

Malawi's Marital Property Law

Questions & Answers

How the property of couples is administered, owned and distributed at the end of a marriage has considerable relevance in the context of HIV/AIDS, especially in Malawi where women represent almost 60 percent of those over the age of 15 who are infected. Women and Law in Southern Africa Research Trust — Malawi (WLSA-Malawi) is challenging Malawi's current approach to marital property law before the Constitutional Court of the Republic of Malawi because this approach discriminates against women. This Q&A provides the background and rationale for the court case.

Introduction

Section 24(1) (b)(i) of Malawi's Constitution provides that women are entitled to "a fair disposition of property that is held jointly with a husband" upon the dissolution of marriage. However, the current interpretation of Section 17 of Malawi's *Married Women Property Act, 1882* only considers property to be held "jointly" if a direct, financial contribution has been made to its acquisition.

Since case law has shown that courts in Malawi do not recognize household and caregiving work that women often perform during marriage as an economic activity that contributes to the acquisition or maintenance of family assets, many women retain virtually nothing upon the end of the marriage. This is because property is rarely registered in their name or they cannot prove a direct, economic contribution to its acquisition or maintenance. The fact of marriage is irrelevant when courts are deciding a spouse's entitlement to property, so husbands can more often claim ownership of the assets that they personally purchased. Not surprisingly, this approach to marital property has been criticized for the hardships and injustices that it is capable of producing and has many times produced, in particular for women.

1. Why is WLSA-Malawi going to court?

WLSA-Malawi is challenging the current approach to marital property because it violates provisions of Malawi's Constitution which prohibit discrimination on the basis of sex and mandate women's right to property, specifically upon the end of the marriage. As such, WLSA-Malawi is requesting the Constitutional Court of Malawi to declare section 17 of the *Married Women Property Act* invalid, or in the alternative to declare that section 17 be interpreted in a manner that recognizes women's contributions to marital property and guarantees women receive half the marital assets upon the end of a marriage.

2. What support for this case does WLSA-Malawi enjoy?

Organizations such as the Malawi Human Rights Commission, the Malawi Women Lawyers Association, the Southern African Litigation Centre and the Canadian HIV/AIDS Legal Network are supporting WLSA-Malawi's efforts by outlining the national, regional and international human rights arguments for changing Malawi's current approach to marital property.

3. How does the division of marital property relate to HIV/AIDS?

Unequal marital property rights can affect women's economic autonomy, security, dignity and health by reinforcing women's dependence on their husbands. For example:

- Numerous studies have demonstrated how the fear of poverty and insecurity inhibits women, including those who are married, from engaging in safe sex, or from leaving violent relationships, making them more vulnerable to contracting HIV.
- Women with access to resources (including land and property) are better able to negotiate condom-use in their sexual relationships, to provide for their own and their children's needs, and to leave abusive partners.
- Upon marriage dissolution, women without access to marital property may face daunting difficulties in terms of securing a place to live, maintaining a basis for survival and accessing economic opportunities. This may drive women to engage in behaviours that put them at increased risk of contracting HIV.
- Property rights can also help ease the impact of HIV and AIDS on those living with the disease. For example, access to shelter, clean water and services helps to keep those infected with HIV healthy. Failing to recognize women's interests in marital property can have particularly harsh consequences for women affected by HIV, who may face stigma, discrimination and forced eviction as a result.

4. How have other countries dealt with marital property?

Worldwide, there is a strong international trend regarding the equal division of a married couple's joint estate. In numerous jurisdictions, including Austria, Canada, Croatia, Denmark, France, Germany, Greece, Italy, the Netherlands, New Zealand, Norway, Spain, Sweden and the United States, a marital-property approach reflecting an equalization of marital assets upon marriage dissolution has been implemented in recognition of women's non-economic and indirect contributions to marital property.

5. Can you give an example closer to Malawi?

- In countries such as South Africa and Namibia, a "community of property" approach exists, in which all of a couple's assets and liabilities are pooled and shared equally by the spouses, irrespective of whether they were acquired before or during the marriage, and each spouse assumes joint control with his or her partner over the estate.
- In Ethiopia, only marital property acquired during marriage is jointly administered and equally divided upon marriage dissolution.
- In South Africa, a "community of gains" or accrual regime, is also available, in which each spouse retains and administers his or her own assets and liabilities during marriage. Upon marriage dissolution, the growth in value of assets accumulated by the two spouses during the marriage is automatically divided equally.

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

6. Do any of these approaches take away a person's freedom to conclude a contract about his or her property prior to marriage?

No. A re-interpretation of Section 17 of the *Married Women Property Act* does not prevent couples from concluding ante-nuptial contracts outlining alternative approaches to marital property. Recognizing the equal contributions of spouses to marital property merely introduces a starting point for the equitable division of marital property, from which couples may choose to depart. Indeed, in South Africa, a significant proportion of couples marrying in the years immediately following the passage of a marital property law chose to opt out of the default regime provided in that law.

7. How is marital property a human rights issue?

Malawi's Constitution and regional and international human rights treaties all feature provisions that are relevant to marital property. For example, virtually all regional and international human rights treaties guarantee women's rights to equality and non-discrimination, including in all matters relating to marriage and family relations. States are thus required to ensure that both spouses enjoy the same rights with respect to the ownership, acquisition, management, administration, enjoyment and disposition of property. In particular, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, to which Malawi is a State Party, obliges Malawi to ensure that women and men are regarded as equal partners in marriage and calls for States to adopt legislation and take the necessary measures to recognize the economic value of women's work in the home. Because the prevailing interpretation of section 17 of the *Married Women Property Act* does not recognize women's equal claim to marital assets in the context of mutual rights and responsibilities and implies that women make a lesser, secondary contribution, women's right to equality before the law is violated.

8. How does marital property concern women's right to health?

Unequal marital property rights can affect women's economic autonomy, security, dignity and health by reinforcing women's dependence on their husbands. In the context of the HIV epidemic, women's lack of property rights has exacerbated women's poverty and increased their vulnerability to HIV infection. Given the linkages between property and a woman's physical security and capacity to provide for herself, a right to marital property is directly linked to the right to the health, which includes the right of every person to control one's health and body.

9. After all is said and done, what does WLSA-Malawi hope the Constitutional Court will say?

It is the hope of WLSA-Malawi and its partners that the Constitutional Court will rise to the occasion and use this opportunity to clarify the guarantees that the Constitution of the Republic of Malawi has in place to protect women's marital property rights. The Court can do this by recognizing the household and caregiving work that women often perform during marriage as an important and valuable activity that contributes to the acquisition or maintenance of family assets. Therefore, unless a couple contracts out of this approach, marital property shall be deemed to be owned and controlled equally by parties to the marriage. In short, marital property shall be deemed to be owned equally by the spouses and upon marriage dissolution, each spouse shall receive half the value of the marital property.