. Child care arrangements are also frequently problematic. Clark<sup>73</sup> also brings to our attention the fact that there have been many complaints about the treatment, attitudes and facilities available at the maintenance courts.

As a result of the delays, expense and frustration generally associated with making a maintenance application, women are often discouraged from doing so, especially because, even if they do take the time and go to the trouble and expense of getting a maintenance order, compliance therewith cannot be guaranteed. Similarly, they will also be loathe to approach the court again at a later date for a much needed increase in amount (which, at the outset, is often woefully inadequate). These women accordingly face an ongoing and uphill battle to attain the means sufficient to support and raise their children.

With regard to the amount of maintenance awarded, Burman and Berger's research indicates that in South Africa, generally, such amounts are small and inadequate.<sup>74</sup> Weitzman too, confirms that insufficient maintenance awards appear to be a world-wide problem.<sup>75</sup> During Burman and Berger's research, they found that the attitude of many of the maintenance officials was that high maintenance awards result in a

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<sup>69</sup>Hereafter referred to as the "1998 Maintenance Act." Discussed *infra* at 33 and 34.

<sup>70</sup>Secs 7(1) and (2).

<sup>71</sup>Secs 7(3)-(6).

<sup>72</sup>Burman S and Berger S "When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa: Part One and Part Two" 1988 4 *SAJHR* 194-206 and 334-354 at 197.

<sup>73</sup>Clark B "The new Maintenance Bill" *De Rebus* December 1998 63 at 64.

<sup>74</sup>*Supra* n72 at 204. See also Clark *Ibid*.

<sup>75</sup>Weitzman *supra* n5 at 97.

higher likelihood of default and that small maintenance payments are preferable to no maintenance at all. Accordingly, during maintenance negotiations, women are often persuaded to accept a low amount offered by a man, on the grounds that they always have the option of asking for an increase at a later date. As we have seen, due to the difficulties inherent in this process, this does not often occur.

Vast discrepancies in the amounts awarded in the different courts have also been brought to light.<sup>76</sup> This is due to the fact that decisions concerning how much maintenance to award are made largely at the discretion of the officials concerned and the criteria used vary, with incorrect assumptions sometimes being made.<sup>77</sup> The decision whether or not to proceed with a maintenance inquiry is also at the discretion of the maintenance officer and this was perceived as a major problem by the SALC,<sup>78</sup> since some officers fail to proceed without adequate reasons.

And so, maintenance officers are seen to act incompetently at times, to the detriment of the women involved; no wonder, as recent studies have shown that only a small part of their training is devoted to maintenance issues and many of their course notes are apparently out of date.<sup>79</sup> They also receive no gender-sensitivity training and may not be aware of the costs involved in raising a child. Furthermore, they are not trained in accountancy to understand the income and assets issues on which they must decide.<sup>80</sup>

A major problem world-wide that significantly contributes to the impoverishment of these single parent families headed by women, is the failure of those liable parents - typically fathers - to comply with their maintenance obligations and to support their families with whom they do not live.<sup>81</sup> Burman and Berger note that while high rates of default on maintenance payments are a universal phenomenon<sup>82</sup> their research indicates particularly high percentages of men failing to pay in South Africa.<sup>83</sup>

Non compliance with a maintenance order may be as a result of negative feelings of bitterness or hostility towards the ex-spouse.<sup>84</sup> Lack of contact with the children may

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<sup>76</sup>See Burman and Berger *supra* n72 at 203 and 4.

<sup>77</sup>Refer to Burman and Berger *ibid* at 204 for examples.

<sup>78</sup>See SALC Maintenance Report *supra* n68 at paras 4.26 and 4.27.

<sup>79</sup>Lund Report at 57.

<sup>80</sup>Lund Report at 54.

<sup>81</sup>See Sinclair *supra* n4 at 149.

<sup>82</sup>Confirmed by Weitzman *supra* n5 at 97.

<sup>83</sup>Burman and Berger *supra* n72 at 340.

<sup>84</sup>Certainly the adversarial nature of divorce proceedings which heightens the tension and widens the communication gap between the parties on divorce, mitigates against attaining a co-operative and

also be a given reason, or, very often, it is simply the social attitude that there is no responsibility upon persons to support their dependants, especially where children are brought up in single-parent households.<sup>85</sup> The low measure of social disapproval with which a non-custodial parent's failure to support his/her children is met (especially if the non-custodial parent is the father) is indicative of this attitude. This attitude has permeated not only our society, but also the administration of our maintenance system.<sup>86</sup> Sinclair points out<sup>87</sup>, however, that default is not always a reflection of the morality of the debtor; indeed, with our poor economic climate and high rates of unemployment, a large proportion of men simply cannot pay. Many are required to support a second family and the bottom line is: their resources are totally inadequate to meet their obligations of support.

In South Africa, the principal means of enforcing a maintenance order is by a criminal prosecution for a contravention of the Maintenance Act; it being intended that the threat of criminal sanction be enough to ensure compliance. However, it has become routine practice for courts to simply suspend sentences for the failure to comply with a maintenance order<sup>88</sup> and accordingly, the criminal sanctions have lost their efficacy.

Furthermore, an order which, prior to the 1998 Maintenance Act, could only be made upon conviction for the failure to comply with a maintenance order, is the garnishee order, which authorises the payment of maintenance from the offender's earnings. Unfortunately these orders do not cater for self-employed persons and they lose their effectiveness if the offender changes employment.<sup>89</sup>

What becomes apparent from the above discussion is the fact that the judicial maintenance system is ineffective in ensuring that support is given to those entitled thereto.<sup>90</sup> The consequence is that increasing numbers of impoverished people are turning to the State Maintenance Grant as their means of subsistence.<sup>91</sup> This places great strain on the already limited welfare resources of South Africa.

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workable post-divorce relationship. Refer *infra* at 36 where divorce mediation as an alternative is discussed.

<sup>85</sup>SALC Maintenance Report *supra* n68 at 5.

<sup>86</sup>*Ibid* at 6.

<sup>87</sup>*Supra* n4 at 149.

<sup>88</sup>SALC Maintenance Report *supra* n 68 at 26. *SvBotha* 1988 4 SA 402 C at 40 E-G.

<sup>89</sup>See *Burman and Berger supra* n72 at 205. *Clark supra* n73 at 67 submits that the order could be improved by being structured in such a way that it does not apply to a specific employer.

<sup>90</sup>The Maintenance Act of 1998 attempts to address many of the shortcomings outlined above, however, as discussed *infra* at 33 and 34, further reform is still required.

<sup>91</sup>Lund Report at 49.

## 1.4.2 STATE MAINTENANCE

In its report in 1996, the Lund Committee made recommendations for the replacement of the then current state maintenance grant system<sup>92</sup> This system, which had successfully reached a small proportion of poor mothers in need of support (primarily Coloured, Indian and White), but had omitted the poorest majority, rural African women and children,<sup>93</sup> was to be substituted by a flat rate child support benefit with other welfare grants being continued.<sup>94</sup> As a result of this, the Welfare Laws Amendment Act 106 of 1997 was enacted in terms of which the new child support grant came into effect on 1 April 1998, entitling the primary caregivers of children under the age of seven to a grant of R100 per month per child.<sup>95</sup> While it is clear that the new grant system attempts to 'do the greatest good for the greatest number', many concerns and criticisms have been raised, for instance, the grant is a small allocation when one considers that 87% of children under 12 are nutritionally compromised.<sup>96</sup> Furthermore, Naidoo and Bozalek ask: "How meaningful is such a benefit in the absence of other inter-sectoral policy measures in place to include the needs of children from six years upwards and poor rural women/caregivers who are not targeted by the grant? Many women in poverty will be plunged into worse conditions."<sup>97</sup>

And so, to conclude, it is unfortunately very apparent that neither the private nor the state maintenance systems are successful in alleviating the phenomenon of the feminisation of poverty to any significant degree.

## 1.5 THE EFFECTS OF APARTHEID

After a long struggle against Apartheid, South Africa's first democratic elections took place in April 1994. A new government was elected. A new era had begun. Today, all laws and policies enacted to bolster the apartheid system have been removed from

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<sup>92</sup>Which involved paying mothers R700 per month, this comprising a R430 caregiver allowance and R135 for each of two children from birth to the age of 18 years. *Agenda* "The Poverty Issue" No 33 of 1997 at 30.

<sup>93</sup> Lund "Poverty alleviation and the Lund Committee" *Agenda forum discussion* 24 March 1998 (Durban).

<sup>94</sup>Lund Report at 87.

<sup>95</sup>See s4; Also R418 reg 3, 9(3) *Regulation Gazette* 18771/31-3-1998 In terms of the regulations, a primary caregiver will qualify for the grant only if the income of the household of which he/she is a member is below R9600 per annum or, if the child and the primary caregiver live either in a rural area or in an informal dwelling, R13 200 per annum. (R413 reg 16, GG 18771/31-3-1998).

<sup>96</sup>*Agenda supra* n92 at 31.

<sup>97</sup>*Ibid.*

the statute books, some examples of which included the Population Registration Act<sup>98</sup>, the Group Areas Act<sup>99</sup> and the Land Acts<sup>100</sup> that denied black people fair access to immovable property. Those policies designed to deter urbanisation, such as those that retarded the provision of urban housing for Black people, are also now relics of an unfortunate past.<sup>101</sup> One cannot, however, afford to stop here; stringent measures to redress the considerable harm done must continue to be taken.

The extent of the harm caused by Apartheid policies is far-reaching. For our purposes, it is clear that it was a major cause of the impoverishment of women heading single-parent families - especially in the rural areas where women and children dominate the population.

Forced removals in terms of the Group Areas Act took many people from where they were living to dump them in poverty-stricken areas without services, infrastructure or adequate means of supporting themselves. Influx control and pass laws and regulations allowed African men to move to the "white" urban areas to work, but confined many African women to the poverty-stricken rural areas. Blacks were thus denied their traditional family-based support systems. They were also excluded from the mainstream of state-based social benefits.<sup>102</sup> Land ownership patterns and restrictions imposed by laws such as the 1913 and 1936 Land Acts also resulted in further hardships.<sup>103</sup> The result in South Africa today is that those (mainly women) living in rural areas often have neither industrial nor commercial jobs, nor land on which to support themselves. They exist outside of the formal sector where they live below the subsistence level on the fringes of the economy, with no way out of the poverty in which they are trapped.

## 1.6 AFRICAN CUSTOMARY LAW

Any discussion which includes an account of African society, must consider the traditional dimension, for the vast majority of African peoples live in rural areas and regard themselves as subjects of customary law. Unfortunately for women, customary law is seen to openly subordinate and discriminate against them. This

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<sup>98</sup>Act 30 of 1950.

<sup>99</sup>Act 36 of 1966.

<sup>100</sup>ie 1913 and 1936 Land Acts.

<sup>101</sup>Sinclair *supra* n4 at 10.

<sup>102</sup>See Sachs *A Protecting Human Rights in a New South Africa* 1990 at 67 where he points out that Whites received higher pensions as well as far more protection from unemployment insurance and workers' compensation law than Blacks. Discussed by Sinclair *supra* n4 at 26.

<sup>103</sup>SA CEDAW Report Part 4 at 11.

immediately becomes apparent when one considers that in terms of customary law, women are always subjected to the authority of a patriarch, moving from the control of their guardians to that of their husbands.<sup>104</sup> The male head of the family represents the family and a woman cannot generally contract or litigate without assistance.<sup>105</sup> Husbands control virtually all the family's property while women's rights are confined to personal items.

Women are accordingly denied access to and rights in land and this is so in spite of the fact that African women are the ones labouring in both subsistence and cash crop agriculture. This unfortunate fact is a key contributing factor world-wide to women's inability to overcome poverty.<sup>106</sup>

Women are also precluded from inheriting property because "custom" dictates that control of property accrues to men, and so as widows, they are often left destitute, with male relatives (in the name of custom) forcing them from family property and failing to support the surviving family as "custom" theoretically requires.<sup>107</sup>

With regard to the termination of a customary union by divorce, in terms of customary law, the husband retains a reserved right to initiate the divorce process, while a woman cannot procure a divorce on her own. She is dependent on her male guardian who received the lobolo (bride-wealth), to negotiate the divorce on her behalf. She will return to her parents' home with only her possessions, to be re-absorbed into the family. Any property acquired during the marriage would remain with her husband to form part of his estate.

Furthermore, under customary law, the husband is not required to pay any maintenance for his ex-wife, the traditional justification being that lobolo, which had already been paid on marriage, should theoretically still be available as security for the wife, to be used in case of divorce. It is clear, however, that this real purpose of *lobolo* has become greatly distorted, for today, it often takes the form of cash settlements, and this money is often used up in meeting ordinary day to day expenses and existing debts. Divorced customary wives are thus left impoverished with no means to support themselves and their families.

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<sup>104</sup>See Bennet TW *African Customary Law* at 167 and 228.

<sup>105</sup>*Ibid* at 328-9 and 330-1.

<sup>106</sup>SA CEDAW Report part 4 at 11.

<sup>107</sup>Cooke R (ed) *Human Rights of Women : National and International Perspectives*. (1994) at 101.

Many of the objectionable features of African Customary Law which undoubtedly may be said to have contributed to the feminisation of poverty, have been addressed by the new Recognition of Customary Marriages Act 120 of 1998.<sup>108</sup> Some of its commendable features include section 6 which declares that women have in all respects a status equal to that of their husbands. Equality between the spouses is thereby entrenched. With regard to the dissolution of a marriage,<sup>109</sup> divorce proceedings may be instituted by either spouse and marriages can only be terminated by decree of the court on the basis of an irretrievable breakdown. Furthermore, where there is no other customary marriage, the marriage is automatically in community of property,<sup>110</sup> and accordingly, there is equal sharing of property unless the parties agree otherwise. The institution of lobolo is retained, but where it was once an integral component of the marriage ceremony, it is now an optional accessory. Furthermore, while the Act does not expressly prohibit polygyny, it assists the wife in a polygynous relationship by providing structures to regulate conduct and create protections for the wife, by, for example, providing for the registration of customary marriages.<sup>111</sup>

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<sup>108</sup>Hereafter referred to as the "Customary Marriages Act." Note: word limit does not permit an in depth analysis of this Act.

<sup>109</sup>See section 8.

<sup>110</sup>See section 7(2).

<sup>111</sup>See section 4.



## CHAPTER TWO

### WORLDWIDE, GENERAL LEGAL SOLUTIONS TO THE PROBLEM OF THE FEMINISATION OF POVERTY

Thus far, the widespread post-divorce economic suffering of women heading single-parent families has been established and it has been shown that this suffering has resulted from a number of factors, some of which will prove to be easier to remedy than others. Some of the possible legal solutions to the feminisation of poverty will now be analysed. What will become apparent from such an analysis is that the impoverishment suffered by single-parent families is not an inevitable post-divorce consequence; living in such a family does not *have* to mean financial hardship for its members.<sup>112</sup>

In recent years there have been many suggestions for combating the feminisation of poverty. Many of these have focused on changes in the labour market. There has also been a great emphasis on increasing social welfare benefits and many legal systems have developed sophisticated social security systems to alleviate the poverty and hardship caused by the breakdown of intimate relationships. Another possibility is also to change the way that the courts allocate property and income at divorce<sup>113</sup> and Sinclair notes that many legal systems have modified their law of matrimonial property to ensure that on divorce women share the assets built up during the marriage.<sup>114</sup> A further option is also to refine the law compelling private maintenance.

#### 2.1 SOCIAL SECURITY

In an attempt to alleviate the poverty of one-parent families, elaborate social security systems have been designed and set up in many jurisdictions. The duty of support has thus been seen to shift from the husbands to the state.<sup>115</sup>

In 1974 in England, the Finer Committee reported on various ways to alleviate the problem of poverty-stricken single-parent families.<sup>116</sup> The report suggested that a

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<sup>112</sup>See Weitzman *supra* n5 at 105.

<sup>113</sup>*Ibid* at 107.

<sup>114</sup>Sinclair *Supra* n4 at 141.

<sup>115</sup>Sinclair *ibid* at 150.

<sup>116</sup>See generally *Report of the Committee on one-parent families* (vol 1) 1972.

guaranteed maintenance allowance should be payable to all one-parent families, irrespective of the reason for the absence of one parent. The state would have the right to claim a contribution from the liable parent but it would be the primary source of support for the child and the custodial parent.<sup>117</sup> Due to financial reasons, this proposal was not adopted in England, however it has been seen to run fairly successfully in New Zealand<sup>118</sup> where domestic purposes benefits are payable to single parents who have one or more dependants.<sup>119</sup> An obligation is imposed on a parent who is liable to support a dependant child, to contribute towards the cost of the benefit and if he fails to make the required contribution, the social welfare authorities can seek to recover it as a debt. What becomes apparent from this system is that it is no longer assumed that children should look primarily to the resources of absent parents to determine their standard of living; the *state* has decided what these living standards should be and it provides uniform criteria for all children in single-parent families.<sup>120</sup>

In Sweden, socio-economic policy aims to redistribute resources in favour of families with children and although parents remain obliged to support their children (including step-children), parental obligations have been far less onerous since 1978, with the state's role ever increasing. Indeed, Clark notes<sup>121</sup> that both public and private law support regimes are child centred. The premise is that a child, one of whose parents is absent, has a special need for support which the state provides.

A contrary approach has emerged in England, where in setting up a child support agency to trace absent fathers<sup>122</sup>, the British government is seen to be reluctant to subsidise child care costs any further.<sup>123</sup>

In assessing the role that the state should play in assisting female-headed families, it may be argued that "public interest" is against extensive state support of these families - the taxpayer/public being reluctant to finance other people's divorce or to allow absent fathers to avoid their obligations to their children. Furthermore, one needs to bear in mind the traditional public/private dichotomy which upholds the liberal philosophy that the state should not intrude into those areas considered to be

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<sup>117</sup>Clark *supra* n55 at 281.

<sup>118</sup>Clark *ibid*.

<sup>119</sup>In terms of sec 6 of their Social Security Act 1973.

<sup>120</sup>Clark *supra* n55 at 282.

<sup>121</sup>*Ibid*.

<sup>122</sup>The agency has powers to prescribe the method by which maintenance payments are made and can order the attachment of earnings. A standard formula also assesses the amount a parent should be liable to pay. See Clark *ibid*.

<sup>123</sup>Clark *ibid* at 282.

private. Whatever the merits of these arguments, they become overshadowed by the desperate needs of impoverished single-parent families that must be met.

Certainly, the appropriate philosophy behind social welfare law needs to be worked out in every jurisdiction and in particular the relationship between private maintenance, public law and children's rights.<sup>124</sup> Perhaps the optimum mix/outcome is for parents to remain primarily responsible to ensure suitable living conditions, but that the state should be obliged in cases of need to provide material assistance and support programs, particularly with regard to nutrition, clothing and housing and to take all appropriate measures to secure the recovery of maintenance for the child.

## 2.2 THE SHARING OF ASSETS AND INCOME AT DIVORCE

With regard to the legal remedy of sharing assets and income at divorce, Sinclair notes<sup>125</sup> that German law achieved this by a system of deferred sharing of acquests (Zugewinnngemeinschaft) and equalisation of pension benefits (Versorgungsausgleich).

English law reformed by creating a judicial discretion to redistribute property on divorce. This was achieved by the enactment of the Matrimonial Proceedings and Property Act of 1970. By mitigating the consequences of a matrimonial property regime which involved a strict separation of property, the Act recognised marriage as a partnership. It introduced a judicial discretion on divorce, thereby making it possible for assets such as the matrimonial home as well as business assets of the husband to be shared on divorce. Its aim was that the parties should as far as possible be placed in a position as if the marriage had not broken down.<sup>126</sup>

In America, almost all states, regardless of whether they are common law states<sup>127</sup> or community property states, also allow divorce courts the discretion to divide the accumulations of the parties during marriage, and to award alimony.

South African law, by virtue of the addition of the accrual system<sup>128</sup> to our then existing matrimonial property systems, and sec 7(3)<sup>129</sup> of the Divorce Act which

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<sup>124</sup>*ibid.*

<sup>125</sup>Sinclair *supra* n4 at 141.

<sup>126</sup>Sinclair *ibid* ft 379. This Act was however later amended by the Matrimonial and Family Proceedings Act of 1984. See *postea* at 9.

<sup>127</sup>ie states that have adopted English rules regarding marital property.

<sup>128</sup>Discussed *postea* at 12.

permits the court a limited discretion to redistribute property, contains elements of both types of sharing. We thus have structured matrimonial property rules as well as a judicial discretion existing to determine the outcome of property division on divorce. It is submitted that this combined approach is suitable for South Africa,<sup>130</sup> however in order for the harshness of the structured matrimonial systems to be mitigated, it will be necessary for the judicial discretion to be extended.<sup>131</sup>

However, although it is clear that various legal systems do, in different ways, make provision for the equitable allocation of resources following divorce, in many instances, this does not prove to be a particularly significant potential remedy for the impoverished single mother. For research has indicated that most divorcing couples have very little property to divide.<sup>132</sup> In America, most have cars, furniture or TV sets, but only half own or are purchasing a home at the time of divorce.<sup>133</sup> Furthermore, much of the tangible property owned has a low monetary value.

What has become apparent is that instead of accumulating traditional types of family property, divorcing couples today have invested in something else - namely the benefits derived from employment termed the "new property". Their real wealth lies in this type of investment and consists of their "career assets" described by Weitzman<sup>134</sup> as those tangible and intangible assets that are acquired as a part of either spouse's career or career potential. The assets include pension and retirement benefits, a licence to practice a profession or trade, medical and hospital insurance, the goodwill of a business, and entitlements to company goods and services.<sup>135</sup>

These career assets acquired during marriage (their value being the lifetime value of the spouse's increase in earning capacity that occurred during marriage) are often far more valuable than the tangible assets acquired and Weitzman argues that they should accordingly be included in the marital estate to be divided at divorce. She bases this viewpoint on two premises, firstly that career assets are joint property acquired in much the same way as other property currently recognised as marital property by the courts and secondly, that it is impossible to have an equal or

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<sup>129</sup>Discussed *postea* at 12 and 13.

<sup>130</sup>Indeed, Oldham J T "The Economic Consequences of Divorce in the United States" in *Frontiers of Family Law* (ed Bainham and Pearl) at 152 is of the opinion that a stark choice between rules and discretion is unrealistic and that one needs to search for the optimal mix. See also Sinclair *supra* n4 at 146.

<sup>131</sup>See *infra* at 28 and 29.

<sup>132</sup>See Oldham *supra* n130 at 142.

<sup>133</sup>*Ibid.* See also Weitzman *supra* n42 at 108-9.

<sup>134</sup>Weitzman *ibid* at 110.

<sup>135</sup>*Ibid.*

equitable division of marital property if these assets are excluded; for to exclude career assets is to “skew the apportionment in favour of the primary working spouse, and to assure an inequitable and unfair division of marital property.”<sup>136</sup>

However, not all legal commentators are in favour of widening the traditional concept of property to include career assets<sup>137</sup> and some of the objections relate to the contingent nature of career assets,<sup>138</sup> while others focus on the difficulty of calculating their value.<sup>139</sup>

Although Oldham is one academic cautious of including career assets in the marital estate, he does recognise the concept of “career damage” incurred during the marriage due to family obligations.<sup>140</sup> He notes that career damage due to roles assumed during marriage can be substantial and submits that the private law divorce system should be responsible for compensating a wife for career damage incurred due to a workforce disruption caused by family responsibilities during the marriage.<sup>141</sup> What Oldham does, then, is to link the notion of career damage with the remedy of post-divorce income sharing. He proposes that a system of short-term, transitional post-divorce equal income-sharing be created in order to equalise the post-divorce living standards of the two resulting households.<sup>142</sup> This sharing would be in addition to child support and any property award, and would, according to Oldham, provide significant assistance to divorcing mothers when they most need it.<sup>143</sup>

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<sup>136</sup>*Ibid.*

<sup>137</sup>See Oldham *supra* n130 at 143.

<sup>138</sup>For instance if a worker is killed or dies he or she may never receive the benefits of his/her education or retirement plan. Such contingencies, it is argued, make career assets theoretical but not real. Sinclair *supra* n4 at 142 ft 22. Eekelaar *supra* n11 at 90 also notes that the sharing of these assets presses the ideology of equality too far. It demands equality of result stretching into the long-term future, which may be incoherent and objectionable because it assumes that if the claimant spouse had not married, she would have had a successful career and marriage prevented her from doing so. In fact, she most probably would have married someone else and chosen the same lifestyle.

<sup>139</sup>Since many career assets involve future benefits, calculating their value requires actuarial projections.

<sup>140</sup>Oldham *supra* n130 at 147.

<sup>141</sup>*Ibid* at 149.

<sup>142</sup>*Ibid* at 154 for more detail. He points out that studies in America have shown that the economic problems of young divorced women are transitional and the greatest needs appear to be experienced shortly after divorce. See Carbone J “Feminism, Gender and the consequences of Divorce” in Freeman M *Divorce: Where Next?* at 205 for a discussion of the principle justifications for income sharing, where various criticisms are also outlined.

<sup>143</sup>Martha Fineman is also in favour of proposals for income sharing. See Carbone *Ibid.* Furthermore, Eekelaar and Maclean too favour an equalisation principle being applied on divorce. *Supra* n11 at 104-37, as does O’Sullivan who opines that if there is to be financial suffering, it is essential that it is shared equitably. See *supra* n36 at 189.

## 2.3 REFINEMENT OF THE LAW COMPELLING PRIVATE MAINTENANCE

In order to solve the problem of female impoverishment after divorce, it is submitted that it is essential for the law to recognise and enforce an on-going maintenance obligation. Indeed, the efficient enforcement of maintenance laws is critically important for female-headed families after divorce, for such laws are a way of ensuring that the wealth reaching the hands of the absent men will ultimately benefit the children of the family.<sup>144</sup> Furthermore, maintenance laws play an important role in reinforcing men's responsibilities in the domestic sphere. They do this by enforcing the financial aspect of the joint responsibility that men have, with women, of supporting their children.<sup>145</sup>

Furthermore, in addition to child support, it is submitted that divorced single mothers also require permanent spousal support.<sup>146</sup> This is particularly necessary in Southern Africa where women remain dependent on men as a result of the operation of various discriminatory practices and elements of customary law<sup>147</sup> and where there are no state-sponsored social security systems operating as an alternative source of financial assistance.

And so, the law must be shaped to ensure that both child and spousal support is forthcoming. Statutes, which may have loopholes allowing men to escape, must be tightened up and lawyers, law officials and women must be trained in the provisions of the law.<sup>148</sup> Debtors must be compelled to pay what is owing and in this regard, stringent statutory devices to locate defaulters and force them to pay or face imprisonment, have been set up in a number of jurisdictions to ensure compliance.<sup>149</sup> Indeed, harsh penalties must be enforced if defaulters are to be brought to book.

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<sup>144</sup>Armstrong A "Maintenance in Southern Africa: The role of the Law" in O'Connell *supra* n1 at 59.

<sup>145</sup>Armstrong *ibid.*

<sup>146</sup>Refer *infra* at 30-32 for more detail.

<sup>147</sup>Refer *postea* at 18-20.

<sup>148</sup>See Armstrong *supra* n144 at 60.

<sup>149</sup>Sinclair *supra* n4 at 149.

## CHAPTER THREE

### AN ASSESSMENT OF THOSE LEGAL SOLUTIONS MOST APPROPRIATE FOR SOUTH AFRICA

#### 3.1 THE PROVISION OF SOCIAL SECURITY

In terms of our Constitution, all indigent members of society have a constitutionally guaranteed right to have access to social security.<sup>150</sup> However, while it is clear that a state has both a moral and legal duty towards such people to provide for their material well being, the nature and extent of the social security against indigence which a state provides will always depend on the strength of the particular state economy and on the social and economic policies of the government. As a developing country still reeling from the effects of the iniquitous Apartheid system, South Africa, which economically is seen as a third world country with only first world elements, is still a long way removed from becoming a welfare state.

Accordingly, in searching for legal solutions to the feminisation of poverty in South Africa, it becomes necessary at the outset to discount as a real option the setting up of elaborate social security structures, for clearly, South Africa is not financially able to sustain the high cost that would be involved

Nonetheless, although South Africa does not have a comprehensive and co-ordinated system of social security, many laws and welfare services do exist which regulate social security. For instance, those that make provision for legal aid to indigent people, as well as those which provide for unemployment benefits. Health services and public housing are also provided and this entails a heavy financial and administrative burden on the state. However, if substance is truly to be given to the constitutional right to have access to social security, then a system of social security, involving co-operation and co-ordination between many state departments and between the public and the private sector on an unprecedented scale will have to be developed. As this is unlikely to occur on any large scale in the near future, other more viable and feasible solutions to the poverty problem of single-parent families need to be found.

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<sup>150</sup>See secs 27(1) and 27(2). Section 184(3) also empowers the Human Rights Commission to obtain information annually from organs of state on measures that have been taken towards the realisation of the right to *inter alia* social security.

## 3.2 THE SHARING OF ASSETS AT DIVORCE

### 3.2.1 THE JUDICIAL DISCRETION

Sinclair is of the opinion that the section 7(3) judicial discretion to distribute the assets of spouses, which is currently applicable to only a small number of marriages, should be extended to apply to *all* marriages.<sup>151</sup> Apart from the fact that the selective operation of the discretion<sup>152</sup> is probably unconstitutional due to the different treatment accorded to people in the same circumstances<sup>153</sup>, it is submitted that this extension is necessary in order to mitigate the harshness and inequity that flows from any rigid application of any matrimonial property system.<sup>154</sup>

In 1990 the Law Commission decided against extending the court's discretion. Their decision<sup>155</sup> was based on the fact that legal uncertainty would result, that there would be an infringement of contractual freedom and further, there was the possibility that the distribution of assets could be in conflict with the wishes of a party.<sup>156</sup> Many legal and feminist writers are also of the opinion that discretionary standards need to be replaced with firm and easily administered rules to overcome judicial bias.<sup>157</sup>

In spite of the above arguments, it is submitted, however, that judicial discretion must be retained; Sinclair points out that unlike Australian law where there is no starting point of equality in the division of property, thereby making the outcome of divorce litigation too uncertain,<sup>158</sup> South African law already has the advantage of structured matrimonial property systems to create the required starting point from which the discretion could operate. We would thus have the optimum mix of rules and discretion as recommended by Oldham.<sup>159</sup> In any case, granting our judges an extended

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<sup>151</sup>Sinclair *supra* n4 at 145 ft 388.

<sup>152</sup>Described *postea* at 13.

<sup>153</sup>The date of the marriage cannot serve to differentiate between people in identical circumstances. As Sinclair points out *supra* n4 at 148, this is discriminatory, the discrimination taking the form of denying to those people a remedy to relieve injustice that is granted to persons married with an identical system, but earlier.

<sup>154</sup>For example, the discretion could be used to prevent the automatic equal division of the estate, or where no sharing would otherwise have taken place, to impose some form of sharing. See Sinclair *ibid* at 145.

<sup>155</sup>See SALC Report "Review of the Law of Divorce" Project 12 of 1990 at 24. (Hereafter referred to as the SALC Divorce Report.)

<sup>156</sup>For example, in many second (or later) marriages involving elderly persons who already have families in existence, it is often the wish of those parties to keep their estates totally separate for their own respective families. SALC Divorce Report *ibid*.

<sup>157</sup>Carbone *supra* n142 at 206.

<sup>158</sup>Sinclair *supra* n4 ft 388.

<sup>159</sup>See discussion *postea* at 24 ft 30 .



discretion to redistribute money and property on divorce would hardly be a revolutionary thing to do, for judicial discretion is already extensively used; in custody awards, with regard to the guardianship of a child and in determining maintenance awards. So, as long as the guidelines and principles upon which the discretionary decision must be based are realistic and workable, the apparent disadvantage of uncertainty may be outweighed by the fact that the preservation by the court of the "utmost elasticity to deal with each case on its own facts will be conducive to a more equitable resolution of family conflicts."<sup>160</sup>

### 3.2.2 INCLUSION OF THE "NEW PROPERTY" WHEN DIVIDING THE MARITAL ESTATE.

It is submitted that if there is to be any relief for the impoverished single-parent in South Africa after divorce, serious account must be taken of the "new property" which must be included when dividing the marital estate. Recognising the principle of pension-sharing on divorce is one way of doing this, and as South African common law does not recognise this,<sup>161</sup> it was up to the legislature, acting on the advice of the Law Commission, to effect change. It did so by enacting the Divorce Amendment Act 7 of 1989 which attempted to divide the interests which one or both parties may have in a pension fund.<sup>162</sup> The provisions of the Act have, however, been criticised as being both inadequate and confusing.<sup>163</sup> In spite of these criticisms, it may be said that the Act itself does contribute positively towards ensuring a fairer distribution of assets on divorce which will assist the impoverished single parent, however, its usefulness as a real solution to impoverishment is not far reaching. For, to ask the court to make an order in respect of pension benefits is seen as a last resort for those parties who cannot otherwise make an equitable division.<sup>164</sup> The Law Commission itself<sup>165</sup> asks the parties to preferably settle their financial affairs first before interfering with pensions. The commission also suggests that its intention was for a spouse's right to a percentage of the pension interest in settlement negotiations to constitute a lever

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<sup>160</sup>Sinclair J "Financial Provision on Divorce - Need, Compensation or Entitlement?" 1981 SALJ at 481.

<sup>161</sup>On the basis that before a pension becomes payable, a pension interest is merely a *spes*- not an asset in an estate and it therefore cannot form part of the joint estate in a marriage in community of property, nor of accrual to a spouses estate, nor can it be the object of an order for the transfer of assets in terms of section 7(3).

<sup>162</sup>By defining "pension interest" and inserting sections 7(7) and 7(8), the Act identifies the nature of the pension interest and indicates how to calculate its value.

<sup>163</sup>It is beyond the scope of this discussion to canvass these criticisms, but see generally: Lane W "Pensions and divorce: dealing with pension interests" *De Rebus* December 1993 at 1090.

<sup>164</sup>*Ibid.*

<sup>165</sup>*Ibid.*

for obtaining some other compensatory benefit. Thus, for example, a contributing spouse may cede to the other spouse a policy for the equivalent value, or transfer to the other spouse a sum of money or other asset. Often, though, a person's pension interest as defined, will be found to be negligible and not worth fighting about.<sup>166</sup>

What South Africa needs to do is to expand the boundaries of the current recognised forms of property. The career asset, which is currently not taken into account when sharing the accruals or when a redistribution order is made,<sup>167</sup> *should* be given greater recognition. Indeed, a bold, enlightened approach in the recognition of new types of property needs to be adopted if we are to maximise the benefits of sharing assets on divorce.

### 3.3 MAINTENANCE REFORMS

#### 3.3.1 PERMANENT SPOUSAL SUPPORT

It has been submitted that the emphasis on the clean-break principle and general aim of the law to make women self sufficient after divorce and consequent demise of the permanent spousal support award has been a major contributing factor to the impoverishment of female-headed families. Accordingly, it is submitted that the key to improving their economic position lies in the widespread granting of permanent spousal support by our divorce courts in addition to child maintenance and any property award that may be made.

Recently in the United States,<sup>168</sup> recognition has already been given of the fact that permanent maintenance should be awarded if for example one spouse has contributed to the household or to the upbringing of the children, or where one spouse has contributed to the other spouse's career or education, or where a spouse's earning capacity is enough to maintain the standard of living of the marriage and the disparity between the two spouse's earning power.<sup>169</sup>

Insofar as South Africa is concerned, it is De Jong's submission that after divorce, although in principle spouses should bear the responsibility of supporting themselves,

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<sup>166</sup>Lane *ibid* at 1092.

<sup>167</sup>De Jong *supra* n16 at 82.

<sup>168</sup>For example in Pennsylvania, California and Florida - previously "clean-break" states. See De Jong *ibid*.

<sup>169</sup>De Jong *ibid* at 83.

there are also definite circumstances that justify the award of a permanent maintenance order to be paid by the one spouse to the other.<sup>170</sup> These circumstances include where a spouse has contributed more than his or her share to the household and the upbringing of the children and has thereby been economically denied the same opportunity as the other spouse to reach his or her full potential.<sup>171</sup>

De Jong submits that permanent spousal support should be awarded regardless of whether the deprived spouse is currently working or has the ability to do so in the future. In those cases, the award would act as a supplement to maintain a decent standard of living after divorce.<sup>172</sup> De Jong notes that this approach would have the effect of enforcing social equality, for it would encourage mothers to work while at the same time, fathers would come to realise that if they did not assume their rightful share of the housework and upbringing of the children during the marriage, they would be compelled to support their ex-wives after divorce on an ongoing basis.<sup>173</sup>

De Jong rejects the view that the common law requirements for maintenance, namely need and the ability to pay, are the only ones to be taken into account when considering spousal support. She notes that by including certain factors in section 7(2) of the Divorce Act such as the standard of living of the spouses prior to the divorce and the conduct of each spouse insofar as it may be relevant to the breakdown of the marriage, whether a redistribution order in terms of section 7(3) will be made and any other factor which, in the court's opinion, should be taken into account, the legislature did not only envisage need as a criterion, but also compensation or a spouse's contribution.<sup>174</sup>

Our Constitution, which guarantees real equality demands that this kind of approach to maintenance orders be followed. Support for this viewpoint also comes from cases such as *Grasso v Grasso*<sup>175</sup>, *Pommerel v Pommerel*<sup>176</sup>, *Nilsson v Nilsson*<sup>177</sup> and *Rousalis v Rousalis*.<sup>178</sup> In *Nilsson* and *Rousalis* the court noted that post-divorce maintenance in terms of section 7 of the Divorce Act is not dependent on the common law requirements of need and the ability to pay but also on other factors such as one spouse's contribution to the household and the upbringing of children. It

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<sup>170</sup> *Ibid* at 84 and 85.

<sup>171</sup> *Ibid*.

<sup>172</sup> *Ibid*.

<sup>173</sup> *Ibid*.

<sup>174</sup> *Ibid*.

<sup>175</sup> 1987 1 SA 48 (C).

<sup>176</sup> 1990 1 SA 998 (E).

<sup>177</sup> 1984 2 SA 294 (C).

<sup>178</sup> 1980 3 SA 446 (C).

was suggested by the court that section 7 can and should be used to ensure fairness between the parties. Furthermore, in *Pommerel*<sup>179</sup>, Mullins J rejected Baker J's comments in *Kroon*<sup>180</sup> that no maintenance would be awarded to an ex-wife who could support herself. Mullins stated that a woman's ability to earn income does not *per se* disentitle her to maintenance since the reasonableness or otherwise of her decision not to work must be considered.<sup>181</sup> Mullins also commented that

"I know of no authority which requires a mother to go to work to maintain herself where it is reasonable that she should stay at home to care for her children and where her former husband is able to maintain her and the children...without her working."<sup>182</sup>

Furthermore, in *Grasso*<sup>183</sup> Berman J expressed doubts whether in South Africa a divorced woman who has not worked during the marriage is entitled to no more than rehabilitative maintenance.

Clearly, the above *dicta* represent a departure from the view of maintenance as simply being based on need and provide the authority for De Jong's suggested approach which is consistent with the criteria of section 7(2) of the Divorce Act and which involves compensating a spouse for her contribution by means of a permanent maintenance order. De Jong therefore calls on the courts to consider under "any other factor" issues such as the unequal economic circumstances of husband and wife and the extent to which this has resulted from the marriage.<sup>184</sup> She notes that:

"The objective of post-divorce spousal support should be to adjust the economic advantages and disadvantages arising from the marriage equitably, in so far as the adjustment is not made by means of the parties' matrimonial property system or a redistribution order in terms of section 7(3) of the Divorce Act. In this way, outcomes will be equalised and a woman will have access to the marital asset which has the most potential to redress gendered economic disadvantage, namely her husband's future income."<sup>185</sup>

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<sup>179</sup>*Supra* .

<sup>180</sup>1986 4 SA 616 E 632.

<sup>181</sup>at 1003H.

<sup>182</sup>at 1002D.

<sup>183</sup>*Supra*.

<sup>184</sup>De Jong *supra* n16 at 84.

<sup>185</sup>*Ibid* at 84.

### 3.3.2 EFFECTIVE ADMINISTRATION AND ENFORCEMENT OF THE PRIVATE MAINTENANCE OBLIGATION

In order for our judicial maintenance system to provide effective assistance to those women heading single-parent families it is necessary for it to be effectively administered and the maintenance obligation stringently enforced. The legislature, in enacting the new 1998 Maintenance Act, set out to achieve this. While the Act deals with many of the problems, not all concerns have been addressed and further reform is required.

While the scope of this discussion does not allow for a detailed analysis of the 1998 Maintenance Act, a few observations include the fact that the Act continues to leave the institution of a maintenance inquiry within the discretion of the maintenance officer. Clark submits that no discretion should be allowed, and that in all cases the officer should be bound to institute an inquiry, for until a body of competent and adequately trained maintenance officers exists, the interests of complainants, especially children, must be safeguarded at all costs.<sup>186</sup>

The lack of training of maintenance officers in maintenance issues is also not specifically addressed by the Act, however, provision is made for the appointment of maintenance investigators with various investigative functions and powers.<sup>187</sup> In terms of the Act, a Magistrate will also be entitled to order a maintenance officer to examine any person likely to give information relating to the residence or employment of any person legally liable to maintain another person or the financial position of such person.<sup>188</sup>

It is hoped that the above measures will ensure a more thorough and satisfactory maintenance inquiry, which in turn will produce positive results for complainants.

In terms of the Act, further provision is also made for the imposition of a garnishee order at the same time that the principal maintenance order is made.<sup>189</sup> This is to be welcomed. The court must however be satisfied that the liable person is in the service of an employer. Furthermore, notice of the order must be served within 7 days. Another welcome provision, given the difficulty of securing a person's attendance at

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<sup>186</sup>Clark *supra* n73 at 65. See Also SALC Maintenance Report *supra* n68 at paras 4.26 and 4.27.

<sup>187</sup>See section 5.

<sup>188</sup>See section 8.

<sup>189</sup>See section 16(2).

court, is that orders may be granted against a person not present at the inquiry if that person gives his consent in writing.<sup>190</sup>

Insofar as the sentencing of offenders is concerned, it is submitted that the court's discretion to suspend or postpone sentences should be limited<sup>191</sup> and family law lawyers must actively intervene to ensure that continual postponement does not occur.<sup>192</sup>

Furthermore, in spite of the arguments against imposing prison terms for continuous defaulting<sup>193</sup>, it is submitted that periodic imprisonment is a viable sentencing option that magistrates should utilise more frequently.<sup>194</sup> It is further submitted, however, that correctional supervision will probably be more appropriate in most cases, for offenders can then be subjected to monitoring and control over their financial affairs in order to ensure compliance with their maintenance obligation. Such persons may also be subjected to educational programmes in order to provide them with the necessary skills to improve their financial affairs.<sup>195</sup>

Whatever sentencing option is chosen, the choice must illustrate that our legal system is serious about the enforcement of maintenance orders."<sup>196</sup>

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<sup>190</sup>See section 17.

<sup>191</sup>Clark *supra* n73 at 68. But see SALC Maintenance Report *supra* n68 at 4.39.

<sup>192</sup>De Jong *supra* n16 at 84.

<sup>193</sup>Such as the fact that applicant may be further prejudiced due to the fact that respondent is unable to earn a living while in prison.

<sup>194</sup>De Jong *supra* n16 at 87; SALC Maintenance Report *supra* n68 at 4.35; Lotriet *The Magistrate* 1996 4 123 at 132.

<sup>195</sup>Lotriet *ibid* at 134.

<sup>196</sup>De Jong *supra* n 16 at 87.

## CONCLUSION

While the focus of the discussion has been on *legal* solutions to the feminisation of poverty, one needs to be aware of the limits of the law, as a vehicle of social change.<sup>197</sup> Although formal equality has been attained and unfair discrimination outlawed by our constitution, this alone does not guarantee women freedom from oppression and poverty.<sup>198</sup>

Sinclair points out that:

“The poverty being experienced by divorced and single mothers heading one-parent families will not be overcome as long as current assumptions about the family and the responsibility for parenting persist and the present male-oriented structure of paid employment remains unchallenged.”<sup>199</sup>

Accordingly, what single-parent families need is a comprehensive program of legal measures combined with financial support, child care assistance, and strategies for increasing women’s education and employment opportunities within society. The paid employment arena needs to be restructured to enable mothers to care for their children, while at the same time inculcating into the fathers a sense of acceptance that they too are responsible for child care.<sup>200</sup> A blurring of the public and private worlds must take place.

Certainly, a broad and bold, innovative approach needs to be adopted if we are to solve the problem of the feminisation of poverty. All potential solutions need to be thoroughly considered. As it is not possible for the state to bear the full financial burden of supporting indigent one-parent families, then perhaps ideas such as Hahlo’s suggestion of a compulsory third-party insurance being established, which in the case of a break-up of a marriage would take care of the needs of the children, should be borne in mind<sup>201</sup>. At this stage in South African history, where the disastrous effects of Apartheid continue to be felt, the public must expect to be called

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<sup>197</sup>Albertyn and Kentridge “Introducing the Right to Equality in the Interim Constitution” (1994) 1 *SAJHR* 149 at 152. Sugarman S “Dividing Financial Interests on Divorce” in Sugarman and Kay *Divorce Reform at the Crossroads* also recognises the inadequacy of divorce laws on their own to eradicate the poverty experienced by women heading single-parent families. See Sinclair *supra* n4 at 153.

<sup>198</sup>Note here Giminez’ marxist feminist perspective which is that people are poor, not because of their age, sex or race, but rather because of their social class. She predicts that the deterioration in the standard of living of workers will continue, along with retrenchments and cuts in social spending. See Giminez, M “The Feminisation of Poverty: Myth or Reality?” 1990 17 *Social Justice* 43 at 58. Discussed in Sinclair *supra* n4 at 25.

<sup>199</sup>Sinclair *supra* n4 at 29.

<sup>200</sup>Sinclair *supra* n4 at 152.

<sup>201</sup>Hahlo *supra* n7 at 16.

upon to assist in the upliftment of those indigent members of society, specifically single-parent families headed by women.

Burman<sup>202</sup> suggests a number of developmental options for helping single mothers that would not necessarily bankrupt the state or be too insignificant to address a family's most basic needs. One suggestion is for a portion of individual grants to be put into community services that a group of single mothers could use - child-care centres and school feeding schemes, for example. These could also provide jobs for women. A further suggestion is to tax all fathers who do not live with their children, and to pay a child allowance to all single mothers. Perhaps Burman's most controversial suggestion is to introduce a voluntary system in terms of which most of the money paid for *lobolo* would be invested in unit trusts or life assurance instead of going to the bride's family. This money could then act as a safety net for children of the marriage in the event of the marriage failing.

It has also been suggested that support obligations should be imposed on social parents rather than only on biological ones.<sup>203</sup> This is done in Zimbabwe and Sweden where support obligations are imposed on step parents when the natural parents are unable to support the child.<sup>204</sup>

With regard to the divorce process itself, it is submitted that wider use should be made of the informal process of conciliation as a way of reaching a satisfactory post-divorce settlement, rather than having to bear the cost - both financial and emotional - of an adversarial proceeding. Indeed, divorce mediation is seen to reduce the conflict between divorcing parties, its purpose being not only to help spouses reach an agreement which recognises the needs and rights of all family members, but also to lay the foundation for the healthy structuring of post-divorce family life, a foundation essential for the effective functioning of the single-parent family.<sup>205</sup>

Our courts must also apply the "clean break" principle cautiously, given the unequal starting point of women after divorce. Indeed, it is submitted that wide recognition of

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<sup>202</sup> *Tribute Newspaper supra* n5.

<sup>203</sup> See Clark *supra* n55 at 278.

<sup>204</sup> Clark *ibid*.

<sup>205</sup> See generally Macnab D and Mowatt J "Mediation and Arbitration as alternative procedures in maintenance and custody disputes in the event of divorce" 1986 *De Jure* 313. It is unfortunate that the family courts, established by the Magistrates Courts Amendment Act 120 of 1993, while having the jurisdiction to adjudicate divorce actions (thereby introducing "local, cheaper and quite probably quicker justice" Editorial: 'divorces in the lower courts: taking justice to the people' 1993 *De Rebus* at 73), do not introduce and use mediation as a means of resolving disputes, but simply provide us with an alternative forum for formal divorce adjudication to take place.



permanent post divorce spousal support would go a long way towards alleviating the plight of many an impoverished single-parent family. Indeed, after divorce, women are entitled to be awarded an equal share of the results of the marital partnership by fully sharing her husband's career assets, including his enhanced earning capacity, through *both* property *and* support awards. Of course, the women heading these families would also be expected to work and contribute financially to their families needs where they are capable of doing so and where necessary, for as Sinclair notes:

"Women ... must come to realise that housewife marriage has become a luxury which few can afford and which the law cannot encourage."<sup>206</sup>

Having said that, it is essential to recognise that our divorce law must compensate for the greater burdens that the current system imposes on women and children of single-parent families. All legal reforms need to be based on fairness, equity and equality of results.<sup>207</sup>

Aggressive laws and policies must also be adopted to force the non-paying non-custodial parent to comply with his maintenance obligations, for men who have fathered children cannot be allowed to continue to avoid their financial responsibilities. However, considering the high unemployment rate and the extent of poverty and deprivation in South Africa, it is submitted that significant state intervention and assistance is essential. The state *must*, somehow, find the resources to contribute financially towards ensuring the upliftment of these families<sup>208</sup> or at least make sure that effective enforcement measures are in place. "Together, private maintenance and state assistance are better than either on its own."<sup>209</sup>

Accordingly, if the phenomenon known as the feminisation of poverty is to be successfully addressed, it is submitted that a composite, all-inclusive approach needs to be adopted that incorporates a number of solutions that together will result in the upliftment of women heading single-parent families.

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<sup>206</sup>Sinclair *supra* n4 at 152.

<sup>207</sup>Weitzman *supra* n5 at 108.

<sup>208</sup>In this regard it was heartening to note the Minister of Finance, Trevor Manuel's recent statement that the government is to increase its spending on job creation, infrastructural development and poverty relief by R500 million to R1,5 billion by 2001-02. *The Independent on Saturday* 7 Aug 1999.

<sup>209</sup>Weitzman *supra* n5 at 153.

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