

CHAPTER 15

PROBLEMS IN THE LAW RELATING TO THE MAINTENANCE
AND SUPPORT OF WIVES AND CHILDREN

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Married life in Ghana is strongly influenced by the structure and scope of the family system. Hence, any development of our matrimonial laws will be meaningless unless it is linked up with the development of the family system. Whereas in the marriage laws of the "Western and Eastern world" marriage may be said to be the basis of the family, under our customary laws in Ghana the position is a little different. Marriage is rather an off-shoot of the family system. This would appear to be the case even when parties marry under the ordinance.

In one of his books on the Ashanti, Rattray stressed the importance of our family system in relation to our legal system as follows:

"It is in the social organisation of a people in which lie the germs of the legal system which is later to develop... This in Ashanti, is not the King, or chief, or clan, or tribe, or even the individual; it is the family." (1929 : 2)

An examination of our present family systems will reveal that the state of matrimonial laws (for example in connection with the maintenance of wives and the maintenance and custody of children) is dependent on it. The family plays an important role in the formation, continuation and the dissolution of the marriages.

2. Three types of marriage are recognised by our laws, namely:
 - (i) Marriage according to the various systems of customary law;
 - (ii) Marriage according to the Mohammedan Law; and
 - (iii) Marriage under the Ordinance.

The extent to which wives and children may be maintained by husbands or fathers may depend on the type of marriage

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celebrated.

3. (a) Maintenance of the wife during marriage

Under customary law the right of wives to be maintained during the marriage is recognised (Okua v. Yankah (1894) Ren. 109); and wives can enforce their right to maintenance in the Courts (Matrimonial Causes Act, 1971 (Act 367), S.41. Again under Section 79(1) of the Criminal Code (Act 29) a man is under a duty to supply 'the necessaries of health and life to his wife, who is under his control.' The expression "necessaries of health and life" include proper food, clothing, shelter, medical or surgical treatment, and any other matters which are reasonably necessary for the preservation of health and life of a person. A deserted wife is entitled to be maintained by her husband. Sirebour v. Dome (1962) I G.L.R. 83 at 84: however customary law wives rarely enforce their rights.

A party to a marriage under the Ordinance may apply to the Court for an order for maintenance on the ground that the other party (usually the husband) has wilfully neglected to make reasonable provision for her maintenance. (Section 16 of the Matrimonial Causes Act 1971.) This statutory provision is most beneficial to deserted wives.

(b) Maintenance of the wife on dissolution of the marriage

Under the Maintenance of Children's Act 1971 S.19, it is provided that, whilst the matrimonial suit is pending the wife may apply for an allotment of alimony which will be sufficient for her support. As a general rule it is immaterial whether the wife is the petitioner or the respondent. On dissolution of the marriage, the wife can also apply to the High Court, for an order that the husband pay to her such lump, annual, monthly or a weekly sum for her maintenance as the court thinks just and equitable. The amount awarded as a rule does not exceed one-third of the husband's income but before the award the court is enjoined to consider the standard of living of parties and their circumstances. The liability of the husband may continue until the re-marriage of the wife.

Formerly, on the dissolution of marriage, customary

law wives were only entitled to "send-off" money which was hardly sufficient for their maintenance for any reasonable period of time. Since the passing of the Matrimonial Causes Act 1971, provision has been made therein to enable customary law wives to apply to court for maintenance. It is too early to envisage the impact of that provision.

(c) Maintenance on death of husband.

Where a Ghanaian person married under the Marriage Ordinance dies intestate leaving a widow or any issue of the marriage, two-thirds of his property goes to the widow and children and the remaining one-third goes to the family of the deceased (section 48 of the Marriage Ordinance, Cap.127). It would appear that the widow may have to be satisfied with what comes to her by way of intestate succession, she should not expect to be maintained by anyone else. By section 13 of the Wills Act (Act 360) a surviving spouse e.g. a widow can petition the High Court to make a reasonable provision for her maintenance, if she succeeds in establishing that her "testator husband" did not make adequate provision for her out of his estate.

Under customary law, however, the predecease of the husband does not automatically terminate the marriage. It is considered proper that the heir or successor of the deceased husband should look after the widow by going through a sort of marriage ceremony known among the Akan as Kuna Awadie, though he may not necessarily want to cohabit with her (see Rattray, 1929: 28; also 1922). If the widow agrees to be "married" then she is entitled to remain in her late husband's house and to be maintained and supported by the successor. In the case of Quaicue v. Fosu (1965) C.C. 105 Archer J. (as he then was) ruled that widows and children are entitled to be maintained by the head of the family of the successor by the payment of adequate allowance to the widow during widowhood and also for the children until they are capable of maintaining themselves.

4. Enforcement of the right to maintenance

The real problem in connection with the right of the wife to maintenance by the husband lies in the field of enforcement. The machinery of enforcement is rather weak. Married women may now enforce their rights through the Superior Courts by resorting to any of the devices available for the enforcement of debts, but as there are

many restrictions on the power to attach a man's income and as the courts will rarely send a man to prison for non-compliance with maintenance orders, wives rarely pursue their rights. The time has come for a review of the machinery for the enforcement of maintenance orders.

5. (i) Maintenance of children during lifetime of their father

One of the elemental principles of our family life is that a father is under a duty imposed by the Common law and statute to maintain his children. A father can not get out of his responsibility in this regard for example on the ground that the child is illegitimate (Adjei and Dua v. Ripley (1956) 1 W.A.L.R. 62; or that in the case of the Akan family, the child belongs to the extended family of the mother, whose family head should look after it. Commissioner of Police v. Ewiah (1956) 1 W.A.L.R. 69. According to customary law the successor to the father is equally liable to maintain the surviving children of a deceased father (Kraah v. Oduro (1966) C. C. 14). Apart from the power vested in the Courts to make orders for the custody and maintenance of the children in matrimonial proceedings (Matrimonial Causes Act 1971 Act 367 S.22) there are two other statutory provisions in relation to children worthy of mention. The Criminal Code imposes a duty on every father to supply the necessaries of health and life to his legitimate and illegitimate children. A guardian is under a similar duty to his ward.

Secondly, there is the Maintenance of Children Act, 1965 (Act 297). The memorandum accompanying the Bill is instructive:

"Every year the Minister of Social Welfare deals with more than a thousand cases of children who exist at subsistence level only. These children are often without proper feeding, adequate clothing and due attention for their education or apprenticeship requirements, because the fathers have failed to assist the mothers, or relatives, who have the custody of the children, in maintaining them. At present, all that the officers of the Ministry of Social Welfare can do about the cases which come to them, is to persuade the defaulting fathers and impress upon them the responsibilities

Which they owe to their own children. This, however, often meets with only temporary success, and in many cases with complete failure. It is, therefore, obvious that there should be a much more effective approach to the problem.

The object of this Bill is to provide for recourse to the Court where a father having the means fails to make adequate provision for his children or child."

By the provisions of the Act a father who fails to provide reasonable maintenance for his child may be persuaded to do so by the Minister responsible for social Welfare. A putative father may also be persuaded. Where a formal application is made to the Ministry, the Minister may refer it to a Conciliation Committee and on receipt of its recommendation, he may make a ruling as to the quantum of maintenance. The amount to be awarded by way of maintenance must not exceed N£10.00 per month for the maintenance of the child. The applicant can resort to the court to enforce her rights only after the Minister has given his ruling, on the ground that she is dissatisfied with the ruling or that the father failed to appear before the Minister or the Committee, or that he has refused to comply with the ruling or that he denies that he is the father of the child. (See Osei Yaw v. Nsiah (1969) C.C. 78).

The ruling will only be given where the child is in the custody of the mother and not otherwise. The money is payable to the mother. Provision is made for the attachment of the income or pension of a father who wilfully disobeys the order to make financial provision for the child of the marriage.

The courts have held that arrears of maintenance can be claimed by the mother or a person having the custody of the children. However there are two conflicting decisions as to the mode of proof of the sum expended on the maintenance of the child by a claimant. In the case of Sirebour v. Dome (1962) 1 G.L.R. Apaloo J. held that arrears of maintenance need not be strictly proved. On the other hand, in Kofi (Agye) v. Sarpong (1970) C.C. 30

Annan J. (as he then was) has decided that a claim for arrears of maintenance of children ought not to succeed in the absence of proof that the sum claimed has in fact been spent. If the view is taken that a claim for maintenance is in the nature of a debt, then strict proof of money actually expended may be essential. On the other hand, if the view is taken that the award of maintenance is in the discretion of the court, then it is submitted that strict proof is not essential (see Manu v. Kuma, supra at p.470). Consequently it is submitted that Thompson v. Ankrah (1968) C.C. 18 was wrongly decided. (For a note on the case, see S.A. Brobbey, "Actions for maintenance of children" (1969) 1 R.G.L. 74-77).

(ii) Maintenance on death of father

On the death of a father whose personal law permits patrilineal inheritance, the surviving children are entitled as of right to be maintained by the successor to the estate of the deceased who also becomes the children's guardian. However under the old rules of Akan Customary law, an Akan surviving child only enjoyed a privilege of living in the self-acquired house of his deceased father. (Swapim v. Ackuwa (1883) Sar. F.C.L. 191. He could be thrown out of the house by the successor who was not bound to maintain any surviving child.

In spite of the above-mentioned dichotomy the Courts, through the devise of judicial legislation, have been enlarging the interests of surviving children regardless of what their particular personal law provides (Quaicoe v. Fosu (supra); Kraah v. Oduro (1966) C.C. 14. The extent of the successor's liability has been laid down in the celebrated case of Manu v. Kuma supra, where the appellate court observed as follows:

"We say therefore that a successor under customary law is under an enforceable obligation not only to maintain but also to educate the children of his predecessor to the extent of the property of the deceased which has come to his possession and his dealings therewith."

Thus, if the estate is insolvent, it would appear that the successor could not be held liable.

Children of an ordinance marriage are entitled to a

portion of the estate of their deceased father who dies intestate (Section 48 of the Marriage Ordinance Cap. 12).

Again under Section 13 of the Wills Act 1971 (Act 360) a child for whom no reasonable financial provision has been made by his testate father can apply to Court for an order that reasonable provision be made for his maintenance.



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