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THE PROBLEMS OF GENDER INEQUALITY RAISED BY UNMARRIED COUPLES IN LIBERIA

YAH-YEPLAH DOLO-BARBU

Submitted to the faculty of Indiana University Maurer School of Law

in partial fulfillment of the requirements

for the degree

Master of Laws – Thesis

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This thesis has been accepted by the faculty, Indiana University Maurer School of Law, in partial fulfillment of the requirements for the degree of Master of Laws – Thesis.

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CHAPTER I. INTRODUCTION

Liberia has historically supported the values and morals of marriage. This is evident in the laws that promote marriage between a man and a woman. The laws recognize two forms of marriages, statutory/civil marriage and traditional/customary marriage. Despite these laws, in recent years many couples have resorted to living together as though they are married, without any contract or legal status. This living arrangement has permeated Liberian society to such extent that it is now competing with the legally-recognized marriage relationship. The only legal remedy for people living and conducting themselves as a married couple is the marriage presumption statute. Because this statute is vaguely written, the Supreme Court has been reluctant to rule on the issue.

This situation has left presumed married couples with little or no remedy from the justice system to address problems such as: (1) the impoverishment of women and children, (2) the insecurity of the family relationship, and (3) unfairness and inequality. Because the marriage presumption law does not address these problems adequately, many women in this situation face undue hardship and poverty and are left with children that they can barely feed or educate.

Although the current marriage presumption law is written in a gender neutral manner, it has a disparate impact on women and children because it lacks clarity and categorical definition. As a result of its ambiguity, the court has been reluctant to rule on the issue. The court's reluctance has left many women with the additional overwhelming burden of child custody combined with a lack of financial support and the deprivation of property. Children also become victims of this situation because they are denied automatic inheritance from their fathers.

Chapters One and Two of this thesis give an overview of current laws regarding civil and customary marriages as stated in the Domestic Relations Law, the Decedent Estate Law, and the act to govern the devolution of estate and establish rights of inheritance for spouses of both statutory and customary marriages. The chapters explain the current laws on property, custody, legitimation, support, and inheritance under both forms of marriages. The first two chapters also identify problems that arise upon death or dissolution/termination of a common-law marriage.

Chapter Three explores the reasons for and causes of the increase in cohabitation. These include a cultural pattern of illicit relationships between older men and younger women, abuse of illiterate women for personal aggrandizement, misconception of marriage laws, a male-controlled state, the decline of Christianity, and military interruptions into civil governance. This chapter's purpose is not to name and shame any particular group of Liberians but to trace the roots and progression of cohabitation in Liberian society. This chapter concludes by recognizing that legal rules cannot reverse the current trend of cohabitation and that the trend is irreversible such that the elimination of the harm caused by the insecure legal status of the relationship is more important than trying to prevent the relationships.

Chapter Four explains that the current laws on marriage presumption, support, custody, legitimation, property, and inheritance cannot resolve the problems created by cohabitation as identified in the first two chapters. The first section analyzes the marriage presumption doctrine. It argues that the statute is poorly written and ambiguous, thereby creating problems of interpretation and application. The second section points out that the statute does not address cardinal issues arising out of presumed marriage such as legitimation and paternity, support, custody and inheritance. It concludes that the law needs to be categorically defined to increase its utility, or amended.

Chapter Five looks to other jurisdictions for models that might be useful in reforming Liberia's law. This chapter does a comparative analysis of the laws on common-law marriage in Kenya, Sierra Leone, California, New York, and Pennsylvania. It concludes that despite cultural and jurisdictional differences, Liberia can still borrow from the laws of other jurisdictions and adapt those laws to fit into the Liberian context. For example, a carefully-thought synthesis of Kenya's and Sierra Leone's Marriage Presumption law would fit Liberia well. This is particularly important because Liberia, Kenya and Sierra Leone share similar culture and tradition. It is also feasible for Liberia to borrow from the American laws on legitimation, custody and support because most of Liberia's laws are patterned after those of the States within the United States, and Liberia uses American cases as precedent.

Chapter Six makes recommendations for solving the problems identified above. It crafts recommendations drawing on and adapting from the laws of the afore-mentioned jurisdictions. For each recommendation, draft model legislation is proposed. Statutory language is included to help resolve problems surrounding the marriage presumption doctrine, legitimation, child support, and custody. Liberia should enact statutes to address these issues in order to curtail the problems arising from the lack of legal status for cohabitation. Additionally, clearer laws will allow the courts to adequately decide cases and lawyers to utilize the statute. Chapter Seven concludes that the common-law marriage statute should not be repealed but amended. It argues that repealing the statute will produce unfair and unequal treatment for presumed married couples. It further warns that care should be taken to not equate marriage with illicit cohabitation.

Cohabitation has become a normal phenomenon in Liberia with its own sets of legal complexities. Therefore, the relationship cannot be treated as business as usual; careful attention

should be given to problems arising there-from. The fact that cohabitation cannot be eliminated should not be a basis for downplaying the problems arising from it. All Liberians are equal under the laws; therefore, Liberia's laws should protect every citizen equally. No relationship problem that has a legal remedy under the law should be swept under the carpet because arises from cohabitation instead of marriage. To ignore or diminish problems emanating from these relationships will be no different from depriving many women and children of property and inheritance rights and subjecting the same group to abject poverty.

CHAPTER II: THE PROBLEMS AND CURRENT LAWS

Presumed marriages come with their own consequences although the law does not forbid cohabitation. Couples living under this arrangement encounter problems that are not usually associated with civil and customary marriages. The problems affecting persons living together as husband and wife but yet not fully recognized by society as such are diverse and numerous; howbeit, the three most daunting ones are: (1) impoverishment of women and children; (2) insecurity of the family relationship; and, (3) unfairness and inequality. Section A discusses problems that affect presumed married couples, Section B gives an overview of the current laws protecting marriages and other family law issues such as property and inheritance, custody, support, and legitimation, and Section C concludes that current laws need reform in order to increase their utility.

A. Problems raised by unmarried couples

1. Impoverishment of women and children

The decision to cohabit under the presumption of marriage has dire consequences for most women and children. Since most people do not understand the limitations of the law, they enter such relationships with the notion that they are married. Upon death of the man, separation or termination of the relationship, the woman is usually at a disadvantage. Upon death, the male's family takes over property acquired by the couple and questions the legality of the relationship. Often the woman is deprived of all that she has acquired; her only option becomes litigation which she often cannot afford. Another common situation involves a man abandoning both the woman and the children after being educated through joint family resources. Thus in the absence of a formal marriage, women and children are left with absolutely nothing subjecting them to abject poverty.

The Supreme Court of Liberia has had many opportunities to interpret the marriage presumption statute in order to render justice to couples seeking remedy, but has neglected to do so and has rather ruled on other issues such as custody, and support. In *Twe et al v. Twe-Pay*, 39 LLR 474, *Manney v. Money* 2 LLR 618, 620(1927), and *Newindeh v. Kromah* 22 LLR 3(1973), the Court was asked to determine the legal status of cohabitants but avoided the question, instead only considering the issue of custodial rights. While determining the custodial rights of unmarried couples is important, custody is just one of many factors that arise after the termination of an unmarried relationship. Other such issues include property division, child support and inheritance for both mother and child. Because the Court has not settled on how to treat the issue of marriage presumption, these important issues have not been addressed judicially. By contrast, in the Pennsylvania case *Knaurer v. Knaure*, 323 Pa. Super. 208 470 A. 2d. 553 (19983), the cohabitants were not divorced from their previous relationship but agreed to live together and share wealth accrued during their cohabitation as unmarried couple. Upon separation, the court awarded money to the woman because the parties' agreement to share in the wealth accrued during their cohabitation was not void against public policy and did not violate the statute of frauds. In this case, the court did not only look at the fact that the couple was still legally obligated to their previous marriages and yet cohabitating, its decision was based on the agreement between the couple. This decision prevented unjust enrichment of one party.

When one party is unjustly enriched, the other most likely falls into poverty, this could lead to additional social problems like illiteracy and crime. In some cohabitation relationships, many women and children become illiterate because the women forgo their education for that of their partners. In others, the women stay home and care for the home and the children or they engage in businesses to earn income for the families, and their partners' educational pursuit.

When these women are thrown out of the relationships, they remain illiterate and their hope for a better future has been lost. The men go on with their life; if the children remain with the woman, there is not much she can do to provide for them. It now becomes a fight for survival; often the mother can do no more than rely on her little business that gives her income. The children must start to help their mother to sell. If, as is often the case, the income of the business becomes insufficient to sustain the family, children resort to criminal activities as a means of sustenance. In a scenario like this, the woman loses much: (1) she loses her partner, (2) she loses her chance at being educated, (3) she loses her children to criminal activities, and (4) she loses her ability to sustain herself and her children.

2. Insecurity of the family relationship

Generally, there is a sense of insecurity in a cohabiting relationship. This insecurity stems from the fact that there is lack of legal protection which contributes to couples' lack of commitment. The lack of legal protection also provides avenues for dishonesty because there is not much thought given to the legal ramification of one's conduct. Additionally, many persons don't see the couples as being legally married, although they are considered husband and wife. This means that little credence is given to their legal status. Cohabiting Couples status is diminished to that of an illicit relationship, and they are not accorded the same rights of a civil or customary marriage. And although the presence of children in a cohabitation relationship will often reduce the likelihood of the cohabitating couple terminating their relationship,¹ there is no guarantee of commitment because the father could deny paternity.

There are no legal grounds for divorce; either spouse can terminate the relationship at will. This lack of legal protection is a major source of insecurity in the relationship. The

¹ Zheng Wu, "The Stability of Cohabitation Relationships: The Role of Children," *Journal of Marriage and Family* Vol. 57 No. 1 231(1995)

insecurity created by the lack of legal remedies surpasses the harm done to the mother; it also affects any child of that relationship in that the child is subjected to an unstable relationship which is by no means its making or choice.

Another destabilizing factor is economic insecurity. Sometimes couples forgo a lot of things to cohabitate. Jobs and homes are among the most common items sacrificed. Letting go of a lucrative job and investment made on a home leaves an individual in a more precarious economic situation. This sort of sacrifice does not matter until the cohabitation relationship is terminated. The chances of re-employment at the level of forgone job becomes challenging. Further, if the person has been out of the job market for a number of years, the chances of getting back in the work force becomes limited, let alone finding a well-paid job.

3. Unfairness and Inequality

There is an inherent unfairness in the way justice is dispensed to couples in a presumed marriage as opposed to those in civil or customary marriages. This difference stems from the failure of the law to recognize situations arising that could result in unjust enrichment of one party. Take for instance the property acquired during cohabitation that is titled in only one party's name; upon separation the other party stands to lose his or her portion simply because he or she is not covered by the law as in a civil or customary marriage. Further, when there is a dispute arising upon death or termination of the relationship, there is no established manner as to how property will be distributed.

Additionally, children born to cohabitating couples remain illegitimate, unless steps are taken by the father to legitimate the children; giving the father the right to discriminate amongst his children regarding who inherits from him. There is a need to establish a statutory provision to

provide more flexible remedies which better fit the circumstances of cohabiting couples.² This can only be accomplished through legal reform process. As it stands, cohabiting couples do not stand to benefit from the current law because of its ambiguity.

B. Overview of Liberian Laws

There are two kinds of marriages recognized in Liberia, civil marriage and customary/traditional marriage. Civil marriage is defined as a civil status, a personal relationship arising out of a civil contract between a male and a female to mutually assume marital rights, responsibilities, duties, and obligations, to which the consent of the parties capable of making such a contract is essential; provided further that the marriage is not prohibited in the provision of section 2.2(3) and 2.3 of the Domestic Relations Law. Consent alone will not constitute marriage; consent must be followed by the issuance of a license and solemnization as authorized by the section.³ On the other hand Customary/traditional marriage is a marriage between a man and a woman performed according to the tribal tradition of their locality⁴. In civil marriage a man can only marry one woman⁵, while in customary/traditional marriage a man can marry more than one wife.⁶

² Gillian Douglas, Julia Pearce, Hilary Woodward, Cohabitation, Property and the Law: A study of injustices,” 72 *The Modern Law Review*, 24, 24-25(2009)

³ Liberian Codes of Law Revised, Title 9 Domestic Relations Law Sub- Section 2.1 (1998)

⁴ An Act to govern the Devolution of Estate and establish rights of Inheritance for spouses of both Statutory and Customary Marriage Act Section 1(a) (1998)

⁵ Liberian Codes of Law Revised, Title 9 Domestic Relations Law Sub- Section 2.1(1998)

⁶ An Act to govern the Devolution of Estates and establish rights of inheritance for spouses of both statutory and customary marriages section 3.2 (2003)

1. Civil Marriage

I. Marriage age

The statutory age for a civil marriage is 21 for a male and 18 for a female.⁷ The exception to this rule is that a male between the age of 16 years and under 21 year and a female between the age of 16 years and under 18 years may be issued a marriage license based on consent of parents, guardian, or a person standing in loco parentis. If there is no parent, guardian, or person standing in loco parentis, the judge having jurisdiction may order the marriage if “proper cause is shown.”⁸ There is no explanation or definition of what proper cause is or any criteria set out. It can only be assumed that “proper cause” is based on the judge’s discretion.

II. Marital property and the rights therein of married women

a. Spouses may convey to each other or partition their jointly held property

Married couples can transfer real and personal property directly to each other, without the intervention of a third party. They “may make partition or division of any real property held by them as tenant in common, joint tenants, or tenants by the entireties, provided that in the case of tenants by the entireties partition may only be maintained when both parties consent thereto.”⁹ The rights accorded couples married under the civil marriage statute to hold property in entirety has not yet been accorded to couples in presumed marriage, since the Supreme Court has not adjudged cohabitants as married based on the marriage presumption doctrine. Therefore cohabitating couple can hold property jointly or as common tenants just as any other person exercising their property rights. Importantly, they do not enjoy the rights of survivorship held by tenant by the entireties.

⁷ Liberian Codes of Law Revised, Title 9 Domestic Relations Law Sub- Section 2.2(1) (1998)

⁸ Liberian Codes of Law Revised, Title 9 Domestic Relations Law Sub- Section 2.2(2) (1998)

⁹ Liberian Codes of Law Revised, Title 9 Domestic Relations Law Sub- Section 3.3) (1998)

b. Property rights therein of a married women

A married woman's property is not subject to control by her husband; and cannot be used to satisfy his debt. Further, a married woman has all rights in respect to her real or personal property, including its acquisition, use, enjoyment, disposal, and use to satisfy liability for her debts as if she was not married. She has the right to contracts in her own name and her contracts are not binding on her husband or his property.¹⁰ These property rights benefits that are enjoyed by a civilly married woman do not apply to woman in a cohabitation relationship. In fact, there are no prescribed property rights for people in that status.

III. Custody

a. Husband and wife joint natural guardian; father paramount upon separation

Husband and wife are joint natural guardians of minor children of their marriage while they are living together. The couples are equally responsible for the care, nurture, welfare and education of the children. Upon separation, the father is the paramount custodian of the minor children of the marriage as against the claim of any other person, unless he is unable or morally unfit to perform his legal, parental, moral, and natural duties. If the father cannot fulfill his responsibilities, the child is given to the mother. If the father is dead or absent, the mother is also given custody.¹¹ The law is gender biased in that it makes the father the paramount custodian upon separation. There is no indication as to what factors were considered in making the father the paramount custodian. One can only assume that the law is based on the historical idea of man being the bread winner and the head of the home. This idea not does hold any longer because

¹⁰Liberian Codes of Law Revised, Title 9 Domestic Relations Law Sub- Section 3.4(1)(2)(3) (1998)

¹¹ Liberian Codes of Law Revised, Title 9 Domestic Relations Law Section 4.1 (1998)

society has changed; women are now in the work-force at rates comparable to men.¹² The law treats the mothers unequally, because it does not require a judge to make a determination of which parent is fit or consider factors such as who the primary care giver of the child is.

By contrast, a mother in a cohabitation relationship is the custodian of her child. The parents are not deemed joint custodians during the period of their cohabitation. Most likely, in the eyes of the law, once the child is born out of wedlock, the parents are assumed to be living apart. Alternatively, cohabitation is considered illicit and therefore offspring from such relationships are illegitimate.

IV. Legitimization

a. Natural parents intermarry

When the parents of a child born out of wedlock marry, the child becomes legitimated by virtue of the parents' marriage. That child is entitled to all the rights and privileges of legitimacy as if born during the wedlock of the parents.¹³

b. Limited legitimation upon application of natural father

In order for a child born out of wedlock to be declared legitimate, the natural father of the child has to petition the probate court for the legitimation of the child. If that petition is granted, the child is considered legitimate as if born in wedlock.¹⁴ The process of legitimation can only be initiated by the father; the mother only has the right to object to the petition.¹⁵ This is another example of a gender-biased law, which renders unequal treatment to mothers. Additionally,

¹² Liberia Labour Force Survey Report 2010, Ministry of Labour and the Liberia institute of Statistics and Geo-Information Services (LISGIS) supported by the International Labour Organization(2010)

¹³ Liberian Codes of Law Revised, Title 9 Domestic Relations Law Sub- Section 4.91 (998)

¹⁴ Id. Sub- Section 4.92 (1998)

¹⁵ Id. Sub- Section 4.92 (1998)

because the father initiates the petition, the law gives him the latitude to discriminate between his children regarding which child inherits and which child does not.

V. Support

a. Persons legally liable for support of dependents

i. Husband

In a civil marriage relationship, the husband is responsible for his wife's support.¹⁶ The statute does not consider the fact that the woman could be gainfully employed or whether the wife's income is more than her husband's. Support obligation for husbands also continues if his wife is separated from him for what the statute considers as "just cause".¹⁷ Contrary to this law, a woman in a cohabitating relationship is not entitled to support from her spouse.

ii. Father

A natural father of a child born in wedlock is obligated to support the child until the child attains the age of twenty-one.¹⁸ If the child is not born in wedlock, the father's obligation is conditional; that is, the father must provide support if he has taken any legal step towards establishing paternity or adopting the child.¹⁹ This provision clearly states that a father is not obligated to support his child born out of wedlock unless the above legal steps are followed and paternity is established. This law falls short of establishing support obligation based on the conduct of the father. For instance, if a man's name is on the child's birth certificate or he has held himself out as the father of the child from birth, could fatherhood not be imputed based on these factors? As it stands, the law answers in the negative.

¹⁶Liberian Codes of Law Revised, Title 9 Domestic Relations Law Sub- Section 5.3(a) (1998)

¹⁷Id. Sub- Section 5.3(a) (1998)

¹⁸Id. Sub- Section 5.3(b) (1998)

¹⁹Id. Sub- Section 5.3(b) (1998)

iii. Wife

In the civil marriage context, the husband is fully responsible for supporting his wife. Notwithstanding this provision, the wife is also responsible to support her husband if he is unable to support himself and there is a possibility that he could become dependent on the state for support.²⁰

iv. Mother

Like the father, the mother is responsible for supporting her child until the child attains the age of twenty-one, except that the mother's obligation is triggered by the father's death, if the father cannot be found, if he does not "possess sufficient means" to support his child or if he is incompetent.²¹ The emphasis in this section of the law is on "possess sufficient means." What constitutes "sufficient means" has not been explained. Writing arbitrary terms in a statutory provision makes the law difficult to interpret and apply, and places unwarranted authority in the hands of judges. It further creates the atmosphere for injustice and unequal treatment of individuals in the same situation. For example, one judge may consider a monthly income of \$500 as insufficient and another judge could consider the same amount as sufficient, because there is no standard of determination only discretionary power.

v. Inheritance

a. Succession of property, real and personal, on intestacy

The property of a decedent is disposed after the payment of all expenses. Property is distributed based on the hierarchical structure as defined by the Liberian Decedent Estate Laws. This hierarchy starts with the spouse if there is any. The first right amount to property valued at \$5,000;²² plus "one-half the residue to the spouse for life with the remainder thereof to the

²⁰ Liberian Codes of Law Revised, Title 9 Domestic Relations Law Sub- Section 5.3(e)(1998)

²¹Id. Sub- Section 5.3(c) (1998)

²²Liberian Codes of Law Revised, Title 8 Decedent Estates Law" Section 3.2(a) (1998)

children and to the issue of any deceased child as prescribed by the statute and the remaining one half of the residue outright to the said children and to the issue of any deceased child in accordance with the provisions of statute.”²³ This statute is clear on how property is distributed if the property is an intestate estate. In the case of cohabitant, there is no provision on how property of a decedent is apportioned when there is no will. Property disputes upon separation and death of cohabitants is a major emanating problem amongst these couples. Usually there is a problem of unjust enrichment, where one party which is usually the man takes all the property and the woman is left with nothing; subjecting her to poverty, only because the law has not settled on this issue.

2. Customary/traditional marriage

Customary marriage means marriage between a man and a woman performed according to the tribal tradition of their locality.²⁴ In most Liberian tribal tradition, the man can marry as many wives as he can; there is no limit on the number of wives. It is not uncommon to see a chief with twenty wives.

I. Wife’s property exclusively her own

A customarily-married woman has exclusive right over her property “acquired or owned before or during marriage.” She also has the right to do business in her own name.²⁵ Under Civil marriage, the wife can contract and do business in her own name without the consent of her husband. By contrast, a customary wife cannot contract without the full knowledge of her husband;²⁶ this is a glaring unequal treatment by the law of individuals of the same social status

²³Id. Section 3.2(a) (1998)

²⁴ “An Act to govern the Devolution of Estates and establish Rights of Inheritance for Spouses of both Statutory and Customary Marriages” Section 1 (a) (2003)

²⁵Id. Section 2.6 (2003)

²⁶Id. Section 2.6 (2003)

(married women). As the law is written, there seems to be no logical explanation for treating women in the same category differently.

II. Custody

Custody of children in a customary marriage is with the surviving spouse upon the death of the other spouse.²⁷ The family of the decedent spouse does not have the right to custody of the children over that of the surviving spouse.²⁸ The standard of review for custody determination is the best interest of the child.²⁹ The law presumes that customary couples do not separate; therefore, there is no provision as to who takes custody upon the separation of the couple. This is a major flaw in the law as it leaves a lot of room for interpretation and the discretion of the judge.

III. Inheritance

A wife or the wives of a decedent in a customary marriage are entitled to one-third of their husband's property upon his death. The remaining two-thirds goes to the children and if there are no children, then to his collateral heirs.³⁰ The statute does not state how the husband can inherit upon the death of the wife. Imagine a customary husband with ten wives being subjected to the division of one-third of their husband's property, while in a civil marriage one wife is entitled to one-third of her husband's real estate during her natural life and one-third of his personal estate in her own rights subject to alienation by her.³¹ Although the crafters of the law on customary marriages are aware that the marriage is polygamous, they allocated one-third

²⁷ "An Act to govern the Devolution of Estates and establish Rights of Inheritance for Spouses of both Statutory and Customary Marriages" Section 3.7 (2003)

²⁸ Id. Section 3.7 (2003)

²⁹ Id Section 3.7 (2003)

³⁰ Id. Section 3.2(2003)

³¹ Liberian Codes of Law Revised, Title 8 Decedent Estates Law Section 4.1(1) (1998)

inherence rights to all the spouses upon the death of their husband. Though spouses in a customary marriage are entitled to one-third of each other's personal and real property when they get married, the law does not require that each spouse must make contribution towards the acquisition of the property as prerequisite for entitlement.³² Juxtaposing the customary marriage laws to that of the civil marriage, the provisions of the customary marriage law are glaringly unfair and filled with issues of inequality and injustice.

C. Conclusion

There is a pressing need to reform, or amend laws regarding marriage and other family law issues such as support, custody, legitimation, and inheritance. In the absence of reform or amendment, cohabitating couples will continue to encounter the problems enumerated above. These problems have grave consequences on families and the problems can only be curtailed if proactive steps are initiated towards weeding out the gaps and flaws in the law. It is imperative that the gaps in the civil marriage law be filled because it is fundamental to both customary and presumptive marriage laws.

Because of the lapses in the law and the Supreme Court's reluctance to rule on the issue of marriage presumption, impoverishment for cohabiting couples seems to be a problem that may not go away any time soon. Based on the lack of legal protection, cohabitants cannot acquire properties by the entireties; therefore, they do not enjoy the right of survivorship. In the absence of this right, the surviving spouse usually will have to resort to litigation, which is unaffordable for most people. Additionally, the lack of established property rights for the same group solidifies the lack of legal protection and reinforces their being at risk to falling into abject poverty.

³² "An Act to govern the Devolution of Estates and establish Rights of Inheritance for Spouses of both Statutory and Customary Marriages" Section 2.3(2003)

Further, the Domestic Relation Law states that the father of an illegitimate child is not obligated to support the child unless certain legal procedures are followed. By this provision, the law assumes that the parents of the child are living apart and therefore paternity must be established. Considering that a cohabiting couple is living under the same roof and the man refuses to support the child, should there not be an exception? Because the law is not flexible and does not take into consideration the conduct of the parties, one of the spouses is placed at a disadvantage which leads to poverty, and that party in this scenario is the woman.

On the same note, because of the flaws in the laws and the lack of clear definition of the marriage presumption statute, there is no established ground for divorce in a presumed marriage as provided for in a civil marriage. Therefore, a couple in this relationship is free to separate at will; they do not need any reason to terminate the relationship. This kind of situation leads to insecurity and a lack of commitment. There is a total lack of consideration of the fact that there are children in these relationships and it is not healthy for children to grow up in an unstable environment. Compounding further the issue of insecurity is the problem of spousal support. In a civil marriage, the husband is responsible for the support of his wife and that obligation extends if the wife is separated from him for what the law sees as “just cause.” By contrast, support obligations for husbands in a presumed marriage have not been established, further compounding the problem of insecurity.

Lastly, the law is inconsistent in its treatment of similarly-situated individuals. For example, there is a clear disparity between civilly and customarily married wives as to property distribution upon the death of a husband. In a civil marriage, a wife is entitled to one-third of her husband property while in customary marriage several wives are entitled to the same one-third. A civilly-married woman can contract in her own name without the consent of her husband but a

customary wife must contract or do business in her own name with the full knowledge and consent of her husband. Additionally, support obligations for a husband to his wife in a civil marriage are not extinguished by separation if the separation is for “just cause.” This extension of support obligation is not accorded to wives in customary marriage. There is no legal justification for why these two marriages are treated differently on these issues.

Comparing marriage presumption with the two marriages discussed above, there is no legal provision for support, inherence or distribution of property. The lack of legal provisions to address these issues continues to serve as a cause of problems such as impoverishment of women and children, insecurity of the family relationship, and unfairness and inequality. These problems can only be addressed if the courts clearly interpret and categorically define the marriage presumption statute. In the absence of a clear definition, these problems will continue to exist and many families, especially women and children, will be deprived of property, inheritance and support.

CHAPTER III: WHY HAS THE RATE OF COHABITATION INCREASED IN LIBERIA?

Liberia was declared an independent nation in 1847. It was clear through founding documents such as the Constitution and the Declaration of Independence that the foundation of legal system was built on Christianity. As a result, laws were enacted to promote and protect Christian values, though other religions were tolerated. As the nation grew in size and population, many of these laws were amended or repealed to accommodate all sectors of the society, reducing the promotion and protection of one particular religion. This process made the nation more secular, so as to conform to global standards of religious tolerance. This religious diversity proved costly to the nation as many societal values were diluted or replaced, giving way to social problems; for example marriage was diluted with cohabitation. Additionally, the 1980 military coup and the fifteen years of civil war further disintegrated the social fabric of the society while institutionalizing lawlessness and immorality.

One of the major societal problems that has permeated the nation is cohabitation. The participants of cohabitation are diverse; cutting across age boundaries, both young and old actively engage in this living arrangement. Cohabitation takes many different forms and is named differently for different people. For the purpose of this Chapter, Section A discusses the Godpa and Godchild issues, Section B discusses Country Women phenomenon, Section C discusses Misconception of cohabitation as Marriage, Section D discusses the Decline of Christian Values, Section E discusses Patriarchy, and Section F discusses Military interruptions. I argue that the decline of Christian values and the lack of adequate laws to deter cohabitation coupled with the disintegration of family and community structures have assisted in the promotion of cohabitation. Further, societal ignorance of the law on marriage presumption has

led to the misconception of the status of cohabitation and has thus increased the rate of cohabitation especially among young couples.

Additionally, because of the patriarchal nature of politics, it is easy to comprehend why the laws law enacted mainly favor men. This inequality is seen for example throughout the Domestic Relations Law. When women are not treated equally by the law, the effect greatly impacts her capacity to care for her children and contribute towards society. Politics over the years has been such that men rule and women suffer the consequences of their rule; an example is the social divide between the indigenous and the Americo-Liberians (Congos). Powerful, educated men (mostly Congo) desired to have relationships with uneducated women known as “country women,” but their political and social status could not permit them to do so; in order to fulfill this desire, they went into clandestine relationship with these women. The result was partial cohabitation and children that many of the men did not identify as their own. Another social problem that resulted from politics was military interruptions into civil governance that exacerbated and institutionalized cohabitation. This chapter discusses the following causes of the growth of cohabitation: (1) Godpa and Godchild syndrome, (2) Country women phenomenon, (3) the misconception of marriage presumption, (4) patriarchy, (5) the decline of Christian values that has led to cohabitation and (6) military interruptions.

A. Godpa and Godchild syndrome

There are situations that slip through society and, when ignored, spread throughout and become an unspoken norm, because everyone is turning blind eye. The Godpa and Godchild syndrome is one such situation that has polluted Liberian society to such an extent that it now seems to be way of life. Godpas are men, usually older men with financial power; they cut across all levels of society. A Godpa could be a prominent political leader, a government official, a

clergyman, or even a taxi driver. The key similarity between all is the ability to provide financial support. The Godchild on the other hand is a female usually 10-20 years younger than the Godpa; usually a high school student. Though many young girls engage in this relationship, many young ladies between the ages of 20-35 are also heavily involved.

The Godpa and Godchild form of relationship became widely spread in the 1970s and still continues today, though the name Godpa is not used as much. Nowadays, names such as “sponsors,” “Big men,” and “Uncles” are used to refer to Godpas. The Godpa situation in Liberia arose when older men started keeping mostly younger girls and supporting them financially.³³ Most of these Godpas were affluent, usually married, men in society. These girls were in the Liberian adage “sponsored” by their Godpas. Some of them drove beautiful cars, lived in expensive apartments, wore beautiful clothes, and often did not work. Some were fortunate to be educated by these men, while some bore children and stayed at home. Though Liberia was implicitly established on Christian principles, the men that were engaged in these activities were prominent citizens and government officials, and some were even members of the clergy. The Godpa situation was so common in society that it was like a way of life. It was barely spoken of by the church, government or society. It became an acceptable norm of society. Many young girls felt that this was the proper way of life, since it was not frowned on but implicitly endorsed by the society. The Godpa situation permeated the core of the Liberian society, even to the point that taxi drivers become Godpas to some young girls.

Young girls were led into the Godpa arrangement for a variety of reasons: poverty, peer pressure, parental pressure, and even material greed. Poverty is increasing in Liberia at an alarming rate; according to the World Food Program (WFP), Liberia ranks 182nd of 187

³³A. Atwood, et al, “Transactional sex among youths in post-conflict Liberia,” *Journal of Health, Population and Nutrition* Vol 29, No.2 115(2011)

countries rated in the human development index. It estimates that 64 percent of Liberians live below the poverty line, of which 1.3 million live in extreme poverty.³⁴ Thus, it is most likely that this is the greatest factor leading to the Godpa/Godchild situation. Additionally, some young females have succumbed to peer and parental pressure³⁵ to establish life-styles that are far beyond their income. Still others engage in unwholesome behaviors which basically serve as a shortcut to early wealth and popularity.

The reasons enumerated for young females engaging in relationships with Godpas are true to a large extent, but these reasons cannot be applied generally. Doing so will be a fundamental attribution error. Fundamental attribution error is “the tendency of observers to attribute another person’s behavior to dispositional factors (those internal to the person), rather than to situational (external) factors despite what we know to be powerful influence of situational factors on behavior.”³⁶ There are both internal and external factors that continue to influence this situation. Some are learned behaviors that have been endorsed by society and, that have now become a societal ill, for example the societal acceptance of women’s dependence on men for sustenance. It has gained cultural acceptance and is not a making of one particular woman or a group of women, it is a way of life. A more prudent way of understanding why many endorse this behavior is by trying to take the perspective of these females, by investigating their motivations, feelings, family background and interests. This will facilitate understanding of “situational influences on their behavior more accurately and make less self-serving judgment,”³⁷

³⁴ World Food Program (WFP/EB.A/2012/8/5)

³⁵ Katherine A. Atwood, Stephen B. Kennedy, Ernie M. Barbu, Wede Nagbe, Wede Seekey, Prince Sirleaf, Oretha Perry, Roland B. Martin, and Fred Sosu, “Transactional sex among youths in post-conflict Liberia,” *Journal of Health, Population and nutrition* Vol 29, No.2 (2011) 116

³⁶ JENNIFER K. ROBBENNOLT AND JEAN R. STERNLIGHT: *PSYCHOLOGY FOR LAWYERS*, 18 (2012)

³⁷ *Id.*, 25

as to what motivate the females participation in a relationship that is not only financial but also abusive and why society remains silent with respect to such behavior.

B. Country women phenomenon

The women referred to as “country women” are mostly illiterate and live in the rural parts of Liberia. In the past, men preyed on their illiteracy to engage in illicit relationships that mostly benefited the men. Many of these women did not know that they had a remedy under the law; nor did they have the means to seek such remedy. As a result many were left to care for and support children fathered by prominent men in society. Many of these relationships were forced because the women worked on the men’s farms and were very secretive because the men involved were married to civilized (literate) women. This section will detail the foundation of the social divide in Liberia and how this divide contributed to societal ills such as cohabitation.

Since the founding of Liberia, there have been two main social groups; the indigenous (natives) and the Americo Liberians (Congos/Settlers).³⁸ The natives were considered uncivilized by the Congos because they could read and write English and the natives could not. The Americo-Liberians were free slaves from the United States of America that settled in Liberia in the nineteenth century.³⁹ They were the elites and governed the country.⁴⁰ There was a large social disparity between the two groups; the Congos were extremely rich because they controlled the economy of the country,⁴¹ while the natives were extremely poor because they were largely illiterate and suppressed by the former. Because of this disparity, there existed a social gap; the

³⁸ G. E. SAIGBE BOLEY, *LIBERIA: THE RISE AND FALL OF THE FIRST REPUBLIC* 29 (1983).

³⁹ D. ELWOOD DUNN, *LIBERIA AND INDEPENDENT AFRICA, 1940S TO 2012: A BRIEF POLITICAL PROFILE* 1(2012)

⁴⁰ Id 29. “The meagre resources of the Republic were diverted to warfare against the indigenous Liberians by the Americo-Liberian controlled Government, and toward the settlement of countless numbers of internal disputes and rivalries.

⁴¹ Jeannine Delombard, *Sister, Servant, or Savior? National Baptist Women Missionaries In Liberia in the 1920s*, *The International Journal of African Historical Studies*, Vol.24, 324 (1991)

Congos saw themselves as superior and did not consider the natives as equals. Because of this social gap, many Congo men were ashamed to openly have relationships with native women, lest they are castigated by their peers. As a result, relationships between Congo men and native women were clandestine, mainly because of their status in society, but also because the men were married.

As the country expanded, many prominent Congo citizens invested in agriculture in the interior of the country which was inhabited by the natives. This increased interaction between the two groups. The natives lived on and cultivated the farms; some of the farmers were paid in cash while others were paid in kind. The farm owners mainly visited the farms on weekends and holidays, most of the time without their wives and children. Most of the Congo wives seldom visited the country-side where their husbands/family farms were. As a result, many of their husbands had illicit relationships with the native women known in the Liberian usage as “country women.” Procreation occurred in most of these illicit relationships because the women involved knew little about family planning methods. The issue from the relationships were mostly kept secret from the men’s wives. Some of these children did not receive love and affection from their fathers as their other siblings that were born in wedlock. In fact, for some men, it was a shame to mention that they had children by these “country women,” they did not identify publicly with the mother or the children, lest they be ridiculed by their peers. However some quietly legitimated their children. An example was Arthur B Walker in the case *Walker-Calloway and Walker-Freeman v. Walker et al* [1994] LRSC 4; 37 LLR 380 (1994). Although the “country women” situation existed in the past, the social divide between the Congos and the indigenous still exist in present-day Liberia.

C. Misconception of cohabitation as marriage

The high level of illiteracy in Liberia coupled with the ambiguity of the law on marriage presumption contributes to the misconception of cohabitation as marriage. Approximately 60.8 percent of the populace is literate.⁴² This has led to many assumptions of what citizens believe the law is as opposed to what the law really is. It is common to hear someone definitively state that “the law says X” whereas the law actually says “Y.” Marriage presumption is no exception to this misconception of laws, as many couples live together for very long periods without any legal protection, believing that their cohabitation is an automatic marriage. This misconception becomes apparent upon death or dissolution of the relationship.

Many couples assume that when they cohabit and refer to each other as husband and wife, then they are recognized automatically as husbands and wives by the law. As a result, they live together for many years in this arrangement and will only realize that there is little legal protection upon termination of the relationship or upon the death of one of the partners. Most Liberians are unaware of the ambiguity in the marriage presumption and the reluctance of the court to rule on the issue. This lack of understanding and blind assumption of the law can be attributed to the high rate of illiteracy. Illiteracy has led to many societal problems such as citizens not being aware of or asserting their basic fundamental rights. Citizens, mostly women, were not accustomed to speaking out or asking questions about problems that affect them. Therefore many problems have lingered for a while unanswered, the marriage presumption being one of them. If the ambiguity of the marriage presumption statute or its enforceability had been challenged, the court or the legislature would have defined, amended, or repealed the law by now. So far, no one has vigorously challenged the ambiguity of this doctrine.

⁴² <http://www.indexmundi.com/liberia/literacy.html>(UNDP index mundi

D. Decline of Christian values

Christianity was brought to Liberia by the freed slaves.⁴³ Societal norms and laws were patterned after the Christian religion. In order to conform to globalization, the state became secular, thereby deviating from historic course. This deviation was accomplished with the aim of tolerance of other religions. As a result of the change, Christian values were diluted but the laws remained the same. Because the laws were still the same, enforcement become problematic as the adoption of a more secular state should have been accomplished by change in the laws. The conflicts between a secular state and laws based upon Christian values have opened the door to immorality and lawlessness.

It is evident in the initial legal documents of the nation that Liberian laws were rooted in the Christian religion. This can be proven from the wording of the Declaration of Independence⁴⁴ and the second paragraph of Article I preamble⁴⁵ and Article I Section 3 of the 1847 Constitution.⁴⁶ When these instruments were written, Christianity was the foundation upon which standards for society were based. This led to the promotion of the Christian value of marriage and the subsequent enactment of Christian marriage laws, that is, marriage being

⁴³ D. ELWOOD DUNN, *LIBERIA AND INDEPENDENT AFRICA, 1940S TO 2012: A BRIEF POLITICAL PROFILE*, 1 (2012)

⁴⁴ “Our numerous and well-attended schools attest our efforts and our desire for the improvement of our children. Our churches for the worship of our Creator, everywhere to be seen, bear testimony to our acknowledgment of His providence. The native African bowing down with us before the altar of the living God, declares that from us, feeble as we are, the light of Christianity has gone forth, while upon that curse of curses, the slave trade, a deadly blight has fallen, as far as our influence extends.”

⁴⁵ Liberia Constitution 1847 Article 1 2nd paragraph of preamble: “Therefore, we the People of the Commonwealth of Liberia, in Africa, acknowledging with devout gratitude, the goodness of God, in granting to us the blessings of the Christian religion, and political, religious, and civil liberty, do, in order to secure these blessings for ourselves and our posterity, and to establish justice, insure domestic peace, and promote the general welfare, hereby solemnly associate and constitute ourselves a Free, Sovereign and Independent State, by the name of the republic of Liberia, and do ordain and establish this Constitution for the government of the same,”

⁴⁶ Liberia Constitution 1847 Article 1 Sec. 3 “All men have a natural and inalienable right to worship God according to the dictates of their own consciences, without obstruction or molestation from others: all persons demeaning themselves peaceably, and not obstructing others in their religious worship, are entitled to the protection of law, in the free exercise of their own religion; and no sect of Christians shall have exclusive privileges or preference, over any other sect; but all shall be alike tolerated: and no religious test whatever shall be required as a qualification for civil office, or the exercise of any civil right.”

defined as a union between one man and one woman.⁴⁷ Hence, in the 1800s and early 1900s, illicit relationships were discouraged by both the society and the government. In fact, it was a criminal offence to bear a child out of wedlock. A child born out of wedlock was considered a child of nobody, and the state compelled an unmarried mother to say who the father of her child was, and the father would be prosecuted for support. Though the state's interest was to identify the father so as to eliminate the state's financial responsibility in the event the child becomes a public charge, its decision was also rooted in public policy of promoting and protecting traditional family values. As the nation became more secular, Christian values ceased being the guiding principles of the nation. Hence, Christian values such as marriage before procreation that set the basis for statutes like the bastardy law began to diminish in significance. Immoral attitudes that were once viewed as a crime became branded as an individual matter; this was exhibited in the way people lived.

E. Patriarchy

In the Liberian society, the concept of patriarchy translates to a political system in which men rule the state. This rule is seen in homes, where men control their households because they have the financial capacity, leaving women in a marginalized role of care giving and housekeeping, and relying on their male partner for sustenance. Sylvia Walby defined patriarchy as a system of social structures and practices; in which men dominate, oppress, and exploit women.⁴⁸ The patriarchal trend is also evident in the way laws are written. For instance the inscription "Let justice be done to all men" was written on the walls of the Temple of Justice which hosted the Supreme Court of Liberia for over a century. The Supreme Court has been headed by men since its origin except for the two female Chief Justices. Though some women

⁴⁷ Liberian Code of Laws of 1956, Domestic relations law, Title 1, Chapter 1: Section 10, 427(1956).

⁴⁸ Sylvia Walby, *Theorizing Patriarchy*, Sociology, Vol.23, 213, 214 (1989)

have endeavored to advance from this lower status, the development is gradual. Women's dependence on men has become institutionalized, thereby promoting societal problems such as cohabitation.

There is a cultural tendency for females to rely on males for sustenance.⁴⁹ This culture is so engrained in the Liberian society that if a male colleague asked a female out for lunch, it is assumed without question that the male will pay the bills. It is taken for granted that males should bear the responsibility for family expenses. This situation may not be unique to Liberia; it can be associated with the era where men were the breadwinners and women caregivers. Fortunately many nations have progressed beyond this stage, but Liberia has not gone as far. This fundamental problem has intensified other problems such as: (1) the complacency of females, (2) the promotion of patriarchy, (3) abuse in relationship, (4) reduced desire for marriage, and (5) the relegation of women to the status of someone that needs to be helped instead of an equal partner. There is a notion in Liberia that women's responsibilities will always be borne by a man, hence the Liberian adage "women kenja cannot leave in the street."⁵⁰ This notion has left many women complacent about finding concrete means of sustenance such as education or business, instead of relying on the opposite sex. There is a belief that once a woman is in a relationship with a man, it is the man's sole responsibility to take care of the home. This belief has helped to promote a patriarchal society, where men are seen as breadwinners, in control of government, and businesses, increasing their power to control both government and family. With power and resources, most men do not have the desire to marry; there is little incentive in marrying one woman when there is societal latitude to having several. Males rather

⁴⁹ Liberia is writing a new history for its women and girls.
<http://www.fgmnetwork.org/gonews.php?subaction=showfull&id=1249317843&archive=>

⁵⁰ The Liberian adage "women kenja cannot leave in the street" simply refer to the cultural belief that a woman's responsibility or burden will always be borne by a man. It insinuates that a woman will not be subjected to hardship; someone will always be there for her.

use their finances to satisfy their desire of having as many women as they can afford. Women that find themselves in these kinds of relationship are usually not seen as a partner but as someone that is in need of help. Therefore they encounter abuse, and disrespect. The net result of this is that most men will not have the desire to marry because they are fulfilled by more than one woman. As such, cohabitation is preferred over marriage.

F. Military interruptions

Military interruptions of civilian rule in Liberia increased the level of immorality and lawlessness as many of the militants used power as retribution against the “civilized and educated”, and the poor and powerless. In a quest to demonstrate their supremacy, they engaged in many unwholesome behaviors which have led to the total disintegration of family, community, and social structures.⁵¹ During the military rule, the entire nation lived in fear for their lives and properties. The wave of atrocities left the country mute; the silence took the form of acquiescence, and a sort of endorsement of the military action. It also confirmed the civilians’ fear of the military. The military took advantage of these circumstances to perpetrate societal ills.

The military coup exacerbated the country’s problem of cohabitation, immorality and lawlessness; many soldiers were the law unto themselves and morality was at the lowest point of society. The country dwelled in this state of low morality for a decade and emerged into a civil war in 1990, further escalating the nation’s problems of lawlessness, immorality, human flight, and increased cohabitation. After the military coup, the soldier with the power of the gun, usually uneducated, found a means of getting even with educated people or proving that, though uneducated, they could equally rule the country. Because of this mind set, coupled with a blatant

⁵¹ AMOS SAWYER, BEYOND PLUNDER TOWARD DEMOCRATIC GOVERNANCE IN LIBERIA, 47-48 (2005)

disregard for human rights, many Liberians fled the country. Immorality and cohabitation increased concomitantly during this period.

The civil war era, was a period where the entire economic, social, and political structure of the country disintegrated.⁵² There were many occasions where citizens did not know who was in charge at a particular point in time. An example of such an occasion was when rebel forces took over a town or a village; there was no clear chain of command. Every armed man was Commanding Officer (CO) in his own right, which meant that discretionary orders and enforcement of penalties were meted out to civilians arbitrarily. As a result of these violations, many girls were forced to cohabit with soldiers as their “war wives,”⁵³ while others were encouraged by their parents. In some instances a soldier would see a pretty girl going about her business and would tell her “you will be my woman today”, at that point the girl is forcibly taken to his house and cohabitation begins. During this period, many females, both old and young, were forcibly taken by soldiers as their wives, regardless of whether they were married or not. Some of these female were below the legal age of marriage, while others were totally unprepared for wifehood. These armed men used the power of their gun to force these women into early and unwanted cohabitation.

On the other hand, some girls did not understand the nature of the civil conflict and were carried away by the plunders of war. Other girls, though not forced, found males that they fell in love with and they lived together, mainly due to the lack of parental guardians. Living together was the order of the day. Parental control was diminished because most parents could not

⁵² Mats Utas, *West-African Warscapes: Victimcy, girlfriending, soldiering: tactic Agency in a young woman's social navigation of the Liberian war zone*, *Anthropological quarterly*, Vol. 78, 403, 412 (2005)

⁵³ AMOS SAWYER, *BEYOND PLUNDER TOWARDS DEMOCRATIC GOVERNANCE IN LIBERIA*, 51 (2005)

provide for their children; instead, they were depending on their children for sustenance.⁵⁴ It is worthwhile to note that most of these cohabitating couples did not refer to each other as husband and wife. The popular term used was “my man and my woman”; to date, most of the ex-combatants still use these terms. While it is true that some cohabitating couples considered themselves as husbands and wives, others did not, because of a lack of commitment as required in a married relationship. The distinction between these groups of cohabitants is important to understanding the difference between an illicit relationship and a presumed marriage. This is why the burden is on the legislature to clearly define the marriage presumption doctrine or take other affirmative actions.

The military coup and the subsequent civil war in Liberia shifted power twice from civil rule to military rule. As a result, there was a drastic change in the society. Prior to the military coup, soldiers were kept in the barracks and were seldom seen in the streets, but the coup increased the presence of military in the streets and the level of civilian- military interaction increased. With the inception of the civil war, there was a multiplicity of armed factions all over the country. These two periods increased the prevalence of armed groups in the country.

Prior to the civil war, immediate families were not the only source of support for family structures. The community played an important role in caring for children. There is a saying in Liberia that “a child is not reared by the parents alone but by the entire community;” that is community members had the responsibility of looking out for children. What is important to note is that communities in pre-war Liberia were administered by mostly older people who took every child in the community as theirs. After the war started, there was a dramatic change in community administration. Young and inexperienced armed men took over power and replaced

⁵⁴ Id. 47-48

the older people.⁵⁵ During the civil war, the armed men, who were mostly young people, disregarded older people because of the power of the gun. For fear of their lives, many old people abandoned their positions and these positions were taken over by armed men who had no idea what they were doing. After the war most of these soldiers held on to power in most parts of the country. In other areas, most of the older people died as a result of the war, or disenchanted by the war, refused to participate in community governance,⁵⁶ thereby leaving the community in the hands of these younger people. The dramatic change and disruption of community structures assisted in lowering community moral standards, while increasing social problems such as illicit relationships and early cohabitation.

G. Conclusion

The intent of this chapter has not been to place blame on one group of citizen as causing the increase the rate of cohabitation in Liberian society, but to trace the roots and progression of cohabitation in Liberian society. Going back in history, the settler ruled Liberia from its independence until 1980, and then natives overthrew the government through a military coup on 12 April 1980. Cohabitation was rampant during both eras. When tides turned during the civil war, Liberia was divided and ruled by both settlers and natives. Cohabitation increased significantly during this time and still continues to date.

Cohabitation has been an age old problem in Liberia and is still on the rise. The goal of this chapter is to point out the societal problems that has led to cohabitation and highlight the groups that have been most affected. While it is true that the upward trend in cohabitation cannot be reversed, prevention of societal problems arising from cohabitation and recognizing that the

⁵⁵ Id 49

⁵⁶ Id 49, “Research done by the Center for Democratic Empowerment in 2000 showed that in several parts of Liberia, elders who traditionally held positions of authority in villages and townships had been refusing to serve as chiefs because of the uncontrolled and excessive powers exercised by young untrained armed men who had become state security officers.”

trend is probably irreversible is fundamental to curtailing the problems of impoverishment of women and children, insecurity of family relationships, and unfairness and inequality. The current laws do not adequately address these problems because of lack of clarity and categorical definition; hence the difficulty in its application. The way to solve the problems identified is to improve on the current laws by clearly defining the law through amendments. When a clear meaning is constructed by the legislature, cohabitants will benefit from its application. Additionally, the Court will not shy away from the issues emanating from cohabitation.

CHAPTER IV: WHY THE CURRENT LAWS CAN'T SOLVE THE PROBLEMS

Cohabitation is not prohibited under the laws of Liberia; cohabitants that hold out as husband and wife are presumed to be married.⁵⁷ Notwithstanding this provision, the Supreme Court has been reluctant to defer to the marriage presumption statute because the statute is unclear and lacks categorical definition. Therefore, couples seeking a remedy under the law do not get adequate redress. Like the above statute, other related family law issues such as legitimation, support, custody and inheritance are also limited in scope. To sum it up, the laws of Liberia are not developing; and this underdevelopment is clearly seen in the Court's opinions. This Chapter seeks to identify and analyze the problems and concludes that the law needs to be categorically defined to increase its utility or the laws should be amended.

A. Marriage Presumption Doctrine

The marriage presumption doctrine is common-law marriage; it a form of marriage conferred on couples based on their conduct. This form of marriage gets its credibility from the endorsement of family, friends, and the community. The validity of marriage presumption is usually determined through a judicial decision. Marriage presumption grants legal marital status to cohabitants who live together as husband and wife. These cohabitants assume marital status upon themselves although their union has never been solemnized or licensed according to law. Typical factors that motivate couples to see themselves as married are: procreation and raising of children, common last name, common investment, spouses listing each other as beneficiary on employment documents and real property, and comingling of finances. In the absence of a dispute, the legality of the relationship and its associated problems are not apparent; but when there is a dispute, or upon the dissolution of the relationship, or the death of one partner, the

⁵⁷ Liberian Code Revised, Title 1, Civil Procedure Law, Section 25.3 (1973)

legality of the relationship or the rights of one spouse to benefit from the other becomes an issue for the court's review.

Many cohabitating couples exercising their rights under the marriage presumption doctrine have received minimum legal protection because of the law's ambiguity and lack of categorical definition. This section will endeavor to analyze the statute's limitations by pointing out why it is not benefiting its users, and how the issue of marriage presumption has been overlooked in past cases, and will demonstrate effective methods of utilization. The basic argument expounded in this section is that a law that is written to protect a certain class of people should be categorically clear in its definition. Additionally, the court should endeavor to precisely interpret to ambiguous laws in the interest of public policy. Finally this section will investigate problems emanating from the lack of legal protection of the marriage presumption statute such as legitimation, support, custody, and inheritance.

Liberians cohabit as husband and wife for many years without any legal protection, be it an agreement, a court authorization, or a traditional endorsement that could protect them in the event of death, or dissolution of the relationship. The rate of increase in this living arrangement is comparable to that of recognized traditional marriages.⁵⁸ Although there are no laws that expressly forbid cohabitation, there is limited protection for cohabitants who live as married couples. Presumed marriages sometimes last for many years and children are conceived and properties acquired. When the relationship is terminated, there are multiple issues that arise: (1) how will property acquired during the relationship be distributed, (2) how will the children be supported, (3) whether or not children will inherit from their father, (4) whether the children are

⁵⁸ Dixon v. Rick-Fleming 32 LLR 133, 138 (1983)

legitimate or not, (5) who takes custody of the child, and (6) whether or not the non-custodial parent will have visitation rights.

Property distribution upon death or termination or dissolution of a relationship is of grave concern, who takes what and on what basis are portions allocated? Is a surviving spouse entitled to all or part of the property acquired by the deceased partner? Should the male partner's family decide what happens to the property? What happens to the children? How is support determined? Should children from the relationship be considered legitimate or illegitimate? Can they inherit from both parents? Which parent is entitled to custody upon separation and on what basis? Assuming that the mother has custody, what are the rights of the father? These questions can only be addressed if the marriage presumption law is clearly defined. In the absence of a clear definition, aggrieved partners would seek remedy under the law to no avail.

Liberia's Marriage Presumption doctrine is found in Section 25.3 of the *Liberian Civil Procedure Law* under the caption *Marriage*. It states that "Persons who live together as husband and wife and hold themselves out as such are presumed to be married."⁵⁹ This statute raises many questions that need to be addressed by the Court since the legislative meaning is unclear. Firstly, what does "hold out" mean? To whom do the couples hold out? Is it to their friends, family, community, or to the awareness of the court? How should they hold themselves out? Does it have to be in writing, by express communication, or by conduct? Do they have to inform their family, the community, or the court that they consider themselves as husband and wife? Secondly, it does not state the length of time couples should hold themselves out. Thirdly, the statute does not state how this presumption can be rebutted, if the presumption is not conclusive.

⁵⁹ Liberia Codes of Law Revised, Title 1, Civil Procedure Law, Section 25:3 (1973)

Lastly, it is unclear whether marriage presumption is applicable in customary or only in civil marriage.

Despite the ambiguity of the statute, it has been used in several ways by many couples, mostly to the detriment of its users. What is most interesting is that those who utilize the statute believe that the law will protect them in case of problems, but this has not been the case. In most parts of Liberia, women change their last names to that of their cohabitating partners. Can such name change translate to holding out? When a woman changes her name to that of her partner, it signals to the public that both are married, especially if the man acquiesces to the change. What is the legal ramification of such name change? There are legal processes for the change of name, such as filing a change of name petition with the probate court and circulation of notice in recognized media.⁶⁰ Whether or not this legal procedure should be followed by presumed married couples is not clear under the law, and whether the usage of the man's last name by the woman with no objection from the man should suffice as holding out is still to be determined. A vivid example of the name change scenario is exhibited in various concession areas in Liberia, women change their name to that of their cohabitating spouse and are known by the community and the man's employer by the man's last name. Men usually name women as spouse and beneficiary to their employers without legally marrying these women. Can this form of arrangement be considered as holding out? Is a woman considered a wife just because she is named by a man to his employer as his wife? Does inclusion of a partner on document as spouse satisfy the presumption of marriage criteria for holding out? One would then wonder whether in the case where a title document, for example a land deed that is issued in the name of a man and a woman for example Alice Davis and John Davis, can suffice as a valid marriage document

⁶⁰ Liberian Code of Laws Revised, Title 1 Civil Procedure Law Chapter 67.1(1973)

under the presumption doctrine? The ambiguity of the statute is clearly seen in these scenarios. The lack of clarity of the terms in the statute and the Supreme Court's reluctance to interpret these terms has assisted in exacerbating problems encountered by couples upon dissolution of the cohabitation relationship.

An assumption could be made that the application of the presumption doctrine relative to holding out would be reviewed by the court when invoked. This was not the case in *Newindeh v. Kromah* 22 LLR 3(1973). The couple in that case lived together for eleven years, and upon separation the father claimed custody of their child based on the marriage presumption doctrine.⁶¹ The mother filed habeas corpus proceedings contending that there was no valid marriage. On appeal, the Chamber Justice concluded that "according to customary law, the payment of dowry is essential to constitute a marriage, and in the absence of proof of such payment, the children resulting from the union are illegitimate and belong to the mother."⁶² The court further held that the union was an agreement to marry, and differentiated marriage from an agreement to be married based on the case *Horton v. Horton*, 14 LLR 57, 60-61 (1960), which states:

"Marriage, in our law, as distinguished from the agreement to marry and from the act of becoming married, is the civil status of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is formed on the distinction of sex."⁶³

⁶¹ Liberian Code of Law Revised, Civil Procedure Law, L. 1963-64 Chapter III, Section 2501(3) (1956)

⁶² *Newindeh v. Kromah* 22 LLR 3, 5(1973)

⁶³ *Horton v. Horton* 14 LLR 57, 60-61 (1960)

The Chamber Justice did not consider the presumptive doctrine sufficient to warrant its discussion although it was invoked by the father instead, the court determined that there was no customary marriage and that the relationship was an agreement to be married. The issue of marriage is germane in custody determination and as such the Court should have clarified how this doctrine is applied or why it should not be applicable in this case. Instead the Chamber Justice expounded that the legal procedure for the appellee was for him to legitimize the child if he wanted any legal rights to the child. The Court also mentioned that when custody is at issue, welfare of the child is the controlling consideration. Although the court states that the welfare of the child is controlling, it did not determine the fitness of each parent. The court ordered the father to immediately return the child to the custody of the mother so that the child could have motherly care and affection in an environment that is most conducive to her well-being, until such a time when the father legitimizes the child.⁶⁴ There is no justification as to why motherly care and affection was necessary to the child's well-being; whether the decision was based on the child's age, or the mother as the primary caregiver, or whether the father was estranged from his child, are questions that were left unanswered by the court, as it is undisputed that both parents lived together for eleven years.

The Court completely ignored the issue of marriage presumption even though the couple lived together for eleven years; but instead opined on the differences between marriage and the agreement to marry. This differentiation was taken from the *Bouvier Law Dictionary Marriage (Rawle's 3rd Rev. 1914)*. Under the Liberian Law, reference is made to a receptive statute only if the laws of Liberia do not address the issue at bar. Why use a law dictionary when there is a statute? In this case the issue was not whether the couple had an agreement to marry; marriage

⁶⁴ Newindeh v. Kromah 22 LLR 9 (1973)

was alleged and the marriage presumption statute was invoked. The opinion should have elaborated on why the couple's relationship failed to meet the requirements of the various forms of marriages in Liberia that is civil marriage, customary marriage, and presumptive marriage. The Supreme Court, as final arbiter, should leave no room for speculation because its opinions serve as precedent. The Newindeh opinion leaves a lot of room for speculation.

Furthermore, the father in the above-mentioned case worked for three years for the mother's parents. He built a zinc house for the parents though he did not pay dowry according to tradition. The Chamber Justice could have reviewed the issues holistically to determine whether the couple qualified under the presumptive doctrine as husband and wife for the following reasons: (1) the couple lived under the same roof for eleven years, (2) though the father did not pay dowry, the couple were considered husband and wife by the family and community, and (3) the man worked for the woman's parents for three year. If there had been insufficient reason to presume marriage, it should have been stated clearly, so as to serve as guidance for future cases. Further, the Court could have found that the trial court did not proceed properly with the case and remanded the case to the lower court to determine issues of law and facts regarding the validity of the marriage. The absence of a well-founded analysis deprives future cases of an established precedent.

The Court's circumvention of the issue of marriage presumption stems from the fact that the law is unclear and leaves too much to interpretation. For instance, the marriage presumption statute does not state how long a couple should live together to be considered as husband and wife. A time requirement in a presumed marriage is essential to establish a line of demarcation between couples that consider themselves to be married and an illicit cohabitation relationship.

The marriage presumption doctrine does not take into consideration the number of years that couples should live together to be considered married. If marital status could be defined by the number of years that couples live together based on the presumption doctrine, then the number of years should be determined by the statute. The current statute is silent on this issue, thereby making its application even more difficult. If the time frame was established, for instance, five years, the couples in the case above might have qualified as married. The unanswered questions posed by this statute are numerous. Since the Court has not passed on this issue; it can only be assumed that marriage will not be presumed based on the duration of a relationship, given that the court has termed an eleven-year union as a mere “agreement to marry.”⁶⁵

Thirdly, there should be a way to rebut a presumption if that presumption is not conclusive. A conclusive presumption is “a presumption that cannot be overcome by any additional evidence or argument.”⁶⁶ On the other hand rebuttable presumption is “an inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.”⁶⁷ There is no evidence based on the statute or any case law to establish the conclusiveness of the marriage presumption doctrine. Therefore a party who objects to a relationship being presumed as marriage should have the requisite opportunity to state its objection. Currently there is no legal defense available; which is one of the major shortfalls of the statute. The marriage presumption statute does not expressly state how the statute can be rebutted, nor has any court held this presumption to be conclusive. In the wake of this dilemma,

⁶⁵Horton v. Horton 14 LLR 57, 60-61 (1960)

⁶⁶ Garner, Black’s law abridged 8th edition

⁶⁷ Garner, Black’s law abridged 8th edition

it seems that the court will continue to evade this issue and couples will not get justice from invoking the law.

As it stands currently, the Liberian statute does not indicate what holding out means. It does not state to whom couples should hold themselves out, there is no time duration for holding out, and there is no rebuttal for marriage presumption. The reluctance of the Court to rule on matters relating to marriage presumption or the legislature to amend the statute have led to the limited application of the law and minimal protection of couples. The Court's reluctance is a glaring violation of the Equal Protection provision of the Liberian Constitution which states that "All persons are equal before the law and are therefore entitled to equal protection of the law."⁶⁸ The fact that other forms of marriages receive adequate remedy under the law and marriage presumption does not indicate an uneven playing field. In cases where the marriage presumption is invoked, the Supreme Court should deal adequately with this issue in order for trial courts to have precedents for reliance. In the cases, *Twe et al v. Twe-Paye et al*, 39 LLR 474 (1999), *Manney v. Money*, 2 LLR 618, 620(1927), and *Newindeh v. Kromah*, 22 LLR 3(1973), the Court has had perfect opportunities to rule on marriage presumption issues but has evaded the questions. These lapses have left many women and children deprived of property, support, custody, inheritance, and legitimate status.

B. Legitimation and Paternity

The two major forms of marriages recognized in Liberia are: (1) civil or statutory marriage and (2) traditional or customary marriage; the marriage presumption doctrine is also recognized under the Civil Procedure Law as a form of marriage. A child born under the civil and customary marriage is legitimate. Conversely, a child that is born to unmarried parents is considered

⁶⁸ Liberian Constitution Article 11(c) (1986)

illegitimate. Legitimation is a process by which an illegitimate child becomes legitimate and enjoys equal rights as a child born in wedlock. The law on legitimation states that “the natural father must make an application to the court and then the child will be legitimated and become the legitimate child of the applicant as though the child was born in lawful wedlock.”⁶⁹ A father’s failure to go through the process of legitimation has adverse consequences for the child. That child will not have an automatic right to inherit from the father; and will be considered illegitimate under the law.

The original laws of Liberia did not make provision for the legitimation of children. These children were considered bastards, which meant that he “has no inheritable blood and cannot be heir to any one by the Common-law”⁷⁰ Provisions were later made under the Liberian Domestic Relations Law for the legitimation of such children to afford them the right to inherit from their fathers. The legitimation procedure allows the father of the child to apply to the court to legitimate his child.⁷¹ This process is at the sole discretion of the father; neither the mother or the child nor the court can compel legitimation. It is unjust to only allow the father to compel legitimation; the mother or the child should also be allowed to compel legitimation in order to protect the child from being deprived of an inheritance. Mothers should be allowed to compel legitimation especially when paternity has been established. If a man has been determined by the court to be the father of a child or he acknowledges the child to be his, it should not be left to his

⁶⁹ Liberian Codes Revised Title 9, Domestic Relations Laws sec.4.92 (1998)

⁷⁰ George Cyrus v. Thomas G. Fuller 1LLR 184 (1884)

⁷¹Liberian Codes Revised, Title 9 Domestic Relation Laws Section 4.92, (1998) “Upon the an application made to the probate court by the natural father of a child born out of wedlock, such child may be legitimated with respect to such applicant and shall become for all purposes the legitimate child of such applicant and entitled to all the rights for legitimacy as if born during the lawful wedlock of the applicant. Upon receipt of such an application, the court shall issue a citation to the natural mother of the child who shall be served therewith together with a copy of the petition. She may serve and file an objection to the proposed legitimation, limited to the sole ground that the applicant is not the natural father of the child.”

discretion to determine the legal status of the child. The court should declare that child legitimate as though the child was born in wedlock.

What is most striking about the statute on legitimation is that it is not gender balanced. The natural father has the option to legitimate the child, while the mother has only the right to object to the legitimation. Moreover, the only way a child can become legitimate is through the legitimation process, and the law does not allow the mothers to compel the father of her child to legitimate the child. A mother could, through litigation establish that a particular man is the father of child, but does that legitimate the child? No. Litigation will only establish paternity, which could entitle her to child support but not inheritance for the child. When a child is not legitimated, that child does not have inheritable blood. In *George Cyrus v. Thomas G. Fuller* 1LLR 184 (1884) the Court, in deciding whether an illegitimate grandchild could seek title to property as heir, opined that, “A bastard has no inheritable blood and cannot be heir to any one by the Common-law.”⁷² To date, children born out of wedlock do not have automatic inheritance from their fathers, but they can inherit from mother and maternal linkage.⁷³

Presently in Liberia, courts rely on ancient statutes such as the bastardy statute. The court has defined bastard in *Prout v. Cooper* 5LLR 412(1937) as “a child born before the marriage of his parents.”⁷⁴ . This statute, which was enacted in the 1800s was a criminal statute. The purpose was to promote traditional marriage and deter a mother from birthing children that could likely become public charge. During the 1800s the population was small, and traditional family values were

⁷² *George Cyrus v. Thomas G. Fuller* 1LLR 184 (1884)

⁷³ Liberian Codes Revised, Title 8, Decedents Estates Law Section 3.5. “An illegitimate child and his issue shall inherit under the provisions of section 3.2 from his mother and from her lineal and collateral relatives, and his mother and her lineal and collateral relatives shall inherit from such child and his issue as if he were legitimated.”

⁷⁴ *Prout v. Cooper* 5LLR 412(1937)

respected and protected; with the increase in population and cohabitation, one wonders at its effectiveness in contemporary times.

The Bastardy Statute was borrowed from the United States of America; specifically from Arkansas, Alabama, and Georgia. The legislative intent was to prevent women from giving birth to children who will likely become “public charge.”⁷⁵ With the multiplicity of children born as bastards in Liberia today, the legislature has to revisit this statute and, take affirmative action to address current realities. The current realities are that many couples live together for prolonged period of time and refer to themselves as husbands and wives and procreate. Children in such a union are disadvantaged by the law when it comes to automatic inheritance from their fathers because they are considered illegitimate. Lack of automatic inheritance rights for children born out of wedlock, especially when paternity is not in question, is discriminatory.

Inheritance for children born out of wedlock is automatic from the mother’s perspective but conditional from the father’s perspective. A father must legitimate his child before that child can inherit from him. If the father does not legitimate the child, he can take the following steps. Those steps are within the sole discretion of the father except in the case where he is adjudicated as the father.

“An illegitimate child and his issue shall inherit under the provisions of section 3.2 from his mother and from her lineal and collateral relatives, and his mother and her lineal and collateral relatives shall inherit from such child and his issue as if he were legitimate. An illegitimate child and his issue shall inherit under the provisions of section 3.2 from his father and from the lineal and collateral relatives shall inherit from such child and his issue as if he were legitimate under any of the following conditions:

⁷⁵ Id., 412

- (a) If the child is adopted by his father; or
- (b) If the father acknowledges his paternity in writing before a justice of the peace or notary public and such acknowledgement is probated and registered; or
- (c) If the parents marry subsequent to the birth; or
- (d) If the child has been legitimated under the provision of the Domestic Relation Law; or
- (e) If the paternity of the child has been adjudicated by a court of appropriate jurisdiction

Such child shall be treated as if he were the legitimate child of his mother, and if any of the conditions enumerated in this section is present, as the legitimate child of his father, for the purpose also of receiving benefits under section 4.3 and 4.4.”⁷⁶

From reading Section 3.5 (e) above, it would seem that once paternity is adjudicated, the child becomes for all intent and purposes the legitimate child of his father. Legitimation clearly gives the automatic right of inheritance from the father to the child and vice versa. This is a deliberate action by the father of his intent for the child to inherit. The assumption is that the child for all intents and purposes is like one born in wedlock. Notwithstanding the above provision, the Supreme Court has from time to time established that for a child born out of wedlock to inherit from the father, the father should necessarily legitimate the child. This rule has been established in *Johnson v. Fadel*, 25 LLR 174, 180(1976), *Newindeh v. Kromah* 22 LLR 3, 9(1973), *Prout v. Cooper* 5LLR 412(1973). Per the Court’s recent opinion in *Cole v. His Hon. Wah et al*, LRSC 9 (16 January 2014), even where there is sufficient evidence that the father recognized the illegitimate child as his child and the father’s relatives did the same, that child still does not have automatic rights, and when his/her status is challenged by a legitimate child, the illegitimate shall not even enjoy the right to be granted a letter of

⁷⁶ Liberian Codes Revised, Title 8, Decedent Estates Law Section 3.2(1998)

administration.⁷⁷ It is clear from the above cases that despite the wording of the statute, the Court has held repeatedly that an illegitimate child can inherit from the father, if such child is legitimated by the father.

The Court relied on Section 4.92 of the Liberian Code Revised, Title 9, Domestic Relations Law⁷⁸ in the above opinions. However, in the Decedent Estate Law Section 3.5 (e), a child may inherit on the bases of the establishment of paternity even though born out of wedlock. On the basis of the Court's opinions and the law cited immediately above, there is clearly some tension as to the question of the mode of enjoying the right to inherit by children born out of wedlock. One is inclined to ask, "What does adjudication of paternity of the child" really mean?" Answering the question may then give a much more realistic appraisal as to whether or not the inheritance right of children born out of wedlock is strictly conditioned on a deliberate action by the father to legitimate or the intent of the father for the child to inherit on the basis of the establishment of paternity. Although there is tension between the laws, based on the court's repeated opinions regarding legitimation as a basis for illegitimate inheritance, it is safe to say that inheritance of an illegitimate child from his father is based on legitimation of the child by the father.

⁷⁷ Cole v. His Hon. Wah et al, LRSC 9 (16 January 2014), "she is qualified under the law, absent any challenge to her on account of her status as an illegitimate child in the statutory line of decent, inheritance and order for letters of administration, to be granted letters of administration to administer the property of the late William C.A. Cole, Sr. the same as William C.A. Cole Jr."

⁷⁸ Liberian Codes Revised, Title 9, Domestic Relations Law Section 4.92 (1998), "Upon an application made to the probate court by the natural father of a child born out of wedlock, such child may be legitimated with respect to such applicant and shall become for all purposes the legitimate child of such applicant and entitled to all the rights of legitimacy as if born during the lawful wedlock of the applicant. Upon receipt of such an application, the court shall issue a citation to the natural mother of the child who shall be served therewith together with a copy of the petition. She may serve and file an objection to the proposed legitimation, limited to the sole ground that the applicant is not the natural father of the child. After the hearing, if an objection has been filed and overruled, or if no objection has been filed, upon the return day of the citation, the court shall order the clerk of court to record the application, its date, the name of the applicant and the name and date of birth of the child, which record shall be admissible as full and sufficient evidence of the legitimacy of the child with respect to the applicant. The clerk shall also prepare, sign and issue to the applicant a certified copy of such record."

Even though the court relies on Section 4.92 Domestic Relations Law in rendering decisions regarding inheritance of children born out of wedlock, the language of the statute is not devoid of problems. One problem is that it is within the sole discretion of the father whether his child born out of wedlock inherits from him or not. That is, even if paternity was established, if a father does not legitimate his child, that child cannot inherit. This law effectively allows fathers to segregate their children. Imagine a father who has seven children and only two are born in wedlock; should the other five not benefit from inheritance just because they were born out of wedlock? Is it really the child's fault that the parents did not marry? Children should not be made to bear such unjustified burdens. A second problem with Section 4.92 is that the provision is patriarchal. Laws should not be gender biased and this law unambiguously favors the father's interest over the mother's and the child's. A third problem with the law is that it discriminates based on social status, that is, because a child is born in wedlock, it will have a special privilege over its siblings born out of wedlock, while the perpetrator the father goes unpunished.

Fathers are given the sole power to decide whether or not a particular child can inherit from him. A law that gives sole power to one gender is discriminatory. This law discriminates against mothers, which is a blatant violation of the Liberian Constitution's equal protection provision, which states that "all persons are equal before the law and are therefore entitled to the equal protection of the law."⁷⁹ Therefore a statute that gives only the father the right to decide which of his children should inherit from him and does not allow the mother to compel inheritance rights for her children is discriminatory; especially when paternity has been adjudicated. The Constitution also states that "any laws, treaties, statutes, decrees, customs and

⁷⁹ Liberian Constitution Article 2 (c) (1986)

regulations found to be inconsistent with it shall, to the extent of the inconsistency, be void and of no legal effect.”⁸⁰ Therefore, a statute that does not protect both males and females equally is inconsistent with the Constitution and should be void. The basis of this argument is not to advocate women’s rights, but to bring the world’s attention to the snail pace of the progression of laws in Liberia on one hand, but most importantly, to stress the point that children’s rights should not be conditioned on the discretion of parents, especially in situations that the children did not create or have any control over.

While legitimation entitles a child to inherit from the father, the process of inheritance does not start with legitimation, but rather with the establishment of paternity. A mother must first obtain a ruling from a competent court that a particular man is the father of her child. Though a mother can litigate paternity, the father can also voluntarily declare himself as a father of a particular child. Both parents can petition the court to establish paternity. There are three ways in which paternity is established: (1) when a man acknowledges a child to be his,⁸¹ (2) blood testing,⁸² and (3) adjudication.⁸³ Although the three methods stated above establish paternity, they do not legitimate a child. The establishment of paternity sets the stage for support obligation. The differences between legitimation and paternity are that paternity establishes the support obligation of the natural father and that paternity proceedings can be initiated by both parents. Establishment of paternity does not make a child legitimate. On the other hand,

⁸⁰ Liberian Constitution Article. 2 (1986)

⁸¹Liberia Code Revised, Title 9 Domestic Relations Law Sub-Section 5.3(b) (1998) “the liability of the natural father shall not be enforceable unless he has adopted him, or has acknowledged or shall acknowledge paternity of such child in open court or by writing acknowledge before a justice of the peace or a notary public and file with the Registrar of Deed.”

⁸² Id. Sub-section 5.20(d).

⁸³ Id. Sub-section 5.20(c).

legitimation establishes paternity and grants the child legitimate status as though that child was born in wedlock.

Even though the law seems to be clear on the methods of establishing paternity, there is still a need to further clarify what it means to acknowledge a child. What actions must a father take to constitute acknowledgement has to be determined by the court since the law is not clear on what acknowledgement means. When a man prepares a document attesting that he is the father of the child but does not notarize such document or present the document to the court, will all of the other actions short of legitimation be sufficient to establish that he is the father of the child for the purpose of indisputably establishing paternity, or creating the right in the child to inherit from his or her father? Where the father does not take any steps and does not support the child in any way but publicly and continuously asserts that the child is his, will that be sufficient to establish paternity? The court could determine from the conduct of the father if he intended for the child to benefit from inheritance.

Another method of establishing paternity required by law is Blood Grouping Test. The law states:

“the court, on motion of the respondent, shall order the mother of the child born out of wedlock, her child and the respondent to submit to and or where grouping tests by a duly qualified physician or technician to determine whether or not the respondent can be excluded as being the father of the child, and the result of such tests may be received in evidence, but only in cases where definite exclusion is established. If the respondent is financially unable to pay for the cost of a test, the court shall direct qualified public health officer to conduct such test.”⁸⁴

The law speaks to the situation where a woman has sued a man to establish paternity of her child. As this law is written, it seems as though the law is concerned with absolving the man

⁸⁴ Liberian Codes Revised, Title 9, Domestic Relation Law Sub Section 5.20. (d) (1998)

from fatherhood. Can a woman take a man to court to establish that he is or is not the father of her child under this provision? If she cannot afford the cost, will the court direct a qualified public health officer to conduct such test? Again, this law is gender-biased and needs to be re-written in a gender neutral manner, so that both parents can benefit equally. The law is written in a patriarchal manner which is not representative of a truly democratic state. The laws of Liberia should be written in a gender neutral manner in order to benefit both parties in a married and unmarried relationship.

One will wonder why paternity is separated from legitimation under the Liberian Domestic Relations Law. In order to better understand, the history and social-political conditions of the Laws have to be reviewed. As a caveat, the analysis below is from a real-life perspective and experience without empirical evidence.

Firstly, there are two forms of marriages in Liberia, customary and statutory. The law on legitimation was enacted to protect statutory marriage and not customary marriage, because in customary marriage, a man could marry as many wives as he desires. On the other hand civil marriage is limited to one man, one wife.

Looking back into the past, the prevailing condition at the time was as stated in earlier chapters: the government was controlled by a select group of Liberians who were settlers from the United States. Most of those government officials kept concubines that bore them children. They could not afford to publicly identify with the mothers and the children because most of these women were “country women,” working and living on their farms. The laws were written in this manner as a means of face-saving, keeping the marital home intact, excluding unofficial off spring from inheritance, and maintaining social status.

C. Support

Support obligations are determined differently based on whether a child is born in or out of wedlock. For children born in wedlock, fathers are fully responsible for their support, whereas, support for children born out of wedlock has to be adjudicated. Section 5.3(b) of the Liberian Domestic Relations Law states:

“father liable for support of his child or children, under twenty-one years of age but if any such child been born out of wedlock and if the natural parents have not inter-married thereafter, the liability of the natural father shall not be enforceable unless he has adopted him, or has acknowledge or shall acknowledge paternity of such child in open court or by a writing acknowledge before a justice of the peace or notary public and filed with the Registrar of Deeds or he has been legitimated under the provisions of section 4.92 or the father has been adjudicated to be the father of such child by a court of appropriate jurisdiction including the court making the determination for support.”⁸⁵

The statute as written regarding married couples seems to be borrowed from the ancient past as it does not take into consideration contemporary realities with respect to gender equality. This is a clear replication of historical times when men were viewed as the bread winners and women as care givers. It further entrenches historical male superiority and gender inequality in family settings. Why should the support of a child be placed squarely on the father when the child has two parents? Is this a short-cut for the court, or does the court still believe that women do not have the capacity to support their children equally as their male partner? Or is this a way of ignoring the development of women over the years? Currently 11.7 percent members of the legislature are women, one-third of the cabinet ministers are women and forty percent of the deputy and assistant ministers are women.⁸⁶ According to *Baurer (2009; 207) citing Morgan and Pitcher (2004)*, Liberia at the outbreak of the war, “had a large population of educated, professional women, from which to draw potential leaders,”⁸⁷ and that “Liberia had the highest

⁸⁵ Liberian Codes Revised, Title 9, Domestic Relation Law Sub-section 5.3 (b), (1998)

⁸⁶ BAURER AND TREMBLAY, WOMEN IN EXECUTIVE POWER: A GLOBAL OVERVIEW 92-93(2011)

⁸⁷ Id. 104

percentage of women deputy and assistant ministers in Africa.”⁸⁸ This statistic which was gathered from the World Wide Guide to Women in Leadership 2009, speaks to the progress of women in Liberia over the years. While it is true that from independence to mid-1900s, women participation in social and political activities was minimal, many women have ascended to key positions in both the public and private sectors. Therefore, the law on support which treats women and men unequally and does not conform to either national or international standards, should be amended to reflect current economic realities. Support of children should be determined based on the capacity of both parents, taking into account which parent has legal and or physical custody of the child and the financial standing of each parent.

Support of illegitimate children largely depends on whether or not the father agrees to the paternity of the child. If he does not, the mother has to go to court to establish paternity. If the mother cannot afford to litigate filiation proceedings, then she cannot progress to the next step of demanding support. This is why most children born out of wedlock face extreme poverty, lack quality education, and participate in criminal activities. While I argued above that support obligation of children should not rest on fathers alone, and fathers should be held liable for the support of their children regardless of the child’s legitimacy. It is an undue burden placed on mothers of children born out of wedlock to adjudicate support when in fact the father has not denied paternity but fails to support his child. Fathers, who have not denied paternity and have neglected to support their children, must be penalized for subjecting the children to undue hardship and placing mothers under emotional distress. In the same vein, if a father doubts that a child is his, he has the right to adjudicate paternity. In this instance, the question will be, what happens to the child while paternity is being adjudicated? The most prudent thing will be for the

⁸⁸ Id. 92

both parents to support the child pending the conclusion of litigation and thereafter, if it is established that the man is not father, he can recover from the mother the amount contributed toward the child's support.

Presently, the support obligation of the father is determined by the court. The problem with this process is that there is no standard procedure for determining child support. The statutes regarding support orders is ambiguous, and leaves support determination to the discretion of the court. The statute states "If... a respondent is liable for the support of the petitioner under this chapter and is possessed of sufficient means or able to earn such means, the court shall make an order requiring the respondent to pay weekly or at other fixed periods a fair and reasonable sum."⁸⁹ As with other statutes, rather than directly addressing the problem of support, this statute raises more questions than it answers. What does "possessed of sufficient means" mean? Does the father's income have to be sufficient before he pays child support? What is the yardstick used to determine sufficiency or insufficiency? What if the father does not have the ability to earn "such means," but he has property or other assets? Can the court order that such property or assets be used for the support of the child? The law states that payments should be fair and reasonable. What is the standard used to determine what amount is fair and reasonable? Should a higher standard be used, and if so, what should that standard be? What constitutes income for the determination of support?

In determining the support obligation, the Court's decision is based on what that father says his income is or how much he is willing and able to pay; there is no investigation into all of his income. This lack of protocol deprives children of adequate support. For instance, a father may be a businessman at the same time he is working for the government. Usually what happen

⁸⁹Liberian Codes Revised, Title 9, Domestic Relations Law Sub Section 5.13(1998)

in cases like those is that the lower of the two incomes will be reported to the court instead of the total. Does the court go beyond what is reported or inquire into other incomes? No. It is not the prerogative of the court, and even if was, the Court does not have the capacity to delve into such matters. A specialized agency that deals with family law issues could help to alleviate problems of under calculation, miscalculation, or even over calculation. Additionally, there will be a lesser burden on the court and the process will be more transparent. Such an agency could further investigate and determine what constitutes the income of the parents. If any of the parties are dissatisfied with the Agency's determination, they would have recourse under the law. By contrast, when the court makes support determination, the decision is final and there is no further redress.

The idea of men being the bread-winner and women the caregivers is ancient and must not be used as a standard of evaluation in modern times. Nowadays, in most homes, both parents earn incomes to sustain the family. Therefore, the obligation to support children should not be placed squarely on the father. The earning power of both parents should be determined and each should contribute toward the support of their child according to their respective capacities, whether or not the child is legitimate. In order for the Court to render fair and equal treatment to parents who have the obligation to support, the court needs a clear standard and fair way of setting support amounts. This can only be established if there is a standard support guideline.

D. Custody

Similar to the Domestic Relation Law on Child Support, the Law on Custody is gender-biased. Custody of children born in a married relationship is with the father and in the case of an illegitimate child, the mother. In the case of a married relationship, the law states:

“Husband and wife are joint natural guardians of minor children of their marriage while they are living together. The couples are equally responsible for the care, nurture, welfare and education of the children. Upon separation, the father is the paramount custodian, except he is unable or morally unfit to perform his legal, parental, moral and natural duties. If the father cannot fulfil his responsibilities for any of the reasons stated above, the child is given to the mother. If the father is dead or absent, the mother shall be given custody.”

Again, this law speaks to the superiority of males over their female partners. The law has clearly violated the Constitution by stating that one parent is more fit than the other without due process. The statute has ignored both Article 11(c) of the Constitution of Liberia which states “All persons are equal before the law and are therefore entitled to the equal protection of the Law, and Article 20(a) which states that “no person shall be deprived of life, liberty, security of the person, property, privileges, or any other right except as the outcome of a hearing judgment consistent with the provision laid down in this Constitution and in accordance with due process of law.” If all individuals are equal before the law, why does the father become the paramount custodian of the child without adjudicating fitness? This law as written is discriminatory on its face and does not accord the mother an opportunity to prove her fitness; it should be re-written in a gender neutral manner. Fitness and capacity should be determined in order to establish which parent takes legal or physical custody of the child. For the court to decide on matters of legal or physical custody, the statute must clearly define what constitutes legal custody and physical custody.

The problems that ensue from illegitimacy, child support, and custody are not new family law issues. That is why the Supreme Court’s reluctance to clearly rule on these issues is astonishing. The Court itself recognized these family law problems in 1984 and predicted that

they would continue in the future when Chief Justice Gbalazeh opined in *Dixon v. Rick-Fleming* 32 LLR 134 (1984) that, “The question of care and custody is in an age in which a myriad of married couples is dominated by centrifugal forces necessitating a multiplicity of divorces, and when everywhere more and more children are born out of wedlock, the question of child care and custody is bound to seriously bother and concern our court in the years ahead.”⁹⁰ Even though the Court realized over thirty years ago that care and custody are serious problems for the nation because of the growing number of children born out of wedlock, no steps have been taken to judicially curtail these problems nor has the Court overturned earlier rulings on these issues.

E. Lack of Inheritance and Property ownership Rights for Unmarried Woman

There is no definite law on the inheritance rights of an unmarried woman. An unmarried woman could inherit under the presumptive doctrine provided she qualifies as a wife. In the event that the unmarried couple conducts itself as married, upon death, dissolution, or termination of their relationship, the law does not state how property should be distributed. Women that are faced with this situation do not have a remedy under the law. There are many women who live in long-term relationships and upon termination of the relationships are left with absolutely nothing. The law does not protect them from such unequal treatment by their male counterpart. As a result some men are unjustly enriched while the women are subjected to hardship. In some extreme situations, the woman is deprived of property acquired during the relationship at the same time she is sent away with her children, because the children are illegitimate. In other scenarios, when the man dies, the relationship is usually categorized as illicit and the woman does not inherit from her deceased partner.

⁹⁰ *Dixon v. Rick-Fleming* 32 LLR 133, 138 (1984)

F. Conclusion: Change is necessary

The problems that exist with the laws of Liberia go beyond the interpretation of the law. They have to do with how the laws are written. The law has not evolved over the years; it has simply been re-worded, but the basic content is still the same. Situations that existed fifty years ago do not exist now. Therefore, as times change, the law should be written to conform to prevailing situations. Although the statutes were revised in 1976 and 1998, the basic content did not change. As a result, laws are laden with ambiguities and reflect a patriarchal society. The marriage presumption doctrine is one of those laws that needs to be reviewed by the Court. Until that is done, exercising one's right under this law will be a challenge. Many children will be deprived of automatic inheritance from their fathers. Legitimacy, support, and custody will continue to be a big challenge encountered by anyone invoking this statute. In order to solve these problems, the marriage presumption statute should either be clearly interpreted by the court, or amended by the legislature.

CHAPTER V: COMPARATIVE ANALYSIS

This chapter focuses on how other jurisdictions have dealt with the issue of marriage presumption. They are Kenya, Sierra Leone and three American states: New York, California

and Pennsylvania. The chapter also analyzes other family law issues such as legitimation, support, custody and inheritance and property in a presumed marriage.

The chapter further seeks to compare common-law marriage of the countries and states mentioned above; it recognizes the fact that the American states have now abolished common-law marriage. It argues that though the American states have abolished common-law marriage, historical factors that led to common-law marriage in these states still exist in Liberia today, and therefore Liberia can learn valuable lessons from these states.

This chapter also seeks to analyze how these different jurisdictions, have dealt with the issue of cohabitation or common-law marriage. It also distinguishes between presumed marriage and illicit cohabitation and investigates issues arising out of the dissolution of presumed marriage such as legitimation, support, custody and inheritance. The advantages and disadvantages of how these countries and states treat these issues will be discussed. Finally, there will be discussions on differences in culture and how it could have impacted how each country and state have handled common-law marriage.

The Chapter concludes that Liberia can borrow a synthesized version of Kenya's and Sierra Leone's marriage presumption laws and adopt them to fit its situation, primarily because Liberia and these countries share similar culture and traditions. Additionally, Liberia's laws are patterned after that of the United States; therefore it is feasible to borrow from the American laws.

A. Reasons for choosing the African countries and American States

Couples get married formally in order to legitimate their status before the law. Couples in a married relationship are protected by the law and have legal rights to one another. Upon death, separation, or dissolution of the relationship, their legal rights could extend to real and personal property distribution, inheritance, support, custody and alimony. Marital status is very important to the extent that it sometimes serves as a guarantee that a person is responsible enough to hold political and corporate positions. While many couples choose to marry and enjoy these privileges, others cohabit for long periods of time carrying out the same duties as married couples, but falling short of legalizing their relationships.

Cohabitation is the fact or state of living together as life partners, usually with the suggestion of sexual relations.⁹¹ When couples cohabit, there is a presumption of marriage when they hold out as such, for a long period of time. Presumed marriage is also known as common-law marriage. Presumed marriage or common-law marriage is marriage that takes legal effect, without license or ceremony, when two people capable of marrying live together as husband and wife, intend to be married, and hold themselves out to others as a married couple.⁹² Cohabitation can also be illicit from its conception. An illicit cohabitation is the offense committed by an unmarried man and woman who live together as husband and wife and engage in sexual intercourse.⁹³

The distinction between the legal and illicit forms of cohabitation is pivotal to the determination of cases arising from these relationships; for instance in some countries that recognize common-law marriage, there are set criteria that trigger the marriage presumption. In

⁹¹Garner, Black's Law Dictionary abridged 8th edition

⁹² Garner, Black's Law Dictionary abridged 8th edition

⁹³ Garner, Black's Law Dictionary abridged 8th edition

other countries, the marriage presumption is made through judicial decisions. In reviewing cases involving marriage presumption, the court sets a high standard of proof for the party alleging marriage. If the standard is not met, the relationship is considered meretricious, which is the same as an illicit relationship.

Marriage presumption or cohabitation is very common in many parts of the world. Therefore countries have sought to define it through statutory provisions or judicial opinions. Some countries have endeavored to interpret meaning to such laws so that its citizens can benefit from their application, while others have now abolished common-law marriages because they are viewed as obsolete. This section discusses common-law marriage in two African countries, Kenya and Sierra Leone and three states in the United States of America, California, New York, and Pennsylvania. Kenya and Sierra Leone were selected because, like Liberia, they are common-law jurisdictions and share similar culture practices and traditions. Because of these similarities, Liberia could learn valuable lessons from these countries and fit them into its own setting. Kenya and Sierra Leone provide for common-law marriage through judicial decisions and legislative enactment respectively.

The American states were chosen because the United States and Liberia have long-lasting historical ties. Liberia was established under the auspices of the American Colonization Society (ACS), a philanthropic organization established in the United States of America to repatriate freed slaves to Africa. Liberia declared its independence in 1847, thereby ending its political relationship with and detaching itself from the control of the ACS, which until then was the issuer of its laws. Despite its independence, Liberia's constitution and laws were patterned after the United States. To date, there are still strong political ties between the two countries.

There are huge cultural differences between the indigenous Liberians and the United States of America. The indigenous Liberians constitute ninety percent of Liberia's population. The remaining ten percent are the Americo-Liberians who share a similar culture with the US. Though there is a huge cultural disparity between the US and Liberia, most of Liberia's laws were patterned after United States Law, because the Americo-Liberians were the ones that actually wrote the laws. Even though there are similarities in the laws of both countries, Liberia has both civil and customary laws while United States has only civil law, and they share a common-law jurisdiction. It is worthy to note that some of the American laws adopted by Liberia have either been repealed or abolished in the US, while they are still being utilized by Liberia. An example for such law is the bastardy statute which was used in the 1800's in the United States, and is still applicable in Liberia today. While it is true that some of these laws are obsolete and should be amended or repealed, there are numerous factors that justify continuing to recognize presumed or common-law marriage in Liberia, for instance, poor infrastructure development, lack of public transportation, high illiteracy rate, and poverty.

The American states that are discussed in this section are California, New York, and Pennsylvania, though these states have abolished common-law marriage because the social values have changed. Nonetheless, Liberia can benefit from these past laws because the conditions that existed in the states prior to the abolition of common-law marriage still exist in Liberia; for example, a poor transportation network which is usually unpassable during the rainy season, and the unavailability of a marriage license registry owing to the poor economic capacity in most parts of the country. Additionally the cost of obtaining a marriage license is too much for the ordinary Liberian to afford because most of the citizens live below the poverty line. Currently, the cost of obtaining a marriage license is one hundred United States dollars. If most

Liberians cannot afford one dollar United States a day for a meal, they certainly cannot pay \$100 for a marriage license. These are some of the circumstances contributing to the increased rate of cohabitation.

B. Marriage Presumption

1. WHAT DOES HOLDING OUT MEAN?

I. KENYA

Common-law marriage is recognized in Kenya through judicial decisions. In order to establish whether cohabitants should be considered married under the common-law, the High Court of Kenya at Nakutu defined “holding out” in, *In the matter of the Estate of Patrick Kibunja Kamau* as “living together openly and notoriously.”⁹⁴ The Court in deciding whether Faith Wangechi Kamau should be considered a wife of Patrick Kibunja Kamau who died intestate, found that the couple lived together openly and notoriously without any protest from his legally married wife for approximately six years. It was also noted that the couple presented themselves to family and colleagues as if they were married. Faith assumed Patrick’s last name without any objection from Patrick, hence his acquiescing to her being referred to as Mrs. Kamau. There were other factors that influenced the court’s decision to consider Faith as Patrick’s wife: (1) the deceased personal effects were retrieved from the house he shared with Faith, (2) Faith took the deceased to the hospital when he was ill, (3) the funeral took place in Subukia, the residence he shared with Faith (4) the funeral committee included Faith as widow and accorded her the full honor of a widow, (5) the deceased was married under customary law and had the capacity to marry Faith, (6) Faith held herself out as the deceased’s wife, (7) Faith worked on the deceased’s premises, (8) the deceased’s father recognized her as the manager of the premises, and (9) after the deceased’s death, Faith continued to work on the premises.

⁹⁴In the matter of the Estate of Patrick Kibunja Kamau(Milka Githikia Kamau v. Faith Wangechi Kamau[2008] eKLR

Considering these factors holistically, the Court held that Faith was not an imposter. Given the years she lived with the deceased, she might have held a legitimate expectation that she was his wife; denying her a share of the deceased's estate was tantamount to denial of the fundamental rights of fair treatment and equality before the law. The court determined that Faith Kamau's and Patrick Kamau's relationship met the criteria for common-law marriage and therefore they were presumed married.

On the other hand, although Faith claimed that she and the deceased had three children, the court held that Faith's children could not benefit from the deceased's estate because, the children last names were different from that of the deceased, they did not live with the couple in their home, and there were conflicting statements as to whether Faith had the children before or during her cohabitation with Patrick. On these bases, the children were denied inheritance.

II. SIERRA LEONE

Unlike Kenya, Sierra Leone's marriage presumption law is statutory; the law is found in the Registration of Customary Marriage and Divorce Act. This law defines holding out as, "living together as husband and wife for a continuous period."⁹⁵ Like Kenya, "holding out" has to be public, and the couples must register with the Government in order to receive legal protection.

The advantage of registering with the government is that there will be a public record of the couple's cohabitation which serves as evidence of such a marriage. It also serves as a defense to a party alleging marriage and helps the court to determine whether or not there was a marriage, thus alleviates the problems of a discretionary ruling by the court to determine a valid common-law marriage. Additionally, it sets clear and defined criteria, removing any form of

⁹⁵ Sierra Leone Registration of Customary Marriage and Divorce Act Section 6(1)(b)(2009)

ambiguity as to the procedure a couple must follow to be considered married. Further, registration helps to differentiate illicit relationship from actual common-law marriage. By contrast, in the absence of proper a registration, party could use non-registration or improper registration to rebut an alleged marriage claim.

The goal of creating a registry is to provide a medium through which presumed marriage is recorded to avoid confusion as to its validity. The creation of a registry will serve as evidence that there is indeed a common-law marriage. This registration is a public record and will serve as the best evidence for a court to rely on, which will help alleviate the problem of determining whether or not a marriage was established and how it was established. The registry can also serve as a rebuttal to marriage presumption, because non-registration will be equivalent to non-marriage. However, there must be registration centers available in the entire country, and costs will attach to obtaining a license or certificate from the registrar. This requirement places financial and logistical burdens not only the government to create such a nationwide registry but also on those requiring the service. Further there must be trained personnel to administer the registry, which will be an additional burden for the government. A decision could be made by the government to either substantially reduce or waive fees, to reduce the burden on citizens. But despite the government's burden in creating a registry, the benefits of the creation of a registry outweigh the costs in that a system will be formed that will ensure national statistics of common-law marriages, assist the court in adjudication of cases, provide a voice for couples who find themselves in this category of relationship, and curtail deprivation of property and inheritance rights. In addition, there must be high levels of public awareness in order for the system to be utilized. Therefore, the country should endeavor to initiate a national awareness campaign to ensure that cohabitating couples utilize the registry.

III. CALIFORNIA

California does not recognize common-law marriage, but provides a remedy for agreements between non-marital couples upon death, separation or termination of the relationship. Though there are no statutory provisions for common-law marriage, courts have adjudicated cases where couples in a non-marital relationship agreed to hold themselves up as married. *In Marvin v. Marvin 18 Cal. 3d 660 (1976)* the California Supreme Court held valid the agreement made between non-marital partners, stating that the fact that man and woman live together without marriage and engage in a sexual relationship, does not in itself invalidate an agreement between them relating to their earnings, property, or expenses. Nor is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a non-marital relationship when they entered into it.⁹⁶

The California Court recognized the prevalence of cohabiting couples and reasoned that it cannot impose moral considerations that have been abandoned by many.⁹⁷ Instead non-marital cohabitation should be differentiated from illicit or meretricious relationships. The courts should determine whether there was an expressed contract or, in the absence of an expressed contract, the court should inquire into the conduct of the parties. Equating a non-marital relationship to a meretricious relationship would be to consider non-marital relationship as prostitution.⁹⁸

Currently, California has a domestic partnership statute, which is primarily for same-sex⁹⁹ couple and opposite sex couples that are 62 years and above, that is, one or both of the

⁹⁶ *Marvin v. Marvin* 18 Cal. 3d 660,670-671 (1976)

⁹⁷ *Id.* 684

⁹⁸ *Id.* 683-685

⁹⁹ Cal Fam. Code sec 297 (b)4.(a) <https://advance.lexis.com/search/?pdmfid=1000516&crd=a1c1e382-5f17-45f5-a69f->

persons should meet the eligibility criteria under *Title II of the Social Security Act as defined in Section 1381 of Title 42 of the United States Code* for aged individuals.¹⁰⁰ For Domestic Partnership to be legal, it must be filed with the Secretary of State.¹⁰¹

There is great value in the court inquiring into the contractual relationship between cohabitants and finding marriage based on the conduct of the parties. These inquiries assist in differentiating couples that agreed to live as married couples from those that are engaged in a mere illicit relationship. When couples agree to hold out as married, compromises are made as to how they will conduct themselves. These compromises could be explicit or implicit. They often pool their resources, or agree that one party should forego a career or education for the benefit of the relationship, sometimes, one party works while the other keeps the home. If the court does not inquire into the parties' conduct, such a relationship will be categorized as meretricious thereby making it unlawful. The consequence of such a categorization is the unjust enrichment of one party.

IV. NEW YORK

In the 1800s, New York recognized common-law marriage; the primary factors in determining marriages were cohabitation, reputation, acknowledgement of parties, and reception in the family. For common-law marriage to be considered valid, words had to be exchanged in the present tense that is, *per verba de presenti*.¹⁰² A landmark case that clearly set out these criteria was *Fenton v. Reed*, 4 Johns. 52.(1809). Common-law marriage was abolished on April

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¹⁰⁰ Cal Fam. Code sec 297 (b) 4.(b)

¹⁰¹ Cal Fam. Code sec 297 (b)

¹⁰²In re Benjamin's Estate 34 N.Y. 2d 27 355 N.Y.S 2d 356, 311 N.E. 2d. 495 30(1974)

29, 1933.¹⁰³ During the period of recognition, the burden of proving the existence of common-law marriage was on the party asserting marriage; the primary rebuttal to such marriage was that the relationship had to be meretricious from its conception.

Currently, New York does not recognize common-law marriages contracted within its borders; a common-law marriage contracted in a sister state is recognized as valid if it is valid where the marriage was contracted.¹⁰⁴ Cases regarding common-law marriages in New York are not adjudged for the purpose of finding the validity of the marriage, but to determine contractual issues.

V. PENNSYLVANIA

Like many states in the United States of America, Pennsylvania abolished its common-law marriage as of January 1, 2005. There have been controversies about the actual abolition date, whether it was done judicially in *PNC Bank Corp* or through legislative amendment to *section 1103 of Title 23 Pa.C.S.A. Domestic Relations*.¹⁰⁵ The court acknowledged in *Costello v. W.C.A.B. (Kinsely Const., Inc.)*, 916 A,2d 1242,1247 (2007), that the legislature specifically stated that “no common-law marriage contracted after January 1, 2005 shall be valid but providing that “nothing in this part” shall be deemed or taken to render any common-law marriage otherwise lawful and contracted before that date invalid.”¹⁰⁶ It was further determined that the wordings of the law was clear and did not need any interpretation. Therefore the abolition date is January 1, 2005.

¹⁰³ Fenton v. Reed, 4 Johns. 52 (1809)

¹⁰⁴ Baron v. Suissa, 74 A.D. 3d 1108, 1109 (2010)

¹⁰⁵ Title 23 Pa.C.S.A. Domestic Relations Section 1103: No common-law marriage contracted after January 1, 2005 shall be valid. Nothing in this part shall be deemed or taken to render any common-law marriage otherwise lawful and contracted on or before January 1, 2005, invalid.

¹⁰⁶ Costello v. W.C.A.B. (Kinsely Const., Inc.), 916 A,2d 1242, 1247 (2007)

Before abolishing common-law marriage, the Court's standard for proof for cases regarding common-law marriage was clear and convincing evidence, see *Staudenmayer v. Staudenmayer* 552 Pa. 253 714 A. 2d 1016 (1998), and *Pierce v. Pierce* 355 Pa. 175, 181, 49 A. 2d. 346, 349 (1946). In *Staudenmayer*, the wife alleged common-law marriage based on constant cohabitation and the reputation of marriage, contending that she and the husband had a common-law marriage before their civil marriage based on the fact that they had a joint bank account, she had his last name, they held out as couple, they held property by the entirety, and filed joint taxes. The Court opined that "If a putative spouse who is able to testify and fails to prove, by clear and convincing evidence, the establishment of the marriage by exchange of verba in praesenti, then the party has not met its "heavy burden" to prove a common-law marriage, since he or she does not enjoy any presumption based on evidence of constant cohabitation and reputation of marriage."¹⁰⁷ The court used this "heavy burden" standard of proof to avoid perjury and fraud.¹⁰⁸ This is because the Court in, *In re Estate of Stauffer*, 504 Pa. 626, 476 A. 2d 354 (1984) citing *Wagner's Estate*, 398 Pa. 531, 159 A.2d 295 (1960), opined that "common-law marriage is a fruitful source of perjury and fraud. This being so, the law imposes a heavy burden on one who grounds his or her claim on an allegation of common-law marriage..."

2. WHAT IS THE TIME DURATION FOR HOLDING OUT?

I. Kenya and Sierra Leone

The length of time a couple must live together to be considered married in Kenya is two years.¹⁰⁹ This means that couples should live together openly and notoriously for two years. While in Sierra Leone the time duration is five years of continuous cohabitation.¹¹⁰

¹⁰⁷ *Staudenmayer v. Staudenmayer* 552 Pa. 253 714 A. 2d 1016 (1998) Pa Lexis 1486

¹⁰⁸ *In re Estate of Stauffer*, 504 Pa. 626. 476 A. 2d 354 (1984) 630 Pa. Lexis 260

¹⁰⁹ *In the matter of the Estate of Patrick Kibunja Kamau (Milka Githikia Kamau Vs. Faith Wangechi Kamau)*[2008] eKLR

The duration of time couples must live together to be perceived as husband and wife sets a clear criterion for them. Misconception of marriage can easily be eliminated by realizing that the time requirement for marriage presumption has or has not been met. The time requirement also draws a clear line of demarcation between meretricious relationships and a presumed marriage. On the other hand, a couple who lived together and met all the other criteria of common-law marriage but does not meet the time requirement may be at a disadvantage. But in the interest of public policy and transparency, it is prudent to have a time requirement for cohabitation.

3. HOW IS THE MARRIAGE PRESUMPTION REBUTTED?

I. Kenya and Sierra Leone

Generally, presumptions are rebuttable or conclusive. A rebuttable presumption is an inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence¹¹¹ and the conclusive presumption is a presumption that cannot be overcome by additional evidence or argument.¹¹² In the case of the countries mentioned above, there is no indication that the marriage presumption is conclusive; since in fact there are conditions stated in the various laws as to how the presumption law is rebutted.

In Sierra Leone, marriage presumption is rebutted by proof of non-registration, age requirement, or fraudulent registration.¹¹³ In Kenya, the courts have adjudged the marriage presumption to be rebuttable by the lack of capacity to contract a presumed marriage, a lack of

¹¹⁰ Sierra Leone Registration of Customary Marriage and Divorce Act Section 6(1)(b) (2009)

¹¹¹ Garner, Black's Law Dictionary abridged 8th edition

¹¹² Garner, Black's Law Dictionary abridged 8th edition

¹¹³ Sierra Leone Registration of Customary Marriage and Divorce Act Section 6(1)(c) (2009)

joint ownership in business establishment, the lack of legitimate expectation of marriage, and the lack of openness and notoriety of a relationship.¹¹⁴

In Kenya and Sierra Leone, the definitions of “holding out,” can be synthesized as living together as husband wife openly and notoriously for a continuous period. A notorious cohabitation is an “illicit cohabitation in which the parties make no attempt to hide the living arrangement.”¹¹⁵ In marriage presumption, couples live together and hold themselves out as husband and wife without hiding their relationship. The attitude exhibited is one of expressed confidence that they are actually married. The relationship is also open, which means that it is visible, exposed to the public view, and not clandestine.¹¹⁶ The fact that no one objects and the law does not punish this behavior lends it a sense of legitimacy. Although this relationship is illicit, it is not necessarily illegal. Therefore, if it is not illegal, it should be given the requisite protection under the law; that is why some countries have taken steps to give couples under this arrangement legal protection.

An open and notorious relationship (presumed marriage) could be compared to the doctrine of adverse possession, which is defined as “the use or enjoyment of real property with a claim of right when that use or enjoyment is continuous, exclusive, hostile, open and notorious.”¹¹⁷ Like adverse possession, couples in a presumed marriage enjoy an affectionate relationship without protest from anyone. Because there is no objection, the couples are free to exercise the same rights as married couples. For instance, the female assumes the name of her

¹¹⁴ In the matter of the Estate of Patrick Kibunja Kamau (Milka Githikia Kamau Vs. Faith Wangechi Kamau[2008] eKLR

¹¹⁵ Garner, Black’s Law Dictionary Abridge 8th edition

¹¹⁶ Garner, Black’s Law Dictionary abridged 8th edition

¹¹⁷ Garner, Black’s Law Dictionary abridged 8th edition

male partner, her partner names her as his wife on employment documents, they acquire properties in their names, and they commingle their finances. Additionally, most of these couples live together for a long period of time. The essential similarity between marriage presumption and adverse possession is that a legal claim is being asserted based on a relationship or a connection. In the case of adverse possession, a person claims legal possession of a real property because they have inhabited the property publicly for a continuous period without confrontation. Similarly, marriage presumption is a legal claim to be considered married because the couple has lived together publicly and conducted all activities as husband and wife for a continuous period. Jessica Clarke argues that the elements of adverse possession and marriage presumption are “strikingly similar: physical proximity, notoriety and publicity, a claim of right, consistent and continuous behavior, and public acquiescence.”¹¹⁸ She stresses that the continuous nature of both adverse possession and marriage presumption create ownership and reliance and that it is morally wrong for a true owner to allow a relationship of dependence to be established and then to cut off the dependent party.¹¹⁹

There are legal procedures to follow if an individual wants to acquire property. There are also legal procedures for the different forms of marriages. If an individual is accorded legal protection to possess real property because they have enjoyed it openly, notoriously, and continuously, then by the same token, two people should be given all legal deference as married couple if they have lived together openly, notoriously and continuously.

¹¹⁸Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 Or. L. Rev. 563 (2005)pg. 579

¹¹⁹Id. 566

C. Legitimation

In order to fully comprehend how marriage presumption is applied in the above mentioned countries, it is necessary to review the laws that influence how judicial decisions are made or factors that the legislatures consider in making the laws. The issues of legitimation, support, custody, and inheritance are greatly intertwined with the issue of cohabitants being declared married. Usually problems come about upon separation, termination or death of one party. This section will delve into laws related to legitimation in Kenya, Sierra Leone, and the states of California, New York and Pennsylvania.

1. KENYA

Under Kenyan laws, a child born out of wedlock is illegitimate. The child can be legitimated when one of the following conditions are met: (1) the subsequent marriage of the parent, provided that the father is domiciled in Kenya,¹²⁰ (2) re-registration of births of legitimated persons,¹²¹ and (3) a declaration of legitimacy.¹²² There are different ways legitimated persons' rights to take interest in property are determined. Section 5 (1) (a), (b), and (c) of Kenya's legitimation law states that a "legitimated person and his spouse, children or more remote issue shall be entitled to take any interest, (a) in the estate of an intestate dying after the date of legitimation, or (b) under any disposition coming into operation after the date of legitimation; or (c) by descent under an entail interest created after the date of legitimation."¹²³

¹²⁰ Kenya Legitimation Act section 3(1)
<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.145>

¹²¹ Kenya Legitimation Act (CAP 145) Section 3(3)

¹²² Kenya Legitimation Act (CAP 145)Section 4(1)

¹²³ Kenya Legitimation Act (CAP 145) Section 5(1)(a)(b)and (c)

Further the mother of an illegitimate child has parental responsibility at first instance.¹²⁴ The father can acquire parental responsibilities under the following conditions: (1) application to the court for parental responsibility,¹²⁵ (2) agreement by both parents that the father should have parental responsibility,¹²⁶ or (3) where the parents of the child were not married at the time of the child's birth but have subsequent to such birth cohabitated for period not less than twelve months.¹²⁷ When a father acquires parental responsibility of a child, both parents share parental responsibility. Additionally, in Kenya, acknowledgement of the child on record, filiation proceedings and voluntary registration in the putative father registry legitimates a child.¹²⁸

2. SIERRA LEONE

In Sierra Leone, under the Registry for Customary Marriage and Divorce Act, there is no such thing as legitimation. Once parentage is established, the child enjoys all rights as a child born in wedlock. Parentage is established when a man recognizes a child to be his, by medical testing and adjudication.¹²⁹ Application for parentage can be made by the child, either of the child's parents, guardian, probation officer, social welfare officer, or any other interested person.¹³⁰ This law is only applicable in the customary setting and does not apply to other forms of marriages. In this provision, only children of cohabitants that have lived together for the period of five years are deemed legitimate because their parents are considered married and

¹²⁴ Kenya Children Act (CAP 141) Section 24(3)(a)
<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.141>

¹²⁵ Kenya Children Act (CAP 141) Section 25(1)(a)

¹²⁶ Kenya Children Act (CAP 141) Section 25(1)(b)

¹²⁷ Kenya Children Act (CAP 141) 25(2)

¹²⁸ Kenya Social Services Law section 4-1

¹²⁹ Sierra Leone Child Rights Act Section 85 (2007)

¹³⁰ Sierra Leone Child Rights Act section 83(1)(a)(b)(c)(d)(e) and (f) (2007)

enjoy all rights as married couples. This provision is pivotal to the differentiation between presumed married couples and illicit cohabitating couples.

3. CALIFORNIA

In California, parentage and child legitimation are one and the same. Once parentage is established, the child is the legitimate child of his father. Parentage is established through the following means: (1) the presumed father and the child's natural mother have been married when the child is born, (2) the child was born 300 days after the marriage ended, or before the child's birth, (3) the presumed parents attempted to marry, although the attempted marriage could be invalidated by law, after the child's birth the presumed parent and the child's natural mother married, (4) with consent, (5) the child is given the name of the presumed parent, (6) the presumed parent is obligated to support the child under written voluntary promise or by court order, and (7) the presumed parent receives the child into his home and openly holds out the child as his natural child.¹³¹

It is important that the establishment of parentage legitimates a child. This process accords the child all rights and privileges as a child born in a legitimate married relationship. A mother does not have to contend with the hardship of litigating for parentage and legitimacy in separate proceedings. The parent/ child relationship extends equally to all children, regardless of the marital status of the parents.¹³² The issue of unequal treatment of children based on the marital status or separation of parents becomes moot; once parentage is established, the child is entitled to support and inheritance as a matter of law.

¹³¹ West Ann. Cal. Fam. Code sec 7611

¹³² West Ann. Cal. Fam. Code sec. 7602

4. NEW YORK

A child born out of wedlock is the legitimate child of the mother and may inherit from the mother and maternal kindred. On the other hand, an illegitimate child is the child of his father if legitimated under the following conditions: (1) a court order declaring paternity, (2) the mother and father execute an acknowledgement of paternity, (3) the father signs an instrument acknowledging paternity, (4) a formal acknowledgement within 10 years of the child's birth, or (5) paternity is established by clear and convincing evidence through genetic marker and open and notorious acknowledgement.¹³³

5. PENNSYLVANIA

As a general rule, all children are considered legitimate regardless of the marital status of the parents and are entitled to enjoy all rights and privileges as if born in wedlock once paternity is established. Paternity is established when the parents of a child born out of wedlock marry each other, when a determination is made by clear and convincing evidence that the father openly held the child out as his, if the father received the child in his home or provides for the child and by judicial determination of paternity.¹³⁴

D. Support

1. KENYA

Support obligation for children born out of wedlock is with the mother¹³⁵ except where the father has acquired parental responsibility as enumerated in the previous sections. In cases where children are born in marriage that has been presumed in judicial decision, the support obligation changes from mother to both parents.

¹³³ New York Social Services Law sec. 4-1-2

¹³⁴ Title 23 Pa. C.S.A. Domestic Relations Section 5102

¹³⁵ Kenya Children Act (CAP 141) Section 90(e)

2. SIERRA LEONE

Support obligation is primarily on anyone who is legally liable to maintain a child or to contribute towards the maintenance of the child.¹³⁶ As to the parents, the father is legally liable to maintain the child whether or not the child is legitimate.

3. CALIFORNIA

There is a statewide uniform guideline for child support. Notwithstanding this guideline, a court under special circumstances may depart from it.¹³⁷ In *In re Marriage of Kerr*, 77 Cal. App. 4th 87 (1999), the court, in determining whether children's needs were insufficient to support an award of additional child support, deviated from statewide uniform guidelines for child support; the Court held that Courts are required to adhere to the support guidelines criteria which provides that a child needs support at a level commensurate with both parents' abilities and standard of living.¹³⁸ Unlike spousal support awards requiring consideration of the parties' standard of living, child support awards must reflect a minor child's right to be maintained in a lifestyle and condition consonant with his or her parents' position in society after dissolution of the marriage.¹³⁹

California has a broad range of factors that influence the calculation of child support such as annual gross income, commissions, salaries, royalties, wages, bonuses, rents, dividends, interests, trust income, annuities, income from proprietorship, and worker's compensation benefits.¹⁴⁰ Uniform child support guidelines provide a transparent and independent means of calculating child support. Despite the guidelines, the courts have the discretion to grant awards

¹³⁶ Sierra Leone Child Act Section 90(1) (2007)

¹³⁷ West Ann. Cal. Fam. Code sec. 4052

¹³⁸ Id sec. 4054

¹³⁹ *In re Marriage of Kerr* 77 Cal. App. 4th 87 95-96 (1999)

¹⁴⁰ West Ann. Cal. Fam. Code sec. 4058

for children in special circumstances. The court's discretion for additional awards in special circumstances provides a means of maintaining the same standard of living for children regardless of the marital status of their parents. If special circumstances were not applied, there could be abrupt change in lifestyle for many children which could affect them adversely. Children should not suffer because of the conscious decisions of adults. The separation of parents is a difficult situation that children do not understand; to compound it with a negative change of lifestyle would be insurmountable.

4. NEW YORK

Historically, the determination of child support was based on the ability of the obligor parent to pay and the needs of the child. The amount awarded was purely within the discretion of the judge. Judges were mindful of the financial resources of the obligor and their personal need.¹⁴¹ It was later determined that leaving the child support determination within the sole discretion of the judge led to unequal treatment of the noncustodial parent of the same financial status and number of children. This unequal treatment transformed into disrespect for the court's order and reduced parties' willingness to negotiate because they were uncertain of what the court's order could be.

In a bid to address the problems enumerated above, a statewide child support guidelines were established. The purpose of the guidelines is to afford parents the opportunity to share legal responsibility for support, while allocating the cost of those responsibilities based on economic status. These guidelines are not sexually discriminatory; they encourage the participation of both parents in rearing the child.¹⁴²

¹⁴¹ 1-10 NY Civil Practice: Family Court Proceedings Section 10.05

¹⁴² New York Child Support Guidelines Interpretations and Application Section 1.04

5. PENNSYLVANIA

Pennsylvania like New York and California has child support guidelines which are based on the reasonable needs of the child and the ability of the obligor to provide support. Similarly, the goal of the guidelines is equal treatment for similarly-situated persons. The court at its discretion can modify the award if the application of the guideline produces unjust or inappropriate results. Notwithstanding the court's discretion, there is an assumption that the guidelines are correct.¹⁴³

E. Custody

1. KENYA

Custody is determined by judicial decisions in a presumed marriage. Regardless of whether the child is legitimate, the court may grant the non-custodial parent all rights and duties in relation to the child jointly with the person who is given custody, except the right of possession.¹⁴⁴ Factors considered in making custody determination are: (1) the conduct and wishes of parents or guardians of the child, (2) the ascertainable wishes of relatives of the child, (3) the ascertainable wishes of the child, (4) the safety of the child, (5) the customs of the community in which the child lives, (6) the religious persuasion of the child, (7) whether or not a personal protection order has been made in relation to the child, (8) the circumstances of other siblings, and (9) the best interest of the child.¹⁴⁵ Additionally, the ascertainable wishes of foster parents are considered if the child has made a home with them three years prior to the application for custody.¹⁴⁶

¹⁴³ Title 23 Pa. C.S.A. Domestic Relations Section 4322

¹⁴⁴ Kenya Children Act (CAP 141) Section 83(2)

¹⁴⁵ Kenya Children Act(CAP 141) Section 83(1)(a-j)

¹⁴⁶ Kenya Children Act (CAP 141) Section 83(1)(c)

2. SIERRA LEONE

Anyone that is raising a child may apply for custody. The granting of custody is dependent on the best interest of the child and the importance of the young child being with the mother.¹⁴⁷ Other factors that influence custody decisions are: the age of the child, the safety of the child, the independent view of the child, the desire to keep siblings together, and the need for continuity in the care and control of the child.¹⁴⁸

3. CALIFORNIA

The custody determination in California is based on the state's public policy interest in the health, safety, and welfare of children. The standard used in determining which parent should be awarded legal or physical custody is the best interest of the children.¹⁴⁹ The State has a compelling interest in continuous contact between parents and children after separation, dissolution or termination of the relationship. It also encourages parents to share rights and responsibilities in child rearing except where the effect will not be in the best interest of the child.¹⁵⁰

While the State encourages both parents to share in the rights and responsibilities of children, it neither mandates that both parents have legal or physical custody, nor does it favor one parent over the other. A parent could be granted both physical and legal custody in a particular instance and in others one parent could be granted only legal custody in another. Or a parent could only be granted visitation rights. Custody determination is not a one-size-fits all

¹⁴⁷ Sierra Leone Child Act Section 86 (2007)

¹⁴⁸ Sierra Leone Child Act Section 88(2007)

¹⁴⁹ West's Ann. Cal. Fam. Code Section 3020 (a) and 3011

¹⁵⁰ Id sec. 3011

decision; all of the State's interests have to be weighed in considering the best interest of the child.

4. NEW YORK

Historically, issues concerning children were viewed in light of parental prerogative.¹⁵¹ Custody of children born out of wedlock was primarily to the mother except where she was found to be unfit.¹⁵² The court's granting of custody of an illegitimate child to the mother instead of the father was grounded in public policy. The Court reasoned that granting custody to the father was only proper for the legitimate father.¹⁵³

Currently, child custody is primarily based on the best interests of the child. Some factors that are crucial in the custody determination are: the wishes of the child's parent or parents, the interaction and interrelationship of the child with his parents or parents, the wishes of the child as to his custodian, the child's adjustment to his home, school, and community, and the mental and physical health of all individuals involved.¹⁵⁴ Preference is given to natural parents unless parents are unfit or extraordinary circumstances exist.

5. PENNSYLVANIA

Custody determination is based on the best interests of the child taking into consideration factors such as: which party is more likely to encourage and permit frequent and continuing contact between the child and another party, history of abuse, parental duties performed by each parent on behalf of the child, need for stability and continuation of education, family life and

¹⁵¹ Child Custody Prac. & Proc. Section 1.1

¹⁵² People ex. Rel. Meredith v. Meredith 272 A.D 79, 69 N.Y.S.2d 462 1947 NY.App. Div. Lexis 3224. "The mother has the right to the custody of an illegitimate child as against the father, though the father has custody as against a stranger."

¹⁵³ Id 87-90

¹⁵⁴ Uniform Marriage & Divorce Act Section 402

community life, availability of extended family and siblings, child's choice based on the child's maturity, and the mental and physical condition of a party or member of household.¹⁵⁵ There are basically seven kinds of custody awards: shared physical, primary physical, partial physical, sole physical, supervised physical, shared legal, and sole legal. There is no gender preference in custody determination. If a parent is noncompliant with custody order, penalties could range from fines, probation, suspension or denial of privilege to imprisonment.

F. Inheritance and Property Rights in a Presumed Marriage

1. KENYA

Once a judicial decision has been made in favor of a presumed marriage, either of the spouses can inherit from the other. Usually there is more than one wife in a customary marriage, therefore, each wife will be given her portion according to the dictates of custom and a portion will be allocated for the children. All of the decisions relating to inheritance must be decided by the court in the event of dispute.

2. SIERRA LEONE

When a couple has cohabited for five years preceding the death of one of the spouses, whether the spouse dies testate or intestate, the other inherits; because continuous cohabitation for five years is deemed as marriage.¹⁵⁶ Since customary marriage is usually polygamous, inheritance is distributed in order of the duration of their respective marriages and their relative contribution.¹⁵⁷ Any natural child is maintained and educated by the estate after expenses are

¹⁵⁵ Title 23 Pa. C.S.A. Section 5323

¹⁵⁶ An Act to govern the Devolution of Estates and establish rights of inheritance for spouses of both statutory and customary marriages Part 11 Section 2 (b)(c) (2003)

¹⁵⁷ Id Part 111 Section 6 (2)

paid, until that child attains the age of eighteen, or finishes high school, college, or undergraduate university.¹⁵⁸

3. CALIFORNIA

California does not recognize common-law marriage by statute or judicial decision. But it recognizes a contractual agreement between cohabitants regarding the rights to share in each other's property; such a contract may be either express or implied. In *The Estate of Bernard Shapiro, Cyde E. Pitchford and Steven R. Scow v. United States of America*, the court, in deciding whether cooking, cleaning, and housekeeping constituted sufficient consideration, held that the underlying promise or agreement was contracted "for an adequate and full consideration in money or money's worth."¹⁵⁹ The Court, adopting *Hay v. Hay*, 100 Nev. 196,(1984) and *Marvin v. Marvin*, 18 Cal. 3d 660,(1976) held that courts should enforce express and implied contracts between non-marital partners except when such a contract is inseparably based upon the provision of sexual services.

Although common-law marriage is not recognized under California laws, upon dissolution of such a relationship, parties may be remedied contractually. A cause of action could be brought in express or implied contract as well as breach of fiduciary duty and quantum meruit. These remedies could help to alleviate poverty, unnecessary deprivation of property and promote equality and fair treatment. They also give value to a partner's contribution to a relationship.

4. NEW YORK

Common-law marriage is not recognized in New York unless the marriage was contracted in a sister state. Parties alleging marriage in a sister state, must prove by clear and

¹⁵⁸ Id Part 111 Section 5 (1)

¹⁵⁹ 26 U.S.C.A sec. 2053 (1) (a)

convincing evidence that there was indeed a marriage. *In Chlieb v. Heckler*, 777 F. 2d. 842, (1985) the wife argued that she was entitled to insurance benefits as wife of the decedent by virtue of their 1973 common-law marriage established in Pennsylvania and Ohio. The court opined that the putative wife did not show by clear and convincing evidence the required elements of a valid common-law marriage in either state.

New York does not dismiss out rightly cases of common-law marriage in or out of the state. If such a marriage was alleged to have taken place in New York, the date of establishment will be determined. If it was consummated before 1933, the marriage will be valid. Additionally, when common-law marriage is established in another state that recognizes it, that marriage has to be established by clear and convincing evidence according to the law of the state in which it was established.

5. PENNSYLVANIA

Common-law marriage was abolished on January 1, 2005. All common-law marriages that were contracted before the mentioned date are valid according to law. Therefore, spouses who find themselves in such a category could inherit; the caution is that the court imposes a heavy burden of proof on the party alleging marriage. Once marriage is established, a party can inherit based on the Consolidated Domestic Relations Statute or the Consolidated Decedents, Estate and Fiduciaries Statute.

6. CONCLUSION

As regards the two countries and three states discussed in this section, there is a major contrast between the African nations and the three American states. American states are striving to abolish common-law marriage by statutes and imposing heavy standards of review on parties alleging such a marriage. On the other hand, the African nations are developing means to accommodate such marriage through judicial decisions and statutes.

There is diminishing support in the United State for tolerating common-law marriage, because the historic reasons for allowing common-law marriage do not exist anymore. For instance, couples had to travel long distances to get marriage licenses, but this is no longer the case. Deciding not to marry as prescribed by law is a conscious decision and translates into defiance of the law. In addition, the cost of a marriage license is very minute and the availability of persons authorized to officiate marriages has increased and is accessible to all.

The Africa nations discussed have not reached the Americans viewpoint, primarily because development has been slow due to poverty, war, and illiteracy. Some citizens have to travel for miles in order to obtain a marriage license. Because of poverty, many cannot afford the cost of a marriage license. For instance, marriage ceremony in a Marriage Registrar's office in Kenya costs approximately Kshs.1, 750 which is equivalent to Eighteen United States Dollars; there is also a twenty-one days waiting period or no waiting period for those able to pay, Kshs. 6,250 or Sixty-eight United States Dollars. Marriage outside of the Registrar's Office is Kshs. 10,250 or \$111.¹⁶⁰ By contrast, New York's marriage license cost \$40.00 plus a twenty-four hours waiting period.¹⁶¹

Historically, there have been civil conflicts all over Africa; there have been wars and various forms of insurrections. This has stalled development and imposes hardship on people. Citizens living on less than a dollar a day cannot afford additional sixteen dollars for marriage licenses. Further, because of internal conflicts, there has been a fundamental breakdown in both family and community structure, leading to increased cohabitation. The net effect of poverty and war is illiteracy.

¹⁶⁰ <http://photo.state.gov/libraries/kenya/28844/marriage/kenmarproc.pdf>

¹⁶¹ <http://www.health.ny.gov/publications/4210>

There are also vast differences between Africa's and the United States' legal systems. In most parts of Africa, there are two sets of laws, that is, customary and statutory laws. Customary laws derive their value from statutory laws because customary laws have to get recognition from statutory laws. An instance where these two laws interact is when Africans with customary origins marry civilly; they also usually marry customarily. The main purposes of the two marriages are to satisfy traditional requirements and acknowledgement by family members, and to seek guarantees and protection in civil marriages. American laws are based on statutes and the constitution. Recognition is given to the existence of state laws which derives from the state's legislatures and federal laws, which derive from Congress. Because American laws are not based on customs and traditions, common-law marriages have been abolished in most states.

In order for individuals who find themselves in common-law marriages to receive a remedy under the law, laws have to be enacted or judicial decisions made. In the absence of such provisions, many will be disadvantaged while others are unjustifiably enriched, giving rise to dissatisfaction and intolerance with leaders and governments. When citizens are dissatisfied, there is a tendency to seek change. And that change can be either positive or negative. A positive change could be the enactment of laws that will change the specific situation or create a lasting solution to a specific problem; even repealing a law that is against public policy could be a positive change. On the other hand, negative changes could be civil war, coups d'état, reluctance to participate in local and national initiatives and lawlessness and chaos. Regardless of the differences in culture and tradition, there are similarities with respect to family law issues such as legitimation, child support and custody determination.

In reference to legitimation, California, New York, Pennsylvania, and Kenya laws equate the establishment of parentage to legitimation, except that in New York and Kenya, a child born

out of wedlock is automatically seen as illegitimate unless certain requirements are proven. On the other hand, Sierra Leone's Registry for Customary Marriage and Divorce Act does not contemplate any child as illegitimate, if the parents live together for the required number of years or parentage is established. Sierra Leone's law is more accommodative of presumptive marriages- and does accept cohabitation as a form of customary marriage provided the time requirement is adhered to and the relationship registered. There seems to be similarities between the two countries and the three states on the establishment of parentage except that Sierra Leone's law is more rooted in customs and tradition and requires that presumed married couples register their relationship. If an evaluation was to be conducted on civil marriage, the same laws would have applied to all countries and states. The laws on support are similar to that of legitimation, with some countries and states having related laws, while others differ substantially.

The child support obligation is determined by child support guidelines in California, New York, Pennsylvania, and Kenya. The obligation is allocated between parents based on their respective incomes. Child support guidelines standardize support for similarly-situated parents; therefore, they eliminate the problem of unequal treatment for parents in the same income category. The down-side to this system is that if a parent's income is above the guidelines range, support will be under-calculated and the parties will have to resort to the court for an adequate determination. This situation brings the parties under the jurisdiction of the judge's discretionary power, which is not what the parties necessarily want. Unlike these countries, Sierra Leone does not have a standardized support determination guideline. In fact, the laws on support are ambiguous. Fathers are legally liable to maintain a child whether or not the child is legitimate. The law is vague on how support will be calculated; at the same time, the law is not gender

neutral. There is an apparent bias in favor of females, which can be related to the philosophy of males as breadwinners and females as caregivers. The capacity of the parents does not factor into the best interest of the child.

In all of the countries and states discussed, custody determination is based on judicial determination, and the standard used is the best interest of the child. The court considers the welfare of the child against the rights of the parents. In Kenya, mothers are the natural and primary custodian of illegitimate children, except where the mother is found to be unfit. The father has custodial rights against any stranger. When parentage is established, the court uses its discretion to determine custody. California court decisions are ingrained in the public policy interest in the health, safety, and welfare of the child, while Pennsylvania and Sierra Leone decisions are basically relational.

Chapter VI: RECOMMENDATIONS

It is the prerogative of a nation to enact laws that will benefit its citizens. In order for enacted laws to be utilized, the laws must be clear and justiciable; ambiguous laws are subject to the discretion of the court. Interpretations of laws should not be discretionary but based on the clear meaning and the legislative intent of the law. The common-law marriage statute is one of the laws that are ambiguous and undefined in Liberia. Because it lacks clarity, the Supreme Court over the years has been reluctant to rule on the issue. For the common-law marriage presumption doctrine to be adequately utilized, its meaning must be categorical. For instance, “holding out” must be defined and, the time during which couples should “hold out” must be specified. There should also be ways to rebut the presumption, assuming that the presumption is not conclusive. Other related issues such as legitimation, child support, custody, and inheritance should be substantively addressed.

Hence there must be a national push to amend the law. There are considerations factor into making a definitive conclusion as to what should happen with the current law: (1) are there prevailing circumstances that necessitate having such a statute? And (2) what value/benefit will citizens derive from it? This chapter is written under the assumption that there is a need to amend the statute to address growing issues of cohabitation. To accomplished this goal, Kenya and Sierra Leone are used as direct examples and California, Pennsylvania, and New York laws will serve as a basis for proposed recommendations to the current statutes. The goal is to identify how some of these laws are applicable in the Liberian setting for the purpose of adaptation or expansion of the current laws.

Finally, the chapter proposes legislation on marriage presumption, legitimation, support, and custody. These proposed legislations are intended to clearly define the current statutes, thereby increasing their utility.

A. Marriage Presumption

1. HOLDING OUT

A synthesized version of the Kenya and Sierra Leone definition of “holding out” in addition to Liberia’s own definition will help the courts in making decisions. A suggested new definition of “holding out” is “living together as husband wife openly and notoriously for a continuous period.” Holding out could be determined through means such: joint business, comingling of funds, change of name, naming as beneficiary on an employment document, and joint acquisition of property.

The general standard for “holding out” should be the family. “Holding out” could be established through family introduction or certain traditional ceremonies such as exchange of cola nuts or acceptance by the family. In addition, while couples should generally hold out to family because of the cultural importance of family, couples could also “hold out” by gaining the acceptance of the community. The acceptance of the community is paramount because non-acceptance by the community opens windows for inquiry into the validity of the marriage. Other people that a couple could hold out to are friends, or employers. This is important because couples do not always live around their relatives, and this law is also applicable to citizens as well as non-citizens living in Liberia.

Another possibility of validating a presumed marriage is the registration of the relationship with the Center for National Documents and Records Agency (National Archives). Registration may be feasible in a civil setting, but may be a burden for Couples in a customary

setting considering cost and low literacy rate. In addition, the establishment of a registry may also be burdensome for government as it will require registration centers, training of personnels, and compensation for staff. Currently the idea of a registry may seem to be implausible; however, the idea of establishing a registry could be studied as a future proposal for Liberia because such a system will serve as a documented proof of validation of the relationship with the government.

2. TIME

A time frame for how long a couple should live together to be considered married, should be established. A reasonable time to presume marriage could be two years of continual and open cohabitation. In two years, properties could be acquired, children could be born and a reputation could be established with family, friends, the community or employers. A time requirement in a presumed marriage relationship can also serve as a defense to a rebuttable presumption. For instance, either party could claim in their defense that they have failed to meet this time requirement so as to rebut the presumption.

The two year requirement is sufficient for a relationship to be declared a presumed marriage for several reasons: (1)The couples need sufficient time to get to know each other better; two years is sufficient to determine whether the relationship is worth the time and commitment, (2)Within two years, the couples could have acquired property, (3)The community, family, and friends can testify as to whether the couple continuously held out as husband and wife, (4) children could be born and raised to the couple further solidifying the relationship and (5) The two years is a mean of fulfilling a legal requirement, that is a clear bright line rule.

3. REBUTTAL

The assumption of this thesis is that marriage presumption in Liberia is rebuttable and not conclusive; therefore, there must be ways in which this presumption can be rebutted. Some of the ways are: (1) failure to meet the time requirement, (2) one party is already married civilly, (3) one or both parties are below the legal marriage age, (4) the couple does not hold out as married, (5) the cohabitation is not continuous and (6) the man is openly cohabitating with more than one woman in a civil setting.

4. STANDARD OF PROOF

The standard of proof for marriage presumption is germane to the resolution of cases in both the customary and the civil settings. Although most civil cases are reviewed by the preponderance of evidence standard, the standard for most family law cases is clear and convincing evidence. The courts use this higher standard in order to eliminate perjury and fraud.¹⁶² The clear and convincing evidence standard requires that the evidence be so clear as to leave no substantial doubt in the mind of the trier of fact; it must be sufficiently strong to command the unhesitating assent of every reasonable mind. A preponderance of evidence standard, on the other hand, merely requires that the existence of a fact be more probable than not.¹⁶³

5. CIVIL AND CUSTOMARY MARRIAGES

An important point to note is whether the marriage presumption doctrine is applicable in the civil or customary settings in Liberia. In both Kenya and Sierra Leone, marriage presumption is applied in the customary setting and this has been established by judicial decision and by statute respectively. In Liberia, it is unclear whether the law can be applied in the civil or

¹⁶² In re Estate of Stauffer, 504 Pa. 626. (1984) 630 Pa. Lexis 260

¹⁶³ Tannehill v. Finch, 188 Cal. App.3d 224 (1986)

customary setting. Liberia recognizes two forms of marriages, civil and customary; these two marriages are provided for in the Liberian Domestic Relation Statute. Unlike these two forms of marriages, the marriage presumption law is provided for in the Civil Procedure Law. One could assume that since it is in the civil procedure code, it is meant to be applied in the civil, rather than customary setting because civil procedure law is a “the body of law usually rules enacted by the legislature or court- governing the method and procedure used in civil litigation in a particular jurisdiction.”¹⁶⁴In the same token, it could also be assumed that the law was meant to be fully defined through judicial decision since civil procedure has to do with the method and practice used in carrying out civil litigation.

Looking holistically at the placement of the law, it is safe to assume that the legislature intended for the law to be applied in both civil and customary settings. This assumption stems from the fact that civil marriage laws as well as customary marriage laws are codified in the statutes. Disputes arising from customary marriage laws are not only resolved in tribal courts but also in civil courts but disputes arising from civil marriage can only be settled in civil courts. This means that a customary marriage gets its authority from civil laws and because of the influence that civil law has on customary law, the line that separates the two is very thin.

Marriage presumption can operate in both civil and customary settings. In a civil setting, marriage can be presumed if neither of the parties is civilly married. A previous marriage that has not been terminated or annulled can rebut the presumption. In a customary marriage, a woman can allege marriage based on the criteria stated above, but she can only allege marriage to only one man. On other hand, a man can allege marriage to more than one woman because customarily, a man can marry more than one wife. While this may seem very simple for a man in

¹⁶⁴ Garner, Black’s Law Dictionary Abridge 8th edition

the customary setting, it is not the same for a woman. A woman alleging marriage in a customary setting is fully aware that her husband has the right to marry many women. However upon the death of her husband, she could allege that a particular woman is not a customary wife of the husband. In a traditional setting, this may prove very difficult to resolve because of the restrictions imposed on women and because men make the rules and administer the tribal courts. Other than the tribal setting, the only other remedy available will be a civil court which may prove too expensive for a traditional woman.

6. PROPOSED AMENDMENT ON MARRIAGE PRESUMPTION.

1. The court shall presume marriage under the following circumstances:
 - a. The male is at least 21 years old and the female is at least eighteen years old at the time from which the presumed marriage is claimed;
 - b. They have lived together as husband and wife openly and notoriously for a continuous period of two years;
 - c. They have held themselves out to most of their family, friends, community and employers as married;
 - d. Neither party is already married under civil law and the woman is not married under customary law; and
 - e. Other factor that may be examined in the determination of marriage are, joint businesses, joint property ownership, comingling of finances and reasonable expectation of marriage
2. They shall be deemed to be married under customary law notwithstanding that they may not have performed any customary rites of marriage.
3. The burden of proving presumed marriage is upon the party alleging marriage and that party must prove marriage by clear and convincing evidence.

B. Legitimation

When a child is born out of wedlock, in most instances the issues of legitimacy, support, and custody become a problem upon dissolution of the relationship. In Kenya and New York children born out of wedlock are illegitimate and can inherit from the mother only, unless parentage is established. This law is analogous to Liberian law which states, "Upon an application made to the probate court by the natural father of a child born out of wedlock, such child may be legitimated with respect to such applicant and shall become for all purposes the legitimate child of such applicant and entitled to all the rights for legitimacy as if born during the lawful wedlock of the applicant. Upon receipt of such an application, the court shall issue a citation to the natural mother of the child who shall be served therewith together with a copy of the petition. She may serve and file an objection to the proposed legitimation, limited to the sole ground that the applicant is not the natural father of the child." Unlike Liberia, in all of the states and countries discussed, a holding of paternity legitimates a child.

In Liberia, paternity does not automatically legitimate a child. Parentage is established for the purpose of determining support obligation; this lack of legitimation causes the problem of lack of inheritance for children. Additionally, it gives the father the option as to which of his children will benefit from his estate. It also promotes unequal treatment of children, which could develop into a family feud. Further, determining paternity separately from legitimation is an additional burden on the court. Liberia could expand its laws on paternity to denote that once paternity is established or recognized the child automatically become legitimate. This sort of law abolishes discriminatory language such as "bastard" and "lack of inheritable blood" used to describe children born out of wedlock.

The legitimation law is unrealistic in terms of theory verses reality. For example, recognition and acknowledgement of a child obligates the father to support the child and makes a child part of the family but deprives the child of inheritance. What justification can reasonably be given for enacting a law that is biased on its face when the dominant view or presumption is that once a child is known to be fathered by a particular person, and especially when that person acknowledges the child regardless of marital status, both child and father are entitled to inherit from each other. Another major flaw in the law is that it is not gender-neutral. Only the father can take steps to legitimate a child, that is, it is at the father discretion which of his children is legitimate. The mother has absolutely no voice in this matter; she can compel only paternity and not legitimation. These are some of the injustices of the law that warrants its improvement.

There are few lessons Liberia can learn: (1) since children do not ask parents how they should be born, once they are birthed, they should not be deprived of inherence because of the parents' legal status; and (2) to avoid burdening the court, once paternity is established, the child should be viewed as legitimate.

1. PROPOSED AMENDMENT ON LEGITIMATION AND PATERNITY LAWS

I. Definition

- a. Legitimation means: the act or process of authoritatively declaring a person legitimate, especially a child whose parentage has been unclear.

II. A child born out of wedlock is deemed illegitimate and can be legitimated under the following circumstances:

- a. When the parents subsequently intermarry, except where parental rights are terminated prior thereto, such child shall become legitimate and shall become for all purposes the legitimate child of both parents;

III. Once paternity is established, the child is deemed legitimate as though born in a valid marriage.

IV. Paternity may be established by:

- a. The man's name on the child's birth certificate;
- b. Public acknowledgement by the father
- c. Where paternity is contested, either parent shall have the right to apply to the court to determine paternity of the child;

C. Custody

In all of the states and countries examined, the standard used to determine child custody is the best interest of the child. In Kenya, cohabitants could have joint legal custody but not joint physical custody. Sierra Leone and the three states focus on the child's health and safety, need for continuing care and control, the wishes of the child, and the interaction and interrelationship of the child and the parents. Other factors that are reviewed are the need for stability and the child's adjustment to school, home, and community. Liberia's standard for custody is also the best interest of the child.

In Liberia, as a general rule, mothers are the sole custodians of illegitimate children. Fathers are the custodians of legitimate children upon termination of a marital relationship and those to whom paternity have been established. There is no explanation as to what factors constitute the bases of custody decisions, though as the law is written, the gender of the parents plays a vital role. The gender of the parents should not be the basis for custody, because it is completely irrelevant when considering the best interest of a child. If a father is a given custody of a three months old breastfeeding baby just because the statute says so, does this count as the best interest of the child? Is it better to wean the child because the father, according to law is the primary custodian, or should the health and nutrition of the child be the primary concern? Gender-biased custody laws should be completely eliminated.

Custody should not be based on the gender of the parent but on the best interest of the child. Factors that should play an important role in determining a child's best interest are: (1) the child's health and safety, (2) need for continuing care and control, (3) the wishes of the child, (4) interaction and interrelationship of child and parents, (5) the need for stability, and the child's adjustment to school, home, and community, (6) the choice of the child, and (7) any history of abuse and violence.

Custody decisions should not be a blanket decision, where it is either the mother or the father that takes custody of the child. Custody can be separated based on the capacities of the parents. The court can decide which parent takes legal and which has physical custody. A parent could be fit to have legal custody but not physical custody. For example, a single father of a two-year-old that has been unemployed for a protracted period may not be legally authorized have physical custody of his child.

Liberia could learn from the above research by establishing a provision in the law that separates legal and physical custody. Legal custody is the authority to make significant decision on a child's behalf, including decisions about education, religious training, and healthcare, while physical custody is the right to have the child live with the person awarded custody by the court.

1. PROPOSED AMENDMENT ON CUSTODY

I. Definitions:

- a. Custody means the care and control of a person.
- b. Physical custody means the right to have the child live with the person awarded custody by the court.
- c. Legal custody means the authority to make significant decisions on a child's behalf, including decisions about education, religion, training and healthcare.

- d. Joint or Shared custody mean an arrangement by which both parents share the responsibility for and authority over the child at all times, although one parent may exercise primary physical custody.
- e. Health means the quality, state, or condition of being sound or whole in body, mind, or soul, especially freedom from pain and sickness.

II. The court shall award legal or physical custody of a child based on the best interest of the child.

III. The court may award joint or shared custody based on the best interest of the child.

IV. In determining the best interest of the child, the Court should consider the following factors:

- a. Health and safety of the child;
- b. The need for continuous care and control of the child;
- c. Interaction and interrelationship of the child and parents;
- d. Need for stability;
- e. The parent who has had primary care of the child;
- f. Child's adjustment to school, home and community;
- g. History of abuse or violence; and
- h. The child's preference if the child is sufficiently mature.

V. The gender of a parent is irrelevant to the custody award.

D. Support

In Kenya, the child support obligation for illegitimate children is with the mother unless the father acquires parental responsibility. At the same time, when marriage is presumed, the support obligation is with both parents. Unlike Kenya, Sierra Leone places the support obligation on anyone who is legally liable for support, additionally, the father is responsible for child support regardless of marital status. There is no discrimination between illegitimate and legitimate children when it comes to the issue of support. Like Kenya, support for children born

out of wedlock in Liberia is with the mother and that of legitimate children is with the father. The determination of support is in the sole discretion of the court.

Kenya, California, New York, and Pennsylvania use child support guidelines for determining support and the court has the discretion to modify support if applying the guidelines will produce an unjust or inappropriate result. The court does not determine support as it does in the case of Liberia and Sierra Leone. In fact the court exercises its discretion in extraordinary support cases as stated above.

There are problems of inequality, bias, and an inference of male supremacy associated with the Liberian child support law. The law confirms the historical belief that fathers are the breadwinners and head of the home and mothers are caregivers and house-keepers and as such, father are charged with the responsibility of family support. There is a glaring conflict in the law because a mother must support her child when the child is illegitimate but has no obligation to do so when the child is legitimate; there is no legal justification for why the law is written in this manner. Both parents should be responsible for the support of their children; the determination of support should not be based on gender or legitimacy but on the incomes of both parents except where a parent losses parental rights.

The lack of a standardized means of calculating child support leads to unequal treatment of the noncustodial parent of the same status, that is, same income and number of children. In addition, the law is biased against men, in that it overlooks the fact that some mothers have a higher income than their male partners. The development of a standardized child support guideline will establish a nationwide uniform system. To achieve this goal, the factors that should be examined in the determination of child support are: annual income of parents, salaries, wages, bonuses, rents, dividends and interests, income from proprietorship, benefits, and

commissions. The court may still have to exercise its discretionary power when the guidelines result proves unjust, for example, children with special needs and parents' earnings that are above the guidelines limits. Additionally, maintaining the same standard of living for children upon the separation of their parents may require the court's discretion.

Also, to establish a standardized system, the government must create agencies that will oversee and enforce the system. To have a transparent system, the support guidelines should be set by one agency and another agency should be responsible for the enforcement. For instance, the Ministry of Gender or the Ministry of Health and Social Welfare can be responsible for setting the guideline, while the National Police Women and Children division can be responsible for enforcement.

1. PROPOSED AMENDMENT FOR SUPPORT

I. Definition

- a. Child includes a stepchild, foster child, child born out of wedlock, or likely to be born out of wedlock under age twenty-one or a legal son or daughter twenty-one years of age or older who is unable to maintain himself/herself based on mental and physical disability and is or is likely to become a public charge.
- b. Marital property means property acquire during marriage.
- c. Quasi marital property means: all property real or personal wherever situated, acquired before or after the date of this statute in either of the following ways:
 - i. By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this country at the time of its acquisition.

ii. In exchange for real or personal property, wherever situated, which would have been marital property if the spouse who acquired the property so exchanged had been domiciled in this country at the time of its acquisition.

d. Income includes all earnings, including but not limited to the following: salaries, commissions, wages, bonuses, rents, dividends, interests, trust income, and worker's compensation benefits.

e. "Reference to married person include formerly married person" means: A reference of "husband and wife," "spouse," or married person," in a comparable term, including persons who are lawfully married to each other, person who were previously lawfully married to each other and persons the court declared to be married, as is appropriate under the circumstances of the particular case.

f. Parent means the lawful father or mother of someone, that is, a biological father or mother, an adoptive father or mother, or a person adjudicated a father through a paternity proceeding.

g. Estate means a person's interests in land or other real property.

h. Support means an obligation on behalf of a child, spouse, or family.

II. This section shall be an amendment to chapter five of the Domestic Relations Law.

a. The Division of Child Support Services is hereby created within the Ministry of Health and Social Welfare. The division shall administer all services and perform all functions necessary to establish, collect, and distribute child support.

b. It is further determined that a standardized child support guideline be established by the Ministry of Gender administered by its Women and Children division.

- c. The National Police Women and Children Division is responsible for the enforcement of this section.

III. Duty of parents

The father and mother of a child have an equal obligation to support their child in the manner suitable to the child's circumstances regardless of their marital status.

IV. Duration of support duty

- a. Normally, duty of support is up to the age of twenty-one
- b. The duty of support continues as to an unmarried child who has attained the age of twenty-one, is a full-time student, and who is not self-supporting, until the time the child completes the college, whichever comes first.
- c. Nothing in this section limits a parent's ability to agree to provide additional support or the court's power to inquire whether an agreement to provide additional support has been made.
- d. The father and mother have an equal responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means.

V. Support out of a parent's estate

If a parent chargeable with the support of a child dies, and the parent leaves an estate sufficient for the child's support, the state, in the absence of a legitimate relation, may claim provision of the child's support from the parent's estate, and for this purpose has the same remedies as creditors against the estate of the parent.

VI. Support out of the child's property

The court may direct that an allowance be made to the parent of a child for whom support may be ordered out of the child's property for the child's past and future support, on condition that are proper, if the direction is for the child's benefit.

Chapter VII: Conclusion

This thesis posits that the common-law marriage doctrine as enshrined in the civil procedure law does not protect couples in a presumed marriage because the law is vaguely written. For couples to benefit from the law, it has to be constructed well so that those invoking the law will have an adequate remedy. As it stands, the law is ambiguous and impractical. A clear and categorical definition of the law will facilitate its usage. The recommended definition of the marriage presumption in preceding chapter will assist the court in rendering equitable judgements and affords lawyers a means to adequately represent their clients.

Secondly, the laws need to be changed in order to protect women in some cohabitation situations. Clearly differentiating illicit cohabitation and cohabitating as a married couple will alleviate the problem of mistaking presumed marriage for illicit cohabitation. Women and children will not face the harsh reality of poverty just because the laws are unclear. Many women and their children have fallen victim to the court's reluctance to rule on the issue of marriage presumption for fear of equating marriage to an illicit relationship. In the process of protecting traditional marriage and community moral standard, many women and children become vulnerable to a legal system that has not only failed them but also subjected them to abject poverty. The welfare of women and children can be fully addressed by expanding the law to make the provisions for support and inheritance clear and categorical.

Thirdly, this thesis argues that the laws should be changed to protect children regardless of their birth status. Marriage should not be a determinant of a child's rights. Whether a child is born in or out of marriage, the child should still be entitled to all benefits from both parents. When children have the same rights regardless of birth status, the problem of illegitimacy that usually leads to family feuds and societal problems will be eliminated.

Fourthly, this thesis recommends that the marriage presumption laws and laws on other family law issues such as legitimation, support, custody, properties and inheritance be amended to afford equal treatment to all seeking a remedy under these laws. The amendments will help to alleviate the problem of insecurity in family relationships because there will be definite criteria set for these contentious issues. A required time for which couples to be presumed as married will be set, hold out will be clearly defined, and there will be ways to rebut the marriage presumption. Further, there will be clear standards for support and custody to curtail a court's discretionary power and the issue of legitimation will be moot because there will be no discrimination based on status of birth. The current absence of such amendments leaves inequitable and unfair results and justice is not served.

The author's position is that the marriage presumption doctrine should not be repealed because its repeal will have a disparate impact on women and children who have been victims of poor legal drafting and the court's reluctance to interpret the law. If the marriage presumption law is repealed, illiteracy and crime rate will increase among cohabitants. While it is true that repealing the law is not the best alternative, presumed marriage should be differentiated from other forms of cohabitation, so as not to equate all cohabitation to marriage.

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