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## Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana

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# Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana

Jeanmarie Fenrich and Tracy E. Higgins

## Abstract

This Report presents the findings of a Fordham delegation. It consists of three parts. Part I sets out Ghana's obligations under international law as they relate to issues of women's equality generally and inheritance rights specifically. Part II describes the sources of Ghanaian law relevant to the issue. Part II begins with a very general description of the Ghanaian family. It then proceeds to analyze in some detail customary law governing marriage and property, including the customary law of intestate succession, which governed estates prior to 1985. Part II then describes both constitutional and statutory law relevant to intestate succession, particularly Law 111 which created for the first time a right for spouses to inherit from the estate. Finally, Part III presents the delegation's findings with respect to a range of problems women face in claiming their rights under the statutory regime. Part III describes and documents the problems and then offers recommendations designed to address them.

## SPECIAL REPORT

# PROMISE UNFULFILLED: LAW, CULTURE, AND WOMEN'S INHERITANCE RIGHTS IN GHANA

*Jeanmarie Fenrich\* & Tracy E. Higgins\*\**

"Palm fruits in the farm of a woman can never ripen."

—Ewe Saying

### INTRODUCTION

Although women in Ghana cultivate forty percent of all land, they are far less likely than men to exercise control over their land as independent farmers or farm managers.<sup>1</sup> Often they do not control the proceeds from the land<sup>2</sup> and lack the ability to dispose of it through sale or inheritance.<sup>3</sup> On average, women farmers cultivate plots that are about half the size of those cultivated by men.<sup>4</sup> The literacy rate for women in Ghana is 38.5%;<sup>5</sup> for men it is 60.8%.<sup>6</sup> Girls receive less education than

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1. Nii Ashie Kotey & Dzodzi Tsikata, *Women and Land Rights in Ghana*, in *WOMEN AND LAW IN WEST AFRICA: SITUATIONAL ANALYSIS OF SOME KEY ISSUES AFFECTING WOMEN* 204 (Akua Kuenyehia ed., 1998); Mariama Awumbila, *Women and Gender Equality in Ghana: A Situational Analysis*, in *GENDER TRAINING IN GHANA: POLITICS, ISSUES AND TOOLS* 44 (Dzodzi Tsikata ed., 2001) (noting regional variations in women land owners with 50% in the Ashanti region and only two and four percent in the Northern and Upper West regions respectively).

2. C.K. Brown, *Gender Roles and Household Allocation of Resources and Decision-Making in Ghana*, in *THE CHANGING FAMILY IN GHANA* 21, 25 (Elizabeth Ardayfio-Schandorf ed., 1996) (explaining that women often work on the land but do not control the profits that they make).

3. See Kotey & Tsikata, *supra* note 1, at 215, 217 (noting that men own most land and that, although women labor on the land, they often do not inherit family land).

4. SALLY BADEN ET AL., *BRIDGE (DEVELOPMENT—GENDER), BACKGROUND PAPER ON GENDER ISSUES IN GHANA* 12 (Jan. 1994).

5. The literacy rate for females in urban areas is 57% and in rural areas 28.3%. See JOHANNA O. SVANIKIER, *WOMEN'S RIGHTS AND THE LAW IN GHANA* 45 (1997).

6. The literacy rate for males in urban areas is 74.8 % and in rural areas 53.5 %. *Id.*

boys at every level: in 1994, girls comprised forty-seven percent of primary school students, thirty-five percent of senior secondary school students,<sup>7</sup> and twenty-three percent of university students.<sup>8</sup> Over one-third of married women in Ghana are in formally polygynous marriages,<sup>9</sup> though polyandry is nonexistent. Marital rape is not a crime in Ghana.<sup>10</sup> Only one shelter exists for battered women in the entire country.<sup>11</sup>

These conditions persist despite Ghana's commitments under international law to secure equality for women. Ghana has signed and ratified the International Covenant on Civil and Political Rights,<sup>12</sup> the International Covenant on Economic, Social, and Cultural Rights,<sup>13</sup> the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>14</sup> and the African Charter on Human and Peoples' Rights.<sup>15</sup> Taken together, these instruments reflect Ghana's obligation to guarantee women's equal rights under law, both national and customary, and

7. See The World Bank Group, Africa Region Findings, No. 145, October 1999, at <http://www.worldbank.org/afr/findings/english/find145.htm>.

8. U.S. DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: GHANA, CHILDREN (2000).

9. John Hodiak Addai-Sundiata, *Family Dynamics and Residential Arrangements in Ghana*, in *THE CHANGING FAMILY IN GHANA* 72 (Elizabeth Ardayio-Schandorf ed., 1996). This number does not reflect the incidence of informal polygynous unions in which married men establish long term relationships, often called concubinages, with other women.

10. Kathy Cusack, *Defining Violence*, in *VIOLENCE AGAINST WOMEN AND CHILDREN IN GHANA* 29 (Dorcas Coker Appiah & Kathy Cusack eds., 1999).

11. As of 1999, no such shelters existed. NETWORK FOR WOMEN'S RIGHT—NETRIGHT, GHANA: NGO ALTERNATE REPORT FOR BEIJING +5, at 16 (Accra, Nov. 1999). A small private shelter opened outside Accra in 1999. E-mail from Chris Dadzie to Tracy Higgins (Jan. 16, 2002).

12. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 [hereinafter ICCPR]. The Covenant was adopted on December 19, 1966, and entered into force on March 23, 1976.

13. International Covenant on Economic, Social and Cultural Rights, 999 U.N.T.S. 3 [hereinafter ICESCR]. The Covenant was adopted on December 19, 1966, and entered into force on January 3, 1976.

14. Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1980) [hereinafter CEDAW]. The Convention was adopted on December 18, 1979, and entered into force on September 3, 1981.

15. African [Banjul] Charter on Human and Peoples' Rights, O.A.U. Doc. CAB/LEG/67/3 Rev.5 (1981), available at [www.umn.edu/humanrts/instree/ratz1/afchr.htm](http://www.umn.edu/humanrts/instree/ratz1/afchr.htm) [hereinafter African Charter]. The Charter was adopted on June 27, 1981, and entered into force on October 21, 1986. Ghana ratified the Charter on January 24, 1989.

to eliminate cultural practices and beliefs as well as material conditions that undermine that equality.

This Report represents the culmination of a year-long project undertaken by the Joseph R. Crowley Program in International Human Rights at Fordham Law School to study the status of women's inheritance rights in Ghana in light of these international commitments. Inheritance rights are a critical issue for Ghanaian women because traditionally in Ghana, as in many African countries, widows had no right to inherit property from their husband's estate even when the property was acquired during the marriage. As a result, women were often left destitute and homeless upon the death of their spouse.

While important in its own right, the issue of inheritance rights also illustrates more broadly women's inequality in the ownership of property and in marriage and provides a window into the persistently unequal conditions of women's lives in Ghana. Because Ghana adopted a national statute in 1985 designed to address the problem of gender inequality in inheritance under customary law,<sup>16</sup> the issue also illustrates the sometimes problematic intersection of statutory and customary law. Finally, the issue of women's inheritance rights provides an opportunity to assess the efficacy of legislation in guaranteeing women's rights and changing longstanding social practices.

The Fordham delegation was led by Professor Tracy E. Higgins and Jeanmarie Fenrich, the 2000-01 Crowley Fellow, and included the Honorable Deborah A. Batts, United States District Judge for the Southern District of New York; Professor Victor Essien of Fordham Law School; Eric Okyere-Darko, Esq., a Ghanaian-trained lawyer and graduate of Fordham's Masters in Law program; and six second-year law students, Daniel Edelson, Mamta Kaushal, James Regan, Lucinda Saunders, Julia Wright, and Lindsay Zelniker. Prior to the mission, the delegation participated in an intense program of study throughout the academic year, including a seminar on human rights in Ghana led by Ms. Fenrich and Professor Martin Flaherty, co-director of the Crowley Program. While in Ghana, the delegation met with lawyers, judges, legislators, government officials, including President Kufuor and members of his administration, academics, local leaders, and ordinary Ghanaian women and men. The dele-

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16. Intestate Succession Law, P.N.D.C.L. 111 (1985) (Ghana).

gation conducted approximately 200 interviews in all.<sup>17</sup>

This Report presents the findings of this research effort. It consists of three parts. Part I sets out Ghana's obligations under international law as they relate to issues of women's equality generally and inheritance rights specifically. Part II describes the sources of Ghanaian law relevant to the issue. Part II begins with a very general description of the Ghanaian family. It then proceeds to analyze in some detail customary law governing marriage and property, including the customary law of intestate succession, which governed estates prior to 1985. Part II then describes both constitutional and statutory law relevant to intestate succession, particularly Law 111 which created for the first time a right for spouses to inherit from the estate. Finally, Part III presents the delegation's findings with respect to a range of problems women face in claiming their rights under the statutory regime. Some of these problems are inherent in the laws themselves. Others result from material conditions and cultural practices that frustrate the application of the laws. Part III describes and documents the problems and then offers recommendations designed to address them.

#### *Acknowledgments*

The Crowley Program benefited from the contributions and assistance of many individuals and organizations in Ghana. First, we would like to thank the women lawyers from Women in Law and Development in Africa ("WiLDAF") and the *Federacion Internacion De Abogadas*—Ghana ("FIDA") with whom we worked closely both in developing the mission and during our stay in Ghana. In particular, we would like to thank Ms. Bernice Baiden, Programme Coordinator of the Commonwealth Human Rights Initiative (Africa), who represented WiLDAF as part of the Crowley Program team during the mission; Mrs. Hilary Gbedemah, Legal Officer for the SNV/WiLDAF Legal Awareness Programme in Ho; Mrs. Patience Diaba and Mrs. Yaa Boadi, Legal Officers for the SNV/WiLDAF Legal Awareness Programme in Takoradi; and Mrs. Gloria Ofori-Boadu, Executive Director of FIDA—Ghana. All of these women offered their wisdom and counsel on women's inheritance rights in Ghana as well as invaluable assistance in facilitating our access to many of the individu-

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17. See Annex I.

als with whom we met. We also appreciate their willingness to comment on an earlier draft of this report. Others who provided helpful comments include Mrs. Betty Mould-Iddrisu, Chief State Attorney, International Law Section, Ministry of Justice; Mrs. Chris Dadzie, Chief Legal Officer, Commission on Human Rights and Administrative Justice; and Mrs. Dorcas Coker-Apiah, Executive Director, Gender Studies & Human Rights Documentation Center.

We would also like to thank President John Kufuor and Attorney General Nana Akufo Addo, and the many judges, lawyers, legal scholars, non-governmental organization representatives, and traditional leaders who met with us in Ghana. Many ordinary women and men also made time in their busy lives to meet with us and share their stories with us. Some traveled considerable distances to do so. We are grateful to them for their stories comprise the heart of this report.

We are indebted to Kakuna Kerina, Executive Director of the Open Society Initiative for West Africa (OSIWA), Soros Foundation, for invaluable logistical support and expertise. Her efforts allowed us to travel throughout Ghana with ease. Finally, we would also like to thank Mrs. Monica Baeta of ExperTravel, for arranging our travel plans, as well as Mr. Laud Lamte, Mr. Percy Quarshie, and Mr. Maxwell Antobam who drove us everywhere, endured our questions, shared our experiences, and enlightened us about Ghanaian culture.

## I. GHANA'S OBLIGATIONS UNDER INTERNATIONAL LAW

International human rights law embodies a longstanding commitment to equal rights for women. The United Nations Charter,<sup>18</sup> the Universal Declaration of Human Rights,<sup>19</sup> the International Covenant on Civil and Political Rights,<sup>20</sup> and the International Covenant on Economic, Social, and Cultural Rights,<sup>21</sup> all contain a guarantee of equal rights without regard to sex.<sup>22</sup> The African Charter on Human and Peoples' Rights

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18. U.N. CHARTER. The Charter was signed on June 26, 1945, and entered into force on October 24, 1945.

19. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/180, at 71 (1948).

20. See ICCPR, *supra* note 12.

21. See ICESCR, *supra* note 13.

22. U.N. CHARTER art. 55 states:

("African Charter") and the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") impose more specific obligations on States to ensure women's equality.<sup>23</sup>

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With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: . . . (c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

*Id.*; Universal Declaration of Human Rights, *supra* note 19, art. 7 states:

All are equal before the law and are entitled without any discrimination to equal protection of the law.

*Id.*; ICCPR, *supra* note 12, art. 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Id.* Article 2(1) of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Id.* art. 2(1); ICESCR, *supra* note 13, art. 3 states:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

*Id.*

23. *See, e.g.*, African Charter, *supra* note 15, arts. 2, 3, 18(3). Article 2 states: Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

*Id.* art 2. Article 3 states:

- (1) Every individual shall be equal before the law;
- (2) Every individual shall be entitled to equal protection of the law.

*Id.* art 3. Article 18(3) states:

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

*Id.* art. 18(3). *see also* CEDAW, *supra* note 14, arts. 2, 3, 15, 16. Article 2 states:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end, undertake

- (a) To embody the principle of equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;



This section will review Ghana's obligations under these international instruments with respect to women's inheritance rights.

Most basically, international law requires Ghana to accord women equal rights under law.<sup>24</sup> This means that Ghana must eliminate any facial discrimination against women with respect to their legal status and rights under law. This obligation, however, goes beyond the mere use of gender neutral language in the articulation of rights guarantees. For example, many of the statutes discussed in this Report meet this threshold test in that

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- (b) To adopt appropriate legislative measures, including sanctions where appropriate prohibiting all discrimination against women;
  - (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
  - (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
  - (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
  - (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women . . . .

*Id.* art. 2. Article 3 states:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

*Id.* art. 3. Article 15 states:

- (a) States Parties shall accord to women equality with men before the law.
- (b) States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals . . . .

*Id.* art. 15. Article 16 states:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women;

- 1. The same right to enter into marriage; . . . .
  - c. The same rights and responsibilities during marriage and at its dissolution; . . . .
  - h. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

*Id.* art. 16.

24. *See supra* notes 22-23 and accompanying text.

they define the rights of *spouses* rather than husbands or wives. However, because Ghanaian law permits men but not women to have multiple spouses, the neutral terminology of “spouse” masks facially discriminatory treatment. Although the legal status of polygyny is beyond the scope of this report,<sup>25</sup> the failure of statutes governing marital rights explicitly to recognize the practice renders those statutes discriminatory on their face.

International law also requires Ghana to adopt measures aimed at eliminating discrimination against women in all spheres of life: domestic, economic, and political.<sup>26</sup> To meet fully this obligation, Ghana must not only identify discriminatory practices and adopt legislation to address those practices, it must devote the resources necessary for enforcement. Moreover, it must undertake any additional steps—such as education—that may be necessary to ensure equal rights for women. For example, Article 1 of the African Charter obliges Ghana to “recognize the rights, duties and freedoms enshrined” in the Charter and to “undertake to adopt legislative or other measures to give effect to them.”<sup>27</sup> Article 25 obliges Ghana to “promote and ensure through teaching, education and publication, the respect of the

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25. The Organisation for African Unity’s (“OAU”) Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa recommends the abolition of polygamy. Organisation for African Unity, Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, art. 7(c), CAB/LEG/66.6 (Sept. 13, 2000). Although many of the women that we interviewed were critical of the practice of polygyny in Ghana, many also acknowledged the difficulty of abolishing it. *See, e.g.*, Interview with Bernice Baiden, Program Coordinator of the Commonwealth Human Rights Initiative (Africa), Accra (June 4, 2001) (“abolishing polygamy is viewed by men as taking away a right that they have”); Interview with Justice Isaac Lartey-Young, Circuit Court Judge, Tarkwa (June 6, 2001) (acknowledging that polygamy is a central problem but claiming that he sees no way of doing away with it); Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001) (stating that “polygamy is a major problem in Ghana, but who is going to do anything about it because you can’t go to Parliament since most of them are men.”). In another interview, one woman expressed disgust at the institution of polygamy. *See* Interview with Mrs. Chris Dadzie, CHRAJ, Accra (June 15, 2001) (claiming that “my skin crawls when I think of polygamy”). Another interviewee characterized polygamy as a form of violence against women. Interview with Mrs. Y’aa Amekudzi, Director, Center for the Development of People (“CEDEP”), Kumasi (June 6, 2001).

Although we endorse the language of the Draft Protocol, we assume for the purposes of this Report that the practice of polygyny will likely continue for the foreseeable future in Ghana.

26. *See, e.g.*, African Charter, *supra* note 15, art. 1; CEDAW, *supra* note 14, arts. 2, 3, 15, 16.

27. African Charter, *supra* note 15, art. 1.

rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood."<sup>28</sup> CEDAW is even more explicit, requiring States to:

modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>29</sup>

In short, Ghana has an international legal obligation not only to guarantee women's equality under and through law but to undertake to change cultural practices and beliefs that undermine the realization of equality in women's lives.

These broad and thoroughgoing legal obligations apply specifically to women's rights in marriage and the ownership of property. For example, in Article 18, which addresses the protection of the family, the African Charter obliges States to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of [women] as stipulated in international declarations and conventions."<sup>30</sup> Article 16 of CEDAW requires State parties to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women . . . the same rights and responsibilities during marriage and at its dissolution."<sup>31</sup> Elaborating and interpreting this obligation, the Committee on the Elimination of all Forms of Discrimination Against Women adopted General Recommendation Number 21 stating that:

There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. *Such*

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28. *Id.* art. 25.

29. CEDAW, *supra* note 14, art. 5(a).

30. African Charter, *supra* note 15, art. 18(3).

31. CEDAW, *supra* note 14, art. 16(1)(c).

*provisions contravene the Convention and should be abolished.*<sup>32</sup>

In sum, it is beyond dispute that international law requires the equal treatment of men and women in the ownership and disposition of property, including property acquired during marriage and passed on under the laws of intestate succession.

## II. *WOMEN'S INHERITANCE RIGHTS AND SOURCES OF LAW IN GHANA*

Family relations in Ghana are regulated largely by customary law, traditional law indigenous to the region, though varying in its particulars among ethnic groups and communities.<sup>33</sup> Although statutes or English common law have superceded it in certain contexts, customary law still largely determines the requirements for marriage, the rights and duties of husbands and wives, the obligations toward and custody of children, the ownership of property acquired during marriage, and many other aspects of family life in Ghana.<sup>34</sup> Until 1985, customary law governed intestate succession for the vast majority of estates, providing rules of succession that largely excluded spouses.<sup>35</sup> This regime was radically altered in 1985 by a statute intended to protect more fully the interests of spouses, particularly widows.<sup>36</sup>

Despite this statutory change, an understanding of the structure of family systems in Ghana and the customary law governing marriage, property rights, and succession is essential to an appreciation of the problems facing Ghanaian widows today. This is true for three reasons. First, under the current statutory regime,

32. General Recommendation No. 21 (13th Session, 1994), Equality in marriage and family relations, ¶¶ 34-35, available at <http://www.un.org/womenwatch/daw/cedaw/recomm.htm> (emphasis added).

33. Section 19 of the Supreme Court Ordinance, 1876, which established the modern legal system in Ghana, specified that customary law would apply:

"in causes and matters when the parties thereto are natives of the said colony or territories, and particularly . . . in causes and matters relating to marriage and the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions . . ."

Victor Essien, *Sources of Law in Ghana*, J. BLACK STUDIES 246, 248 (1994).

34. See *id.* at 248.

35. See Christine Dowuona-Hammond, *Women and Inheritance in Ghana*, in *WOMEN AND LAW IN WEST AFRICA: SITUATIONAL ANALYSIS OF SOME KEY ISSUES AFFECTING WOMEN* (Akua Kuenyehia ed., 1998) (noting that "these rules of customary law which govern the distribution of property upon death were based on age old concepts of marriage, family relationships, and property rights under customary law").

36. Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana).

customary law still dictates the distribution of a part of the estate.<sup>37</sup> It also governs both ownership of property acquired during marriage,<sup>38</sup> and the composition of the inheriting group, including who counts as a legal spouse.<sup>39</sup> Second, to the extent that people lack knowledge of the law or the resources to enforce it, customary law still governs the distribution of estates. Third, even when the statute is well-understood, the persistence of longstanding expectations and social practices informed by the customary law of intestate succession has given rise to many of the problems in enforcing of the statute.

This Part begins by describing briefly the basic family systems in Ghana as well as customary law governing marriage, ownership of property, and intestate succession. It then describes the statutory scheme enacted in 1985 which substantially altered the system of intestate succession. This Part thus provides a foundation for Part III's analysis of the problems widows face in claiming their rights under the statutory scheme.

#### A. *Law Governing Marital Property and Inheritance prior to Law 111*

##### 1. Family Systems in Ghana

In Ghana, "family" refers to individuals related by blood rather than by marriage, the lineage being traced either through the female line (matrilinal) or the male line (patrilinal).<sup>40</sup> The term "family" may also be used to describe the nuclear family; however, in Ghana, spouses are not regarded as related to each other as under a Western conception of the family.<sup>41</sup> More-

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37. See *infra* Part II.B.2 (discussing the distribution of property under Law 111).

38. Kotey & Tsikata, *supra* note 1, at 219.

39. See *infra* Part III.B.1 (discussing situations where the customary family has asserted that a widow is not actually a legal spouse).

40. One commentator defines family as:

the group of people lineally descended from a common ancestor exclusively through males (in communities called patrilinal for this reason) or exclusively through females starting from the mother of such ancestor (in communities called matrilinal for this reason) and within which group succession to office and to property is based on this relationship.

See Akua Kuenyehia & Esther Ofei-Aboagye, *Family Law in Ghana and its Implications for Women*, in *WOMEN AND LAW IN WEST AFRICA: SITUATIONAL ANALYSIS OF SOME KEY ISSUES AFFECTING WOMEN* 23 (Akua Kuenyehia ed., 1998) (quoting K. Bentsi-Enchill, *Ghana Land Law* 25 (1964), providing this definition of family); Dowuona-Hammond *supra* note 35, at 135.

41. See Kuenyehia & Ofei-Aboagye, *supra* note 40, at 28 (claiming that customary

over, historically, the importance of the extended family or lineage as a social institution far exceeded that of the nuclear family.<sup>42</sup> Indeed, even today, the lineage may be “the most important social institution in Ghana” because it:

constitutes the pivot around which the political and socio-economic organisation of society revolves. . . . It determines [one’s] beneficial enjoyment of rights in land and other moveable property. It may also affect generally [one’s] rights of succession to hereditary office in the hierarchy of political organisation within the traditional system.<sup>43</sup>

Two types of lineage systems exist in Ghana, matrilineal and patrilineal, and each person in Ghana belongs to one of these systems.<sup>44</sup> Although significant differences exist between matrilineal and patrilineal systems, they share many characteristics important to the analysis in this Report. This section provides a general introduction to the family in Ghana, emphasizing these shared characteristics but noting where family systems diverge in ways significant to women’s inheritance rights.

The lineage consists of all persons, male and female, who are descended in a direct line from a common female ancestor in a matrilineal system or a male ancestor in a patrilineal system.<sup>45</sup> The major ethnic groups in Ghana that adhere to the matrilineal system are the Akan (except those elements found in the Volta region and Jasikan District), the Lobi, the Tampoese, and the Vagala or Baga, which are found in the Upper East and Upper West Regions.<sup>46</sup> The Akan are the largest of these groups

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marriage does not create notion of husband and wife as “two persons in one”); E.V.O. Dankwa, *Property Rights of Widows in Their Deceased Husbands’ Estates*, 16 U. GHANA L.J. 7 (1982-85) (maintaining that husbands and wives do not become part of each other’s families); Dowuona-Hammond, *supra* note 35, at 138 (examining inheritance consequences of children and wife not being included in husband’s matrilineal family); Takyiwa Manuh, *Wives, Children, and Intestate Succession in Ghana*, in *AFRICAN FEMINISM: THE POLITICS OF SURVIVAL IN SUB-SAHARAN AFRICA* 77, 80 (Gwendolyn Mikell ed., 1997) (noting that wives do not belong to their husband’s matrilineage because they already have their own matrilineal family); A.K.P. KLUDZE, *MODERN LAW OF SUCCESSION IN GHANA* 253 (1988) (claiming that marriage is not relevant to membership in family).

42. L.K. Agbosu, *The Legal Composition of the Akan Family*, 15 REV. GHANA L. 96, 96 (1983-86).

43. *See id.*

44. *See* Kuenyehia & Ofei-Aboagye, *supra* note 40, at 24; Dowuona-Hammond, *supra* note 35, at 135.

45. *See* Kuenyehia & Ofei-Aboagye, *supra* note 40, at 23.

46. *See* Kludze, *supra* note 41, at 247 (asserting that Akan, Tamale town, Lobi, Lobi-Dagarti, Tampoese, and Vagala (or Baga) are matrilineal communities);

and are concentrated in southwestern Ghana.<sup>47</sup> The Akan are not ethnically homogenous and further ethnic divisions can be made among the Asante, Fante, Akwapim, Akyem, Akwamu, Ahanta, Bono, Nzema, Kwahu, and Safwi.<sup>48</sup> Patrilineal groups in Ghana include the Ewe<sup>49</sup> and most Ghanaians in the Volta region,<sup>50</sup> most of the people of northern Ghana,<sup>51</sup> the Ga-Adangbes of the Greater Accra Region,<sup>52</sup> and the Guans in southern Ghana.<sup>53</sup>

In matrilineal communities, children belong to their mother's family.<sup>54</sup> Thus, a matrilineal extended family would include a woman, her mother, her brothers and sisters, her maternal aunts and uncles, her male and female children, her daughters' children, and so on. The binding relationship is between mother and child, so children of the same mother traditionally have strong ties to each other.<sup>55</sup>

Although the matrilineal system is based on relationships to common female ancestors, *matrilineal* does not imply *matriarchal*;

Dowuona-Hammond, *supra* note 35, at 132, 135 (noting that the Akan, Lobi, Tampoese, and Vagala or Baga adhere to matrilineal systems).

47. See GHANA: A COUNTRY STUDY 80, 83 (LaVerle Berry ed., 1995) (showing map of Ghana with ethnic groupings and claiming that Akan are major ethnic group in Ghana); CHRISTINE OKALI, COCOA AND KINSHIP IN GHANA: THE MATRILINEAL AKAN OF GHANA 12, 18 (1983) (asserting that Akan made up 44.1% of total Ghana population and showing map of Akan areas in southwest Ghana).

48. GHANA: A COUNTRY STUDY, *supra* note 47, at 81. The Akan are bound together by a common language, similar customs, and lineage classifications. See Patrick Nkrumah, *The Interaction Between Christianity and Ashanti Religion* 12-13 (1992) (unpublished Ph.D dissertation, Drew University).

49. GHANA: A COUNTRY STUDY, *supra* note 47, at 85. The Ewe comprise 11.9% of the population. E.A. Boateng, *Ghana: Physical and Social Geography, in AFRICA SOUTH OF THE SAHARA* 2000, at 517, 530 (1999) (citing 1991 census data). The Ewe in Ghana live in three areas: Anlo, Tongu, and the Volta Region. The Ewe of the Volta Region generally live in either the Kpando district or the Ho district. A.K.P. KLUDZE, *EWE LAW OF PROPERTY* 5 (1973) [hereinafter *EWE LAW*].

50. Dankwa, *supra* note 41, at 7.

51. *Id.* This does not include the Lobis, the Tampoese, Vagales, and Lobi-Dagarti in northern Ghana, which are matrilineal. KLUDZE, *supra* note 41, at 247.

52. Dankwa, *supra* note 41, at 7. The Ga-Adangbe are 7.8% of Ghana's total population. Boateng, *supra* note 49, at 530.

53. Dankwa, *supra* note 41, at 7. Guan communities and their ethnic subgroups are found in both northern and southern Ghana. GHANA: A COUNTRY STUDY, *supra* note 47, at 86. Guans comprise 11.9% of the population. Boateng, *supra* note 49, at 530.

54. CHRISTINE OPPONG, *MARRIAGE AMONG A MATRILINEAL ELITE: A FAMILY STUDY OF GHANAIAAN SENIOR CIVIL SERVANTS* 29 (1974).

55. *Id.*

men usually occupy the positions of authority within this system.<sup>56</sup> For example, the *wofa*, or mother's brother, is typically the head of the smaller family unit.<sup>57</sup> He is the guardian of dependent women and children within the extended family and will often have a very close relationship with his sisters' children.<sup>58</sup>

Patrilineal communities in Ghana define a person as belonging to his or her father's family.<sup>59</sup> Thus, a patrilineal extended family consists of a man, his father, his brothers, his paternal aunts and uncles, his own children, and so on.<sup>60</sup> A man's sisters are also members of his lineage; however, their children are not<sup>61</sup>—they are considered a part of their father's family.<sup>62</sup> Similarly, a man's son's children are part of his lineage; his daughters' children are not.

Whether matrilineal or patrilineal, one's kinship arrangement has significant political, economic, and social implications.<sup>63</sup> For example, membership in a certain lineage may render an individual eligible for political office.<sup>64</sup> The lineage defines one's right to use and inherit family land.<sup>65</sup> Members of a lineage can expect financial assistance from each other, and in return, are expected to labor for or fulfill other responsibilities to the lineage.<sup>66</sup> The head of the lineage is often responsible for settling internal disputes within the family, controlling religious observance, and determining the utilization of lineage land.<sup>67</sup> In short, the social structure of a community is largely driven by lineage membership and relationships.

56. GWENDOLYN MIKELL, *COCOA AND CHAOS IN GHANA* 247 (1989); see also BADEN ET AL., *supra* note 4, at i (claiming that while matrilineal systems have potential to grant greater access to resources for women, they do not guarantee such access).

57. OPPONG, *supra* note 54, at 29.

58. *Id.* at 29, 33. His own children, of course, are not regarded as part of his family but rather of their mother's family.

59. KLUDZE, *supra* note 41, at 245.

60. A.K.P. KLUDZE, *CHIEFTAINCY IN GHANA* 4 (2000) [hereinafter *CHIEFTAINCY*].

61. Manuh, *supra* note 41, at 81.

62. *CHIEFTAINCY*, *supra* note 60, at 35.

63. OPPONG, *supra* note 54, at 28; GHANA: A COUNTRY STUDY, *supra* note 47, at 83.

64. OPPONG, *supra* note 54, at 28.

65. See *id.* at 28; Duwouona-Hammond, *supra* note 35, at 134.

66. GHANA: A COUNTRY STUDY, *supra* note 47, at 116.

67. OPPONG, *supra* note 54, at 30; Gwendolyn Mikell, *Pleas for Domestic Relief: Akan Women and Family Courts*, in *AFRICAN FEMINISM: THE POLITICS OF SURVIVAL IN SUB-SAHARAN AFRICA* 96 (1997).



For the purposes of this Report, the most important role of the lineage may be in connection with the death of one of its members. When a member dies, the lineage is responsible for giving the deceased a proper burial, including transporting the body home for burial when possible and sponsoring a funeral appropriate to the status of the family and the deceased.<sup>68</sup> As funerals in Ghana are very significant events for family members as well as the community, they can be quite expensive.<sup>69</sup> Lineage members are expected to contribute to the cost of the funeral,<sup>70</sup> which may exceed the value of the deceased's estate.

## 2. Marriage and Property Rights under Customary Law

Under customary law, the formalities required for a marriage vary from one ethnic group to another. For all ethnic groups in Ghana, however, the consent of the two families involved is an essential prerequisite to a valid customary law marriage "because marriage in Ghana is not just a union between a man and woman as in European legal concept, but also the establishment of a permanent relationship between the families of the parties to the marriage."<sup>71</sup> Nevertheless, despite this relationship, the marriage does not affect family *membership*. The two individuals remain members of their separate lineages.<sup>72</sup>

In addition to consent of the families, other requirements for a customary marriage may include: consent of the parties;<sup>73</sup> the giving of presents and drinks by the man's family to the wo-

68. KLUDZE, *supra* note 41, at 259; OPPONG, *supra* note 54, at 29.

69. See RACHEL NAYLOR, GHANA: AN OXFAM COUNTRY PROFILE 71 (2000) (describing importance of funerals in Ghana and expense of these ceremonies); Interview with Professor L.K. Agbosu, Dr. K. O. Adinkrah, Lecturers Prempeh-Eck, Ghana Law School, Accra (June 13, 2001).

70. KLUDZE, *supra* note 41, at 259; Interview with Professor L.K. Agbosu, Dr. K. O. Adinkrah, Lecturers Prempeh-Eck, Ghana Law School, Accra (June 13, 2001).

71. Kuenyehia & Ofei-Aboagye, *supra* note 40, at 26.

72. See *id.* at 28 (claiming that customary marriage does not create notion of husband and wife as "two persons in one"); Dankwa, *supra* note 41, at 7 (maintaining that husbands and wives do not become part of each other's families); Dowuona-Hammond, *supra* note 35, at 138 (examining inheritance consequences of children and wife not being included in husband's matrilineal family); Manuh, *supra* note 41, at 77, 80 (noting that wives do not belong to their husband's matrilineage because they already have their own matrilineal family); KLUDZE, *supra* note 41, at 253 (claiming that marriage is not relevant to membership in family).

73. There is no defined minimum age of marriage under customary law, however, a girl cannot be given in marriage until she has reached the age of puberty. Kuenyehia & Ofei-Aboagye, *supra* note 40, at 26; OPPONG, *supra* note 54, at 30; Nkrumah, *supra*

man's family and the receiving of these presents and drinks by her family; and, in some parts of Ghana, a dowry or bride wealth.<sup>74</sup> Whatever the particular requirements of customary law marriage, they tend to be informal, recorded through the witness of the community rather than a system of licensing or registration.

Marriage under customary law confers certain asymmetrical rights and obligations to the husband and wife. First, the husband gains complete and exclusive sexual rights to his wife.<sup>75</sup> Yet, because customary law permits men to have multiple spouses,<sup>76</sup> the wife has no corresponding right to or expectation of sexual exclusivity. All customary marriages are *potentially* polygynous.<sup>77</sup> Almost half of these are, or will become, formally polygynous unions.<sup>78</sup> This statistic does not include *de facto* polygynous unions in which a man, already married, enters an informal union with another woman. These unions, often called "concubinages" are commonplace in Ghana,<sup>79</sup> and a man suffers

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note 48, at 51. Nevertheless, a girl may be betrothed long before she is of marriageable age. See Kuenyehia & Ofei-Aboagye, *supra* note 40, at 26.

74. Kuenyehia & Ofei-Aboagye, *supra* note 40, at 26.

75. Marital rape is not considered a crime in Ghana. See Cusack, *supra* note 10, at 29 (noting that marital rape claims carry no legitimacy in Ghana and quoting one queenmother as saying "it is the right of a husband to have sex with his wife"); Interview with Mrs. Ursula Owusu-Adjei, Vice-President, FIDA-Ghana, Accra (June 12, 2001) (explaining that "rape is defined outside marriage"); Interview with Gloria Ofior-Boadu, President FIDA-Ghana, Accra (June 12, 2001) (expressing the view that marital rape provision would probably have to be removed before pending domestic violence legislation could be passed by Parliament).

76. See Kuenyehia & Ofei-Aboagye, *supra* note 40, at 24; OPPONG, *supra* note 54, at 31. Polygyny is the practice of a man having more than one wife at one time. Fitnat N.A. Adjetey, *Violence Against Women in Ghana: A Pervasive Yet Ignored Problem*, in *RIGHTS OF WOMEN UNDER NATIONAL AND INTERNATIONAL LAWS* 25 (1995). Adjetey argues that polygyny is discriminatory against women because it allows men to have more than one wife while women are allowed only one husband, that it denies a woman her sexual freedom and equality in marriage, and has the effect of placing woman in a low bargaining position in marriage and family relations. See *id.* at 26. As will be discussed below, there are three types of marriages in Ghana, customary law marriages, marriage under the Marriage Ordinance, and marriage under the Marriage of Mohammedans Ordinance. Marriages contracted under customary law and under the Marriage of Mohammedans Ordinance are potentially polygynous. See Kuenyehia & Ofei-Aboagye, *supra* note 40, at 25.

77. See Kuenyehia & Ofei-Aboagye, *supra* note 40, at 25 (80% of married women are in customary law marriages).

78. See *id.* (33% of married women are in formally polygynous unions).

79. *Id.* For instance, Justin Dorgu, Legal Officer of the Commission for Human Rights and Administrative Justice estimated that 60% of men have children outside of marriage whether or not they are married to multiple wives. See Interview with Justin

little social prejudice for failing to formalize the union.<sup>80</sup> Also commonplace are liaisons which do not rise to the level of concubinage. As Ms. Rosaline Obeng-Ofori of Actionaid explained, “[m]en do not commit adultery in customary marriages because they are free to have relations with any woman they choose.”<sup>81</sup>

Second, the husband gains rights to his wife’s domestic labor.<sup>82</sup> As Justice Ollenu explained in *Quartey v. Martey and Anor*, “[b]y customary law, it is the domestic responsibility of a man’s wife and children to assist him in the carrying out of the duties of his station of life.”<sup>83</sup> A husband has no corresponding duty to labor for his wife but rather a duty to provide her with economic support.

These asymmetrical obligations, hers to contribute labor, his to provide economic support, in turn justify asymmetrical rights under customary law to property acquired during marriage. Again, as Justice Ollenu explained, “[t]he proceeds of this joint effort of man and wife and/or children, and any property which the man acquires with such proceeds, are by the customary law the individual property of the man.”<sup>84</sup> Ghanaian courts have departed from this strict interpretation when a woman makes a direct financial contribution to the acquisition of prop-

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Dorgu, Legal Officer of the Commission for Human Rights and Administrative Justice, Ho (June 5, 2001).

80. Interview with Justin Dorgu, Legal Officer of the Commission for Human Rights and Administrative Justice, Ho (June 5, 2001).

81. See Interview with Rosaline Obeng-Ofori, Actionaid, Accra (June 4, 2001). It should be noted that these informal unions are not an opportunity for informal polyandry. Although married men commonly enter such unions, married women do not—marriage entitles men to exclusive sexual rights to the woman.

82. See Kotey & Tsikata, *supra* note 1, at 219 (claiming that women’s duty to labor for husband interferes with women’s ability to build their own assets); Manuh, *supra* note 41, at 81 (noting that women had duty to assist husband in chosen profession); Dankwa, *supra* note 41, at 1-2; see also MIKELL, *supra* note 56, at 100 (asserting that although women had to labor for husband, their primary obligation was to lineage).

83. *Quartey v. Martey and Anor*, [1959] Ghana L. Rep. 377.

84. *Id.*; OPPONG, *supra* note 54, at 31 (noting that even “property a wife helps her husband to acquire and maintain, belongs only to the husband”); Dankwa, *supra* note 41, at 2. The courts in Ghana have also found that, under customary law, a widow had no legal right to her husband’s estate even if she helped him to acquire it during his lifetime. In *Quartey v. Martey*, [1959] Ghana L. Rep. 377, the High Court held that the widow’s “right is maintenance and support from the family of the husband,” and she was “not entitled to a share in her husband’s estate upon his death intestate.” *But see* Manuh, *supra* note 41, at 81 (noting that whether property acquired as result of joint effort of husband and wife is sole property of husband has been subject of considerable debate in Ghana).

erty,<sup>85</sup> however, the contribution of her *labor* merely satisfies her preexisting marital obligation and does not give her an ownership stake.<sup>86</sup>

In the abstract, this arrangement of separate property may be characterized as gender neutral: neither husbands nor wives have an ownership interest in property acquired by their spouses during the marriage.<sup>87</sup> In practice, however, the system operates to ensure that most property remains under men's control. First, establishing the initial right to land is accomplished through clearing the land, a task generally assigned to men.<sup>88</sup> Thus, women are often unable to acquire virgin land.<sup>89</sup> Second, although women may legally inherit lineage land, families very often give priority to men.<sup>90</sup> Women may inherit from other women within the clan; however, since most women own very little property, they have little to pass on to others.<sup>91</sup> Additionally, when women do inherit land, their marital obligation to labor for their husbands may prevent them from exercising control of the land.<sup>92</sup> Third, and more generally, married women have little time to work to acquire separate property or to improve any property they may own separately.<sup>93</sup> A wife's duty to labor for

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85. See Kuenyehia & Ofei-Aboagye, *supra* note 40, at 35 (noting that "this absolute position has . . . been modified somewhat in recent times, especially where there is clear evidence of financial contribution to the acquisition of the property by the customary law wife").

86. See *id.* at 43 (noting that "it is almost impossible for a wife who is unable to prove some kind of contribution which is capable of monetary computation to claim successfully a share in the property which they acquire during the subsistence of the marriage").

87. OPPONG, *supra* note 54, at 31 (claiming that women can acquire property separate from their husbands); Kuenyehia & Ofei-Aboagye, *supra* note 40, at 35 (noting that women can acquire property apart from their husbands and that women's property is kept separate from their husbands).

88. Kotey & Tsikata, *supra* note 1, at 217.

89. *Id.*

90. Manuh, *supra* note 41, at 80.

91. See Kotey & Tsikata, *supra* note 1, at 217; see also OKALI, *supra* note 47, at 14 (noting that man's property is generally inherited by other men in family while woman's property is inherited by other women). *But see* MIKELL, *supra* note 56, at 16 (claiming that gender lines dividing male and female property sometimes become blurred with men inheriting valuables that women previously controlled).

92. Kotey & Tsikata, *supra* note 1, at 217.

93. Dowuona-Hammond, *supra* note 35, at 132 ("With the unduly great burden borne by women in the household and gender divided patterns of allocation and control of income generating resources, the acquisition of substantial assets during one's lifetime remains the exclusive privilege of men.").

her husband not only hinders her ability to labor for herself,<sup>94</sup> but also, as noted above, undermines her claim to property acquired by their joint efforts during the marriage.<sup>95</sup> Although her direct financial contribution to the purchase of land may be recognized, a woman's non-monetary contribution to the acquisition of property does not result in any legally enforceable ownership right in that property.<sup>96</sup>

Even when women are employed outside the home, their employment may not translate into increased individual assets because they often use any income for the upkeep of the home and support of the children.<sup>97</sup> In fact, by reducing the need for the husband's support in the household, this contribution by the employed wife may permit the husband further to increase his own wealth by investing his profits.<sup>98</sup>

### 3. Inheritance Rights under Customary Law

This separate property regime, although unequal during marriage, has even more negative consequences for women upon the death of their spouse.<sup>99</sup> According to customary law,

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94. Kotey & Tsikata, *supra* note 1, at 219.

95. See *supra* note 84 and accompanying text (discussing *Quarley v. Martey*).

96. Kotey & Tsikata, *supra* note 1, at 221.

97. See GHANA: A COUNTRY STUDY, *supra* note 47, at 100 (recognizing that while women are able to engage in economic activity, their profits usually are invested back into the household while husband's profits are often invested back into enterprise, giving husband more opportunity to acquire larger assets).

98. *Id.*

99. A woman also suffers negative consequences upon divorce. Under customary law, the husband or wife must refund the money exchanged for the arrangement of the marriage and settle any other debts they may have between them in order to divorce. OPPONG, *supra* note 54, at 31. In both matrilineal and patrilineal groups, a man is required to give the woman a "send-off" upon divorce, if she is not at fault; however, the amount of the send-off is wholly discretionary. Kotey & Tsikata, *supra* note 1, at 221; see also Interview with Mrs. Sheila Minkah-Premo, Apex Lawconsult, and Angela Dwamena-Aboagye, The Ark Foundation, Accra (Feb. 21, 2001) (claiming that sometimes amount husband must give to wife for divorce can be as little as U.S.\$10). In some places in Ghana, the lineage will count the pieces of cloth a wife brings with her to the marriage and will make sure that the woman leaves with the same number. Interview with Rosaline Obeng-Ofori, Actionaid, Accra (June 4, 2001). If she is at fault for the divorce, her lineage could be required to pay all debts incurred on her behalf during the marriage and the bride price. One study found that among the patrilineal Ewe, a wife could expect drinks and some monetary compensation to her family upon divorce. The same study found that, among the Akan, women, or their extended families, could receive monetary compensation, drinks, cloth, and in some cases, a portion of the husband's farm.

which governed intestate succession for customary marriages until 1985, when a man dies without leaving a will, his self-acquired property becomes lineage property and is distributed accordingly.<sup>100</sup> Although significant differences between matrilineal and patrilineal communities exist with respect to the way customary law defines the composition of the inheriting group, in neither matrilineal nor patrilineal communities does the spouse have a right to inherit from the estate. Here again the customary law governing property is facially neutral: neither a husband nor a wife of the intestate will inherit under customary law. The rule does not typically work as great an injustice to widowers as it does to widows, however, because the husband is regarded as the owner of property acquired during marriage.<sup>101</sup> Thus, when a wife dies, the husband's possession and control of their property—their land, their home, their business—is usually uninterrupted. The law treats the property as belonging to him, not as part of her estate. In contrast, when a husband dies, the property acquired by the couple during the marriage is subject to the rules of intestate succession, which, under customary law, entirely dispossess the widow.

In matrilineal communities, the inheriting group includes the man's mother, brothers, and sisters and the children of such sisters.<sup>102</sup> The customary successor, appointed by the lineage,<sup>103</sup> takes control of property as trustee and manages it for the bene-

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100. KLUDZE, *supra* note 41, at 256; Manuh, *supra* note 41, at 81; OKALI, *supra* note 47, at 14; Dowuona-Hammond, *supra* note 41, at 138; NAYLOR, *supra* note 69, at 50, 74; BADEN ET AL., *supra* note 4, at 9; Dankwa, *supra* note 41, at 7.

101. KLUDZE, *supra* note 41, at 182; Dowuona-Hammond, *supra* note 41, at 13; Dankwa, *supra* note 41, at 1-2. Dankwa notes that:

The concern for widows stems from the belief that they experience more hardship on the death of their husbands than widowers on the death of their wives. Custom and tradition have relegated the wife to the duties of house-keeping, raising and caring of children and assisting the husband in almost all of his endeavours. Specifically, when she helps the husband to acquire property, the traditional position, as is evidenced by cases such as *Quartey v. Martey* is that she acquires no proprietary interest in such property.

*Id.*

102. Dowuona-Hammond, *supra* note 35, at 138.

103. There are several principles that regulate the appointment of a successor: "(i) a person cannot appoint his own successor; (ii) succession is by appointment by the family; and (iii) succession is not as of right but by appointment." KLUDZE, *supra* note 41, at 276; *see also* OPPONG, *supra* note 54, at 30 (claiming that older sibling of deceased or child of deceased's sister is often chosen as successor).

fit of the inheriting group.<sup>104</sup> Because spouses are not members of each other's matrilineage, a surviving wife does not inherit from her husband if he dies intestate. In addition, because children in matrilineal communities belong to their mother's lineage, they also have no right to inherit from their father's estate.<sup>105</sup> Indeed, although the practice of widow inheritance is in decline in Ghana, the treatment of widows and children under customary law reflects the notion that they are *part of* the estate itself rather than beneficiaries.<sup>106</sup> For example, the successor to the estate has a moral responsibility to maintain the wife and children of the deceased, including educating the children.<sup>107</sup> The widow and children, however, have no legal right to enforce these obligations. The children of the deceased may continue living in the home subject to good behavior as determined by the successor.<sup>108</sup> The widow may re-marry into her husband's matrilineage by marrying the successor to her husband, if both parties agree.<sup>109</sup> If the successor chooses not to marry the widow, the successor may dispatch her with some token sum.<sup>110</sup>

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104. KLUDZE, *supra* note 41, at 276; Dorothy Dee Vellenga, *The Widow Among the Matrilineal Akan of Southern Ghana*, in *WIDOWS IN AFRICAN SOCIETIES: CHOICES AND CONSTRAINTS* 225 (Betty Potash ed., 1986).

105. Dowuona-Hammond, *supra* note 35, at 138; ENOCH D. KOM, *INHERITANCE, MARRIAGE AND DIVORCE* 5 (1993).

106. SVANIKIER, *supra* note 5, at 30 (noting that with the passage of Law 111, there is no longer a compelling economic reason for a widow to marry her husband's customary successor and quoting *Law and Status of Women in Ghana*, United Nations Economic Commission for Africa, Addis Ababa: Research Series, African Training and Research Center for Women, 1984, at 7, which found: "Widow inheritance treats women as chattel, instead of human beings who have rights equal to those of a man."); Interview with Chiefs and Queenmothers, Ho (June 6, 2001) (Togbe Keteku II noting that the custom in the past was to give the widow to the deceased's younger brother but now a woman can choose not to remarry or to go wherever she likes).

107. KLUDZE, *supra* note 41, at 293; Dowuona-Hammond, *supra* note 35, at 138-39. The duty of a successor to maintain and support the widow and children of the deceased has increasingly become a legally enforceable right, with many cases before the courts concerning this issue. Manuh, *supra* note 41, at 88; Dowuona-Hammond, *supra* note 35, at 144; *see, e.g.*, *Manu v. Kuma*, [1963] 1 Ghana L. Rep. 464, 467, 469 (stating that "the responsibility of a successor to maintain and train the child of his predecessor is a legal one"); *In Re Kofi Antubam* (Dec'd), *Quaicoe v. Fosu & Anor*, [1965] Ghana L. Rep. 377 (holding that widows and children have right to maintenance by successor).

108. Manuh, *supra* note 41, at 81; Dowuona-Hammond, *supra* note 35, at 140.

109. Manuh *supra* note 41, at 81; Kludze, *supra* note 41, at 296; *see also* Dowuona-Hammond, *supra* note 35, at 141 (noting that widow's option of re-marrying into husband's family was purely voluntary).

110. Vellenga, *supra* note 104, at 225; Manuh, *supra* note 41, at 81; Dowuona-Hammond, *supra* note 35, at 141.

If the widow chooses not to marry the successor, her family must return part of the original marriage money and any claim she has on the estate is extinguished.<sup>111</sup> In short, caring for the widow and children is a part of the management of the estate assumed by the customary successor and subject to the original marriage contract between the families.<sup>112</sup>

In patrilineal communities, as in matrilineal communities, spouses are not part of the same lineage so a surviving wife will not inherit property from the intestate estate of her husband under customary law.<sup>113</sup> Again, the husband's lineage bears merely a moral responsibility to maintain the widow until she remarries,<sup>114</sup> or, in some cases, until she refuses an offer of marriage from a member of her husband's lineage.<sup>115</sup> As a practical matter, however, widows who have children may be somewhat better off within a patrilineal system than a matrilineal one because their children do have a right to inherit from their father. Indeed, under customary law governing many patrilineal communities in Ghana, children, not the wider family, inherit property from the deceased.<sup>116</sup> Not every child automatically inherits a portion of the deceased's estate, however.<sup>117</sup> The lineage may determine which child inherits and how much of a share the child receives.<sup>118</sup> Although daughters may inherit, sons generally receive preference,<sup>119</sup> especially with respect to land.<sup>120</sup> In

111. Vellenga, *supra* note 104, at 225; Dowuona-Hammond, *supra* note 35, at 141.

112. Vellenga, *supra* note 104, at 225.

113. See Manuh, *supra* note 41, at 79.

114. EWE LAW, *supra* note 49, at 306. The widow may remain in the matrimonial home. *Id.* If the children who inherit from the deceased father are not children of the widow, the children are less likely to care for the widow. *Id.*

115. K.E. de Graft Johnson, *Succession and Inheritance Among the Fanti and Ewe: A Comparative Study of Current Trends*, in DOMESTIC RIGHTS AND DUTIES IN SOUTHERN GHANA 164 (Christine Oppong ed., 1974).

116. CHEIFTANCY, *supra* note 60, at 273-76 (citing Ewe cases in which courts recognized that children inherit property from parents). See also KLUDZE, *supra* note 41, at 266 (explaining that among the Ga-Adangbe, children, not the family, inherit the self-acquired property of the father).

117. EWE LAW, *supra* note 49, at 280. Traditionally, the eldest son received the entire estate but Ewes no longer automatically transfer the entire estate to the eldest son.

118. *Id.* Court decisions recognize that if an oldest son or daughter is unfit, a younger son may inherit. *Id.* at 281 (citing *In re E.N. Tamakloe*, Unreported, Suit No. 78/44, High Court, Accra, which found that among the Anlo Ewe, a senior child will lose his inheritance right if unfit). An only child will automatically inherit an entire estate, as a right. *Id.* at 281.

119. *Id.* at 290. Women traditionally received only a few "feminine" chattels. *Id.*



some communities, when daughters do inherit property, they receive only a life estate in the property.<sup>121</sup>

Polygyny, both formal and informal, complicates the scenario in patrilineal communities. If all of the children of the deceased are from the same mother, each child generally receives a share of the inheritance.<sup>122</sup> However, children born out of wedlock may inherit, provided the father has acknowledged paternity.<sup>123</sup> Thus, there may be more than one set of children even in a formally monogamous union. If there are children from more than one mother, the eldest child of each mother receives a share.<sup>124</sup> These shares are then further subdivided among each of the younger siblings.<sup>125</sup> Often little, if any, property becomes family property.<sup>126</sup>

For the purposes of this Report, the differences between matrilineal and patrilineal systems are significant primarily because they give rise to different sources of conflict surrounding distribution of the estate. In matrilineal communities, the intestate's sisters and her children (his nieces and nephews) are the primary beneficiaries under customary law and are therefore the most likely to challenge the widow's rights under the statutory regime. In patrilineal communities, disputes more often arise

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The Ewe say "*nyonugblede mebiana o*," translated as "palm fruits in the farm of a woman can never ripen." *Id.* In *Fietsu v. Fietsu*, Unreported, Suit 51/51, Atando Native Court, Hohoe (1951), the court found that under Ewe customary law a half brother, as a male, had preference over a sister of the deceased. *Id.* at 293.

120. *Id.* at 286, 294 (explaining that one of the "persisting relics" of Ewe customary law is that "a daughter, however old she may be, may be postponed to a son, even to a younger brother"). If a deceased man has more than one wife, and one wife has only female children, then the female children will inherit in the same manner as children of the other wives, however. *Id.* at 286.

121. *Id.* After the daughter dies, the property becomes inheritable as if the deceased had just died without children. *Id.*

122. *Id.* at 289. The more senior the child, the greater his share in the inheritance. *Id.*

123. *Id.* at 286. OPPONG, *supra* note 54, at 31. Kludze argues that acknowledgment of paternity may not even be necessary in matrilineal communities where legitimacy depends on maternity—which would not be in dispute. KLUDZE, *supra* note 41, at 253.

124. Ewe Law, *supra* note 49, at 286.

125. *Id.*

126. *Id.* at 290. If a man dies without children, the next people to inherit his self-acquired property under customary law would be his father, brothers, possibly sisters—but only for a life estate—and his brother's children, in that order of priority. *Id.* at 295.

among children of different mothers and involve challenges to the widow's portion of the estate.

#### 4. Alternatives to Customary Marriage

Although the vast majority of marriages in Ghana are customary law marriages, for a century now, two alternatives to customary law marriage have existed. Couples may choose a Western-style "Ordinance marriage" that is governed largely by English law,<sup>127</sup> or a marriage under the laws of Islam. Each alternative carries with it different obligations and rights.

In contrast to customary law marriage or Muslim marriage, marriage under the Marriage Ordinance is strictly monogamous. If a man married under the Ordinance subsequently marries a second woman, he can, in theory, be found guilty of bigamy.<sup>128</sup> Ordinance marriage consequently carries with it a high status for a Ghanaian woman. As one commentator has explained, "[s]ocially, there is a great deal of importance attached to a marriage under the Ordinance. Wives of such marriages are referred to as 'Mrs.' and they enjoy a certain measure of respect within the Ghanaian society. This kind of respect is not accorded to customary wives."<sup>129</sup>

Despite this high status, Ordinance marriage does not convey economic rights for women that differ significantly from customary marriage. Indeed, women married under the Ordinance were originally subject to the English common law conception of coverture by which a woman's separate legal identity was extin-

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127. See Marriage Ordinance, Cap. 127, §§ 10-38; see also KOM, *supra* note 105, at 62-69 (discussing requirements of Marriage Ordinance). There are a number of formal procedural requirements set forth in the Ordinance which must be strictly complied with in order to have a valid marriage under the Ordinance. See Kuenyehia & Ofei-Aboagye, *supra* note 40, at 28 (alleging that the essential requirements include: agreement by the parties to be married; celebration of the marriage within certain hours of the day in a place of worship or a Marriage Registrar's office before two witnesses and evidenced by the signing of a Marriage Certificate; a Marriage Registrar's certificate issued after certain formalities; and consummation of the marriage).

128. According to Professor Dankwa, there has only been one prosecution of bigamy in Ghana. Interview with Professor E.V.O. Dankwa, Faculty of Law, University of Ghana, Legon (June 14, 2001). He also noted that it is difficult to enforce bigamy laws because those responsible for enforcing the laws are often bigamists themselves. *Id.*

129. Kuenyehia & Ofei-Aboagye, *supra* note 40, at 29; see Rosaline Obeng-Ofori, Actionaid, Accra (June 4, 2001) (discussing respect accorded to a woman married under the Ordinance).

guished in favor of her husband's.<sup>130</sup> The Married Women's Property Act recognized the right of married women to own property in their own names, a right already enjoyed by women married under customary law.<sup>131</sup> Nevertheless, women married under the Ordinance have no greater claim than women married under customary law to property acquired during marriage through the joint efforts of husband and wife.<sup>132</sup>

Prior to the changes brought by Law 111, intestate succession for Ordinance marriages was governed by the ordinance itself, which provided that two-thirds of the estate would be distributed in accordance with the laws of England in force on November 19, 1884 and one-third in accordance with the provisions of customary law.<sup>133</sup> Although the precise rules were obscure and difficult to apply, the general practice was for a surviving husband to take two-thirds of the noncustomary portion (or four-ninths of the entire estate) and a surviving wife to take one-third (or two-ninths of the entire estate).<sup>134</sup>

The Marriage of Mohammedans Ordinance (Cap. 129)<sup>135</sup> was introduced in 1907 to provide for the registration of marriages and divorces contracted under Islamic law. It provides that marriages celebrated under Islamic law must be registered within one week at the office of the registering agent.<sup>136</sup> Marriages under this Ordinance are potentially polygynous, but a man is limited to four wives—unlike customary law marriages which do not impose any limit on the number of wives a man may marry.<sup>137</sup> Prior to Law 111's enactment in 1985, § 10 of the Ordinance provided that "[o]n the death of a Mohammedan whose marriage has been duly registered under this Ordinance, the succession to his or her property shall be regulated by Mo-

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130. See Kuenyehia & Ofei-Aboagye, *supra* note 40, at 31.

131. *See id.*

132. *Id.* at 35.

133. Marriage Ordinance, Cap. 127, § 48 (1884); Dowuona-Hammond, *supra* note 35, at 147-48.

134. Kuenyehia & Ofei-Aboagye, *supra* note 40, at 30.

135. Marriage of Mohammedans Ordinance, Cap. 129 (1907).

136. *Id.* § 6(1); KOM, *supra* note 105, at 70.

137. The Marriage of Mohammedans Ordinance provides for marriage in accordance with the laws of Islam ("Mohammedan law"). *See* Marriage of Mohammedans Ordinance, Cap. 129, § 6(6). Under Islamic law, a man may have up to four wives. *See* Koran, Women, 4:2 ("If you fear that you cannot treat orphans with fairness, then you may marry other women who seem good to you: two, three, or four of them."); Kuenyehia & Ofei-Aboagye, *supra* note 40, at 30.

hammedan law."<sup>138</sup> It has been widely acknowledged, however, that couples rarely complied with the registration requirement of the Marriage of Mohammedans Ordinance.<sup>139</sup> Absent registration, the estate would be distributed entirely according to customary law.

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Notwithstanding the existence of these alternatives, eighty percent of marriages in Ghana are still celebrated under customary law which makes little provision for widows.<sup>140</sup> As described above, under customary law, the estate of a man who dies intestate reverts to his lineage. His wife or wives have no entitlement to a share of the estate and are dependent on the largesse of the family and the customary successor. In practice, the successor often fails to fulfill his obligations.<sup>141</sup> Moreover, in matrilineal communities, a man's own children have no legal right to any part of the estate. The practical effect of this customary law structure has been the impoverishment and homelessness of many women and children.<sup>142</sup> In response to pressure from churches, traditional groups, and women's advocates, and a desire to comply with international legal standards that obliged the

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138. Marriage of Mohammedans Ordinance, Cap. 129, § 10. Section 10 has now been repealed by the Intestate Succession Law. *See* Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana), § 19. Rules of succession to a deceased man's property are provided for in the Koran:

A male [child] shall inherit twice as much as a female. If there be more than two girls, they shall have two-thirds of the inheritance; but if there be one only, she shall inherit the half. Parents shall inherit a sixth each, if the deceased have a child; but if he leave no children and his parents be his heirs, his mother shall have a third. If he have two brothers, his mother shall have a sixth after payment of his debts and any legacies he may have bequeathed.

You [the man] shall inherit the half of your wives' estate if they die childless. If they leave children, a quarter of their estate shall be yours after payment of their debts and any legacies they may have bequeathed.

Your wives shall inherit one quarter of your estate if you die childless. If you leave children, they shall inherit one-eighth after payment of your debts and any legacies you may have bequeathed.

KORAN, 4:11, 4:12.

139. *See* Kuenyehia & Ofei-Aboagye, *supra* note 40, at 30; Dowuona-Hammond, *supra* note 35, at 149; KLUDZE, *supra* note 41, at 229.

140. Kuenyehia & Ofei-Aboagye, *supra* note 40, at 25.

141. Dowuona-Hammond, *supra* note 35, at 138, 141.

142. *Id.*; Agbosu, *supra* note 42, at 109; *see, e.g.*, OPPONG, *supra* note 54, at 57 (reporting story of man whose mother was widowed and left with nothing because matrin of deceased husband came in and took all that husband owned after he died).

State to end discrimination against women and children, the Ghanaian government in 1985 adopted Laws 111 and 112, significantly altering the system of intestate succession.<sup>143</sup> The following section describes the changes to the customary law and to the marriage statutes that resulted from the adoption of Law 111. Despite these changes, many of the social practices and expectations underlying the customary law persist.<sup>144</sup> Part III discusses in detail the problems resulting from these changes and their tension with practices under customary law.

### B. *Constitutional and Statutory Law*

Under the Provisional National Defense Council ("PNDC") government, Ghana enacted the 1985 Intestate Succession Law, P.N.D.C. Law 111, and later included a provision in the 1992 Constitution that addressed property rights of spouses. This section describes these changes and other domestic law provisions relevant to women's property rights and analyzes their relationship to the customary law principles described above.

#### 1. Article 22 of the 1992 Constitution

Article 22 of the Ghanaian Constitution (1992) addresses property rights of spouses during marriage and upon death or dissolution of the marriage. It provides that:

- (1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.
- (2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.
- (3) With a view to achieving the full realization of the rights referred to in clause (2) of this article—
  - (a) Spouses shall have equal access to property jointly acquired during marriage;
  - (b) Assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.<sup>145</sup>

Pursuant to Article 22(1), upon the death of one spouse, the

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143. Dowuona-Hammond, *supra* note 35, at 149.

144. OPPONG, *supra* note 54, at 92-93.

145. GHANA CONST. art. 22.

surviving spouse can claim a reasonable share of the estate, whether or not she was a beneficiary under a will.<sup>146</sup> Thus, Article 22(1) goes beyond the context of intestate succession to permit—indeed to require—courts to override a will to provide a reasonable share to a surviving spouse. Significantly, it enshrines as a constitutional right a spouse's claim to a part of the estate, though the portion to which she is entitled is subject to considerable judicial discretion.<sup>147</sup>

Article 22(2), which calls for Parliament to enact legislation addressing the property rights of spouses, is potentially even more significant. Such legislation could specify in greater detail the rights of surviving spouses as well as address the much broader problem of property rights during marriage. To this end, Article 22 specifically directs Parliament to address the difficult topic of jointly acquired property. Such a provision would have important implications for the definition and distribution of so-called self-acquired property in the estate in cases in which the widow has made substantial economic contributions to the acquisition of such property. Unfortunately, the Ghanaian Parliament has thus far failed to fulfill the mandate of Article 22.<sup>148</sup> Although it may be possible to rely on Article 22 directly to claim the substantive rights provided for in Article 22(3), even without implementing legislation, no case has yet done so.<sup>149</sup>

## 2. Domestic Statutory Law

Despite the requirement of Article 22 of the 1992 Constitu-

146. Dowuona-Hammond, *supra* note 35, at 163 (suggesting that courts are likely to consider factors such as independent means of surviving spouse, other dependents of the deceased, provision deceased made for spouse during his or her lifetime in determining "reasonable provision"); Dankwa, *supra* note 41, at 3 (commenting in reference to the similar Article 32(2) of the 1979 Constitution that the "concept of reasonableness excludes the application of a formula which will lead the courts to give the same share to all widows in all cases. Each case will have to be decided on its particular facts.").

147. Dowuona-Hammond, *supra* note 35, at 163.

148. Interview with Nana Akufo-Addo, Attorney General and Minister of Justice, Accra (June 13, 2001); Interview with Drafting Section, Attorney General's Department, Accra (June 14, 2001).

149. See Interview with Supreme Court Justices Joyce Bamford Addo, George Acquah, Sopia Akuffo, Accra (June 11, 2001). A case has been filed, however, alleging that Parliament's failure to enact legislation under Article 22 violates the 1992 Constitution and calling for such legislation to be enacted. *Legal Resources Centre v. Attorney-General & Speaker of Parliament, Writ to Invoke Original Jurisdiction, Article 2(1)(a) and 22(2) and 93(2) and 130(1)(a) of the Constitution, Rule 45 of the Supreme Court Rules, 1996 (C.I.16)*, Supreme Court, Accra (2001).

tion, Law 111, enacted in 1985, remains the most significant legislation to address women's inheritance rights. According to the Memorandum accompanying Law 111, the law was intended "to provide a uniform intestate succession law that will be applicable throughout the country irrespective of the class of the intestate and the type of marriage contracted by him or her."<sup>150</sup> The Memorandum recognizes the precarious position of a surviving spouse and children under customary law and notes the growing importance of the nuclear family in the Ghanaian family system. It also emphasizes the wife's role in the husband's economic activity, which customary law fails to take into account. In addition, the Memorandum states that the "growing importance of the nuclear family brings with it its own logic of moral justice" which

argues that a surviving spouse should be compensated for his or her services to the deceased spouse; that a spouse is more likely to look after the children on the death of the other partner than anybody else; and that expectations of the spouses are probably best satisfied by giving the property of one to the other on the former's death.<sup>151</sup>

Accordingly, the provisions of the law are "aimed at giving a larger portion of the estate of the deceased to his spouse than is normally the case at present."<sup>152</sup>

Law 111 has two important limitations on its scope. First, the statute applies only to property that is not disposed of in a valid will.<sup>153</sup> If a person dies partially intestate, then the law applies to that portion of the estate not subject to the will.<sup>154</sup> Thus, an individual can override the provisions of Law 111 by making a will, subject only to the limitations of Article 22(1) of the 1992 Constitution.<sup>155</sup> Second, the law applies *only to the self-acquired*

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150. Memorandum, Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana). Thus, Law 111 removed the discrimination between succession by widows and widowers which existed under the Marriage Ordinance (Cap. 127) and the Marriage of Mohammedans Ordinance (Cap. 129) as well as altering the customary law of succession. *See id.*

151. *See id.*

152. *Id.*

153. Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana), § 1. A person dies intestate if he or she did not have a valid will at the time of his or her death disposing of his or her property. *See id.* § 2(1).

154. *Id.* § 2(2).

155. For a discussion of wills, see *infra* notes 190-91 and accompanying text.

*property* of the deceased and not to any lineage property.<sup>156</sup> Self-acquired property is “that which a person acquires through his own expertise, without any help or assistance from his [lineage] property, or by gift to himself personally.”<sup>157</sup> In addition, “monies which individuals receive as their share of the proceeds of family property are regarded by custom as the individual property of each member.”<sup>158</sup> In contrast, lineage property is “that which has been inherited and which from that point is managed by the lineage as a corporate body through the lineage head or representative.”<sup>159</sup> Land is often lineage property, “administered by the lineage elders, worked by members of the kinship group, and inherited only by members of that unit.”<sup>160</sup> Any property that is shown to belong to the lineage is excluded from the estate at the outset.

With respect to the self-acquired property of the intestate, Law 111 specifies that the spouse and children are entitled absolutely to the household chattels.<sup>161</sup> These include jewelry, clothes, furniture and furnishings, refrigerators, televisions and other electronic appliances, kitchen and laundry equipment, simple agricultural equipment, hunting equipment, books, motor vehicles other than vehicles used wholly for commercial purposes, and household livestock.<sup>162</sup> If the deceased’s estate includes a house, the spouse and children are entitled to the house and will hold it as tenants-in-common. If the deceased left multiple houses, the spouse and children are entitled to choose one of the houses. If they are unable to agree, they can apply to the High Court to determine which of the houses shall devolve to the spouse and children.<sup>163</sup>

The statute speaks of spouse in the singular and does not specifically address the reality of polygyny. In cases where the decedent had multiple wives, courts have interpreted Law 111 as

156. Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana), § 1(2); Memorandum, at ii.

157. OKALI, *supra* note 47, at 15.

158. *Id.*

159. *Id.*

160. GHANA: A COUNTRY STUDY, *supra* note 47, at 92.

161. Section 3 provides: “Where the intestate is survived by a spouse or child or both, the spouse or child of both of them . . . shall be entitled absolutely to the household chattels.” Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana), § 3.

162. *Id.* § 18.

163. *Id.* § 4; Memorandum, at ii (interpreting § 4).



granting the household chattels and one house to all of the wives and children together as tenants-in-common.<sup>164</sup> In addition, a "child" for purposes of the statute includes all children of the deceased whether or not the child was born in wedlock.<sup>165</sup> Thus, the chattels and one house may devolve to the wife or wives, their children, and any children born outside of wedlock.

Sections 5 through 11 of the statute set forth a complicated formula for the division of the residue of the estate. Where the intestate is survived by a spouse and children, the residue is distributed: (a) three-sixteenths to the surviving spouse; (b) nine-sixteenths to the surviving children;<sup>166</sup> (c) one-eighth to the surviving parent; and (d) one-eighth pursuant to customary law.<sup>167</sup> If there is no surviving parent, one-fourth of the residue is distributed under customary law.<sup>168</sup> In 1985, the Children's Act amended 111 such that "where there is a child who is a minor undergoing educational training, reasonable provision shall be made for the child before distribution."<sup>169</sup>

Where the intestate is survived by a spouse and no children, the spouse inherits one-half of the residue, with the parents and the inheriting group under customary law each receiving one-fourth.<sup>170</sup> If the intestate is survived by children and not by a spouse, the children will inherit three-fourths of the residue and, of the remaining one-fourth, one-eighth will pass to the surviving parent and the remaining one-eighth will devolve under customary law.<sup>171</sup> If there is no surviving child or spouse, three-fourths of the estate devolves to the surviving parent and the remaining

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164. H.J.A.N. Mensa-Bonsu, *The Intestate Succession Law in Ghana: Practical Problems in Application*, JAHRBUCH FÜR AFRIKANISCHES RECHT Bd. 8 (1994) S. 105, 118-19.

165. The Children's Act, Act 560 (1998), § 125 (amending definition of child included in § 18 of Law 111).

166. If a child has predeceased the intestate and is survived by a child, who would be the intestate's grandchild, and that grandchild is dependent upon the intestate at the time of the intestate's death, the grandchild shall be entitled to his or her parent's portion. Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana), § 16.

167. *Id.* § 5.

168. *Id.*; The Children's Act, Act 560 (1998), § 125 (amending § 5 of Law 111). Section 10 of Law 111 addresses what customary law should apply to the portion of the estate that devolves under customary law.

169. The Children's Act, Act 560 (1998), § 125 (amending § 5 of Law 111).

170. Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana), § 6. If there is no surviving parent, one-half devolved pursuant to customary law. *See id.*

171. *Id.* § 7. If there is no surviving parent, the remaining one-fourth shall devolve pursuant to customary law. *See id.*

one-fourth is distributed under customary law.<sup>172</sup> If there is no surviving spouse, child, or parent, the entire estate devolves according to customary law.<sup>173</sup>

Notwithstanding the above provisions, Law 111 makes special accommodation for small estates "to limit fragmentation and to ensure that the beneficiaries under an intestacy received something substantial."<sup>174</sup> If the intestate is survived by a spouse and/or children *and* the residue of the estate is worth less than 10,000,000 cedis, the spouse and child will be entitled to the entire estate. If the intestate is survived only by a parent and the total amount is less than 10,000,000 cedis, the parent is entitled to the whole amount.<sup>175</sup>

As of 1991, the statute provides additional protection for the surviving spouse and children. Section 16A prohibits any person from ejecting a spouse or child from the matrimonial home, whether or not the deceased person died testate or intestate, prior to the distribution of the estate.<sup>176</sup> Section 17 states that any person who violates this provision or who unlawfully de-

172. *Id.* § 8.

173. *Id.* § 11. Where there is no customary law applicable to the estate under these circumstances, the estate shall devolve to the Republic of Ghana. *Id.*

174. Memorandum, Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana), at iii.

175. Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana), § 12. The amount originally specified was 50,000 cedis but was amended to 10,000,000 cedis by the Children's Act, Act 560 (1998) § 125.

176. Section 16A provides in full:

- (1) No person shall before the distribution of the estate of a deceased person whether testate or intestate eject a surviving spouse or child from the matrimonial home:
  - (a) where the matrimonial home is self-acquired property of the deceased;
  - (b) where the matrimonial home is rented property, unless the ejection is pursuant to a court order,
  - (c) where the matrimonial home is the family house of the deceased, unless a period of six months has expired from the date of the deceased; or
  - (d) where the matrimonial home is public property, unless a period of three months has expired from the date of the death of the deceased.
- (2) For the purposes of this section matrimonial house means:
  - (a) the house or premises occupied by the deceased and the surviving spouse, or the deceased and a surviving child or all as the case may be, at the time of the death of the deceased; or
  - (b) any other self-acquired house of the deceased occupied by the surviving spouse or child or both at the time of the death of the deceased.

Intestate Succession (Amendment) Law, P.N.D.C. L. 264 (1991), § 1.

prives a person of the use of any property to which they are entitled under the statute, commits an offense and is liable to minimum fine of 50,000 cedis and a maximum fine of 500,000 cedis or to a term of imprisonment not to exceed one year.<sup>177</sup>

The Customary Marriage and Divorce (Registration) Law, 1985, (P.N.D.C. Law 112) was published and came into force on the same day as Law 111 and was meant to complement Law 111 by creating a system of official record keeping for customary law marriages.<sup>178</sup> Lawmakers believed that such recording of marriages would facilitate the application of Law 111 by simplifying issues of proof and by putting parties on notice as to the new legal implications of such marriages.<sup>179</sup>

As originally enacted, the law mandated the registration of all customary law marriages and divorces within three months of the marriage or divorce and the registration of all existing customary marriages within three months from the commencement of the statute. It also set out the application form for registration<sup>180</sup> and the procedure to register a customary law marriage:

3. (1) The application for registration of the marriage shall be accompanied by a statutory declaration stating the following:
  - (a) names of the parties to the marriage;

177. Section 17 provides that:

Any person who before the distribution of the estate of a deceased person whether testate or intestate—

- (a) unlawfully ejects a surviving spouse or child from the matrimonial home contrary to section 16A of this Law;
- (b) unlawfully deprives the entitled person of the use of—
- (c) (i) any part of the property of the entitled person;
- (ii) any property shared by the entitled person with the deceased to which the provisions of this Law apply; or
- (iii) removes, destroys or otherwise unlawfully interferes with the property of the deceased person, commits an offence and is liable on summary conviction to a minimum fine of 50,000.00 [cedis] and not exceeding 500,000.00 [cedis] or to a term of imprisonment not exceeding one year and the court or tribunal shall make such other orders as it considers necessary for the re-instatement of or reimbursement to the person thus ejected or deprived.

Intestate Succession (Amendment) Law, P.N.D.C. L. 264 (1991), § 2.

178. See Dowuona-Hammond, *supra* note 35, at 153.

179. See *id.*

180. Customary Marriage and Divorce (Registration) Law, P.N.D.C. L. 112 (1985), § 2(3), First Schedule.

- (b) the places of residence of the parties at the time of the marriage;
  - (c) that the conditions essential to the validity of the marriage in accordance with the applicable customary law have been complied with.
- (2) the statutory declaration shall be supported by the parents of the spouses or person standing in loco parentis to the spouses except where there are no such persons living at the time of application for registration.<sup>181</sup>

The Registrar must then notify the public of the registration of the marriage by posting it on a public notice board within twenty-eight days of the application. If anyone objects to the validity of the marriage under customary law, that person may file an objection with the District Court which will hear the grounds of the objection and either dismiss the objection or expunge the registration of the marriage.<sup>182</sup>

Not only did Law 112 mandate registration, it also limited the application of Law 111 to customary law marriages that were validly registered.<sup>183</sup> A number of factors, however, including ignorance of the law, illiteracy, and unwillingness on the part of some men to register, undermined compliance with the law.<sup>184</sup> As a result, rather than facilitating the application of Law 111, the mandatory registration requirement limited its scope. Indeed, a desire to avoid the intestate succession scheme of Law 111 may have motivated some men to refuse to register the marriage.<sup>185</sup>

Law 112 was amended in 1991 to address this problem. As amended, the law provides that “[w]here a marriage has been contracted under customary law, either party to the marriage or both parties *may* apply in writing” to register the marriage with the Registrar of Marriages in the district where the marriage took place.<sup>186</sup> A fixed time period no longer exists for the regis-

181. *Id.* § 3.

182. *Id.* §§ 3-5.

183. *See id.* §§ 2(2), 7(1), 15; Dankwa, *supra* note 35, at 21 (noting that registration of marriages under Law 112 was a condition precedent to the application of Law 111).

184. Dowuona-Hammond, *supra* note 35, at 153.

185. *See id.* at 158.

186. Customary Marriage and Divorce (Registration) Law, P.N.D.C. L. 112 (1985) as amended by Customary Marriage and Divorce (Registration) (Amendment) Law, P.N.D.C. L. 263 (1991), § 2(a) (emphasis added).

tration to take place, although the law allows “the Secretary of Justice . . . [to] prescribe periods of time within which” registration must take place.<sup>187</sup> The amended law also states that Law 111 shall apply to any spouse of a customary law marriage registered under this law but also “where a court or tribunal is satisfied by oral or documentary evidence before it that a customary law marriage had been validly contracted between a deceased and surviving spouse.”<sup>188</sup>

Law 111 dictates the distribution of the estate for individuals who die intestate, regardless of the status of any marriage contracted by the individual during his lifetime. By drafting a will, however, an individual can provide for a distribution of estate other than that established by Law 111 or by customary law.<sup>189</sup> Despite the considerable resistance to Law 111 on one hand and the criticism of customary law rules of succession on the other, Ghanaians very rarely draft wills.<sup>190</sup> Many view drafting a will as inviting death.<sup>191</sup> Nonetheless, many non-governmental organizations and government officials concerned with property rights advise people to make wills in order to avoid any conflict between their nuclear and extended families upon their death, and the use of wills may be increasing as a result.<sup>192</sup>

Written wills in Ghana are governed by the Wills Act, 1971 (Act 360).<sup>193</sup> The Wills Act determines who has the capacity to

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187. *Id.* § 2(b).

188. Customary Marriage and Divorce (Registration) (Amendment) Law, P.N.D.C. L. 263 (1991), § 5.

189. *KOM*, *supra* note 105, at 15; Interview with Justice Asare Korang, High Court, Ho (June 6, 2001) (stating that to get around the fractions in Law 111 people can draft a will).

190. Interview with Justice Asare Korang, High Court, Ho (June 6, 2001).

191. Interview with Professor L.K. Agbosu, Ghana Law School, Accra (June 13, 2001); Interview with Dr. K.O. Adinkrah, Ghana Law School, Accra (Feb. 12, 2001); Interview with Mrs. Patience Diaba and Mrs. Yaa Boadi, Legal Officers, WiLDAF Legal Awareness Programme (LAP), Takoradi (Feb. 14, 2001); Attorney General Department Presentation at Caribbean Association Meeting, “Intestate Succession in Ghana,” at 2 (July 1, 2000) (presented by Mrs. Estelle Appiah, Principal State Attorney) [hereinafter AG Dep’t Presentation].

192. AG Dep’t Presentation, *supra* note 191, at 6; Interview with Vinolia Mantey, National Council on Women and Development, Ho (June 5, 2001); Interview with Rejoice Kasu, Epiphania Akoto-Ampow, and Eunice Dikro of December 31st Women’s Movement, Ho (June 5, 2001).

193. KLUDZE, *supra* note 41, at 2. In some areas in Ghana, there is also a customary law will, *samansiw*, which may be executed orally. The essential requirements include: (1) death bed declaration, (2) only self-acquired property may be granted under *samansiw*, and (3) one credible witness. Other requirements have been asserted in the past

make a will, addresses the contents of a will, specifies when a will takes effect and who should maintain custody of a will, among other things. Most important to this Report, the Wills Act protects widows even when their deceased spouse dies having made a will. Section 13(1) of the Wills Act enables the High Court to make reasonable provision out of the estate of a spouse—the testator—for his widow, or for a father, mother, or child under eighteen years, if (a) the application is made within three years of the date that probate of the will is granted; (b) the High Court finds the testator has not made reasonable provision for the maintenance of the applicant either in his lifetime or in the will; and (c) hardship will be caused by this neglect of the testator. “[T]aking into account all relevant circumstances,” the High Court may then make “reasonable provisions for the needs of” the widow or other relevant person.<sup>194</sup>

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The changes the Intestate Succession Law made to customary law were momentous: for the first time, a surviving spouse had a legal claim to a portion of the estate. In matrilineal communities, the changes were particularly dramatic, creating new rights for both the widow and her children. As noted by one scholar, “[t]he Intestate Succession Law radically changes the law of inheritance, and constitutes the most extensive legislative reform ever made in the private law of Ghana.”<sup>195</sup> Not surprisingly, the statute has generated considerable confusion and resistance even as it has improved the lot of widows and their children. Part III describes and analyzes a number of problems that have arisen in the enforcement of Law 111 and offers recommendations for promoting women’s equality in inheritance as required by international law.

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such as the need for the family’s consent, the requirement of thanks offering to the testator or his family, and the limitation that one may not divest himself of more than half his self-acquired property to anyone other than his lineage. *Id.* at 158-60; *see also* Dankwa, *supra* note 41, at 2 (recognizing customary law tradition that husband could not give more than half of self-acquired property to non-family members).

194. Wills Act, Act 360 (1971), § 13(1); Dankwa, *supra* note 41, at 5 (discussing this provision).

195. Gordon R. Woodman, *Ghana Reforms the Law of Intestate Succession*, 29 J. AFRICAN L. 118, 118 (1985).

### III. PROBLEMS AND RECOMMENDATIONS

In its present form, Law 111 has improved the lives of many women in Ghana by providing for spousal rights in intestate succession, rights that were entirely absent under customary law. Nevertheless, in the seventeen years since the adoption of Law 111, a number of problems have emerged. This section analyzes many of these problems and makes recommendations as to how they may be addressed in order to ensure women's equality in inheritance as required by international law.<sup>196</sup> The first section addresses Law 111's failure explicitly to address polygyny and explores the consequences for women who may be one of several widows with claims on the estate. The second section analyzes problems of proof with respect to both the status of the marriage and the nature of the property in the estate. The third section explores problems in the administration of the estate, particularly problems that arise in connection with the family's opposition to a widow's claim on the estate. Finally, the last section discusses problems stemming from a lack of resources devoted to the enforcement of and education about the statute.

#### A. *The Structure and Interpretation of Law 111: The Problem of Polygyny*

Law 111 is drafted in facially gender neutral terms but does not provide for the legal reality of polygyny or the high incidence of extra-marital relations of men.<sup>197</sup> As a result, the law is not in fact gender neutral. This Part will detail gender specific problems that arise when Law 111 is applied to polygynous marriages or to situations where children are born outside the marriage.

Law 111 provides that the spouse and children of the intestate are entitled absolutely to the household chattels and that, where the deceased's estate includes a house, the spouse and children are entitled to the house and will hold it as tenants-in-

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196. We have formulated many of the recommendations in concrete and specific terms with the hope that they might prove useful to those in Ghana working on these issues. We do not mean to suggest, however, that these recommendations represent the only route to compliance with international law.

197. A number of articles written about Law 111 have discussed this problem with the statute. See generally Dowuona-Hammond, *supra* note 35; Mensa-Bonsu, *supra* note 164; E.V.O. Dankwa, *The Application of Ghana's Intestate Succession Law, 1985 (P.N.D.C.L. 111) and Its Social and Economic Impact*, in RECHT IN AFRIKA 235 (1998).

common.<sup>198</sup> If the deceased left multiple houses, the spouse and children are entitled to choose one of the houses.<sup>199</sup> The spouse and the children are also entitled to shares of the residue.<sup>200</sup> In apportioning the estate, however, the statute makes no explicit provision for a man who dies leaving multiple spouses and children from multiple mothers. In cases involving polygynous unions courts might have interpreted the statute to award each spouse her matrimonial home and the chattels therein. This approach would have been more consistent with the purposes of the statute to protect the financial security of widows and their children.<sup>201</sup> Ghanaian courts, however, have taken a different approach: courts have required all surviving spouses and children to share both the statutory allotment of one house and the fraction of the residue, regardless of the size of the estate.<sup>202</sup>

This interpretation has created several problems. First, by failing to accommodate polygyny, the statute operates in a discriminatory fashion: multiple wives must share the single home and the designated 3/16 residue for a spouse, and accordingly are undercompensated for their economic contribution during the marriage.<sup>203</sup> Conversely, the family of a man who dies leaving several widows benefits unjustly in that the residue of the estate, and therefore the family's portion, is increased. For example, if a man dies leaving three widows, each of whom contributed her labor to the acquisition of a matrimonial home shared with the husband, these three widows must nevertheless share a single home as tenants-in-common. The other two homes become a part of the residue of the estate, only 3/16 of which goes to the widows to share. This result is contrary to the intent of the statute—to recognize the economic contribution of wives to the value of the estate.<sup>204</sup>

This problem raises serious issues of gender equality in that it affects only women: men but not women may have multiple spouses; therefore, women but not men may be forced to share

198. Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana), § 3.

199. *Id.* §§ 3-4.

200. *Id.*

201. See Memorandum, Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana); see also *supra* notes 147-49 and accompanying text (discussing purposes of the law).

202. See *supra* note 161 and accompanying text.

203. Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001).

204. See Memorandum, Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana).



the spousal allotment under Law 111.<sup>205</sup> Indeed, the inequality is exaggerated by the fact that, although each woman can inherit from only one husband, a man can inherit from multiple wives who may predecease him.<sup>206</sup>

Second, that all of the wives, their children, and the children born of nonmarital relationships inherit one house together as tenants-in-common creates tremendous problems for women and children following the death of the intestate. By all accounts, it is unlikely that the women and children will be able to share the property amicably as tenants-in-common.<sup>207</sup> A widow may not even be aware of the existence of the other wives or children born out of wedlock until the death of her husband.<sup>208</sup> In fact, in the case of children born out of wedlock, a woman may believe that she has a monogamous marriage only to discover upon the death of her husband that he had children who now have a right to move into the marital home and share the household chattels under Law 111.<sup>209</sup> As a result, the house that the parties inherit together as tenants-in-common will often have to be sold and the proceeds distributed among the widows and children. This situation not only leads to fragmentation of the estate, but also may leave the widows with insufficient re-

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205. It is also less likely that a woman will have extra-marital relations because it is taboo for a woman in Ghana to have "adulterous" relations. *See id.* In contrast, "men do not commit adultery" in customary marriages in Ghana because they are free to have relations with any woman they choose. *See* Interview with Rosaline Obeng-Ofori, Actionaid, Accra (June 4, 2001).

206. Interview with Mrs. Sheila Minkah-Premo, Apex Lawconsult, The Ark Foundation, Accra (Feb. 21, 2001); Interview with Hilary Gbedemah, Legal Officer, SNV/WILDAF Legal Awareness Programme, Ho (June 7, 2001).

207. As noted by Mrs. Yaa Amekudzi in Kumasi, "nowhere have I seen several women living together getting along." Interview with Mrs. Yaa Amekudzi, Director, The Center for the Development of People ("CEDEP"), Kumasi (June 6, 2001).

208. Interview with Mrs. Sheila Minkah-Premo, Apex Lawconsult, Accra (June 4, 2001).

209. *Id.*; Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001); Interview with Mrs. Betty Mould-Iddrisu, Chief State Attorney, International Law Division, Accra (June 11, 2001) (commenting on the existence of "funeral children" or children who are unknown to the wife or family until the death of the man); AG Dep't Presentation, *supra* note 191. This is especially troubling because often the house is acquired through the joint efforts of the woman and man and will now be apportioned among other children and wives in light of presumption that all property is the self-acquired property of the man. This aspect of the problem will be discussed in greater detail below. *See infra* Part III.B.2.

sources to acquire property to house herself and her children.<sup>210</sup> In any event, some and perhaps all of the widows and children must move from their marital homes. All of the results are contrary to the stated purposes of Law 111, which assumed the surviving spouse and children would form one unit and keep the property intact.<sup>211</sup>

As an example of this problem, Circuit Court Justice Henry Kwofie related the facts of one of his own cases in which a man died leaving four wives, four concubines, and a total of twenty-five children.<sup>212</sup> Although the man owned four houses, the four wives and all the children were expected to share one house. The concubines were not entitled to share in the estate, but their children were. Not surprisingly, the house had to be sold, dislocating all of the women and children involved.<sup>213</sup>

In Ghana, the delegation met with dozens of women who had sought help from the SNV/WiLDAF Legal Awareness Programs in Ho and Takoradi and from FIDA's Legal Aid Clinic in Accra to resolve disputes over the property in the estate of their deceased husbands. The following cases are representative of their many stories and illustrate the contentious relations that often exist among widows and sets of children who inherit property as tenants-in-common under Law 111.

Beatrice Avorkliyah is a forty-five year-old widow from Ho who was married under customary law.<sup>214</sup> She and her husband had three children who are now nineteen, seventeen, and nine. During the marriage, the couple and their children lived at Ms. Avorkliyah's father's house. In addition, seven adult children from her husband's previous marriage lived with them until her husband's death. Ms. Avorkliyah maintained the household while her husband worked for the Ghana Civil Service.

Ms. Avorkliyah reported that, when her husband became very sick, the children from the previous marriage turned against her, "ganging up" on her and engaging in insulting behavior. They were unhappy when she sent him to the hospital and drove

210. Interview with Mrs. Sheila Minkah-Premo, Apex Lawconsult, The Ark Foundation, Accra (Feb. 21, 2001).

211. See Mensa-Bonsu, *supra* note 164, at 119-20.

212. Interview with Justice Henry Kwofie, Circuit Court, Takoradi (June 7, 2001).

213. *Id.*

214. Interview with Ms. Beatrice Avorkliyah, Ho (June 5, 2001). The following factual account of Ms. Avorkliyah's case is based on this interview.

her from the hospital with their abusive behavior. They then moved their father to another hospital and failed to inform Ms. Avorkliyah even when her husband died.

After her husband died, his union sent her 2,000,000 cedis. Although she spent 500,000 cedis to finance the funeral, at the funeral service, the children from the earlier marriage assaulted her children, and her husband's family insulted her. She was advised not to attend the burial. Led by the eldest, the seven children from the previous marriage seized the remaining 1,500,000 cedis along with chattels from the house, in violation of Law 111. The eldest son then proceeded to file for letters of administration without her. Ms. Avorkliyah sought help from WiLDAF in Ho, and WiLDAF filed a caveat in the Circuit Court to prevent the grant of letters of administration. The case is still pending.<sup>215</sup>

Patience Lassey is a forty-six year-old widow, also from Ho, who is employed as a petty trader.<sup>216</sup> In addition to their two children, now eighteen and sixteen, her husband had eight children from a previous marriage. All eight of these children were adults when Ms. Lassey and her husband married.

Her husband owned two houses. During their marriage, he and Ms. Lassey lived in one and rented the other for 200,000 cedis a month. According to Ms. Lassey, immediately after her husband died, the children from her husband's first marriage began harassing her. They began collecting the rent from the second house, giving her only 60,000 cedis out of the 200,000 collected. They seized all of the funeral donations and tried to take the household chattels as well. Ms. Lassey's case is complicated by the fact that her husband had drafted a will in 1983. According to Ms. Lassey, the will was "not in her favor," having been written when Ghana's currency was significantly stronger and before the birth of her second child. Although the will had been subsequently withdrawn by her husband, the eldest child from the first marriage has tried to enforce this will by redepositing it, beginning a legal battle which has resulted in Ms. Lassey filing a caveat to block the will. The distribution of her hus-

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215. *Id.*

216. Interview with Ms. Patience Lassey, Ho (June 5, 2001). The following factual account of Ms. Lassey's case is based on this interview.

band's estate had not yet taken place when we met with Ms. Lassey.

While in Ho, the Crowley team also met with Bernice Segbawu, a forty-five year-old widow employed as a petty trader.<sup>217</sup> Ms. Segbawu was originally from Anloga but had lived in Kumasi and later in Ho during her marriage. Married under customary law, she was her husband's fourth wife, though she did not believe her marriage to be polygynous. Two of her husband's wives had died, and she believed her husband had divorced the third wife before she married him twenty-two years ago. Ms. Segbawu had two children with her husband, now ages twenty-one and eighteen. He had eight other children.

Last year, Ms Segbawu lent her husband 100,000 cedis from her own income for travel expenses so he could visit his village in order to distribute the estate of his father who had recently died. The loan was to be repaid from the estate; however, three days after her husband returned home from the trip, he died. When she informed his family of his death, they immediately began to make claims on his property. The third wife insisted that they were never divorced and therefore she was entitled to a share of the husband's property. Her children also raised a claim on the estate. Together they traveled to Ho and demanded the keys to Ms. Segbawu's house. Ms. Segbawu refused and insisted that both she and her husband had contributed to purchase the house in Ho. The family then requested to look in his chest, claiming that they needed one of his kente cloths in which to bury him. They took his three most expensive cloths and returned to their village. They refused to take Ms. Segbawu with them to travel to the funeral, forcing her to charter transportation for herself and fellow sympathizers to Anloga. At the funeral, his family quarreled with Ms. Segbawu's group and Ms. Segbawu was asked to leave.

In October 2000, several days after the funeral, the eight other children led by the eldest son told Ms. Segbawu that a debt of 2,000,000 cedis had been incurred as a result of the funeral. They requested that she travel back to Anloga in December with her children to discuss payment of the debt. At this point, Ms. Segbawu sought help from the SNV/WILDAF Legal Awareness

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217. Interview with Ms. Bernice Segbawu, Ho (June 5, 2001). The following factual account of Ms. Segbawu's case is based on this interview.

Program in Ho. The family wrote a letter to WiLDAF insisting that Ms. Segbawu return to Anloga to settle the matter amicably. When Ms. Segbawu refused, the family secretly sought to obtain letters of administration to distribute the estate. Ms. Segbawu learned of their efforts and WiLDAF filed a caveat. Although the High Court Justice hearing the case ruled that Ms. Segbawu should be included in the letters, along with her two older sons, the family has now refused to proceed with the administration of the estate.

### *Conclusions and Recommendations*

By failing to provide a distribution scheme that specifically addresses the legal reality of polygyny, Law 111 falls short of its own objective of ensuring the financial security of widows and their children. Cases in which the intestate leaves multiple wives and sets of children, forcing them to share a single house and the standard 3/16 share of the residue, not only creates tension and hardship, but also undervalues the women's economic contribution to the estate and unjustly enriches the family of the intestate. Because customary law permits polygyny but not polyandry, this hardship is borne solely by women, a situation that violates Ghana's international obligation to ensure gender equality, both legally and socially.<sup>218</sup>

1. *Assuming that the legal status of polygyny remains unchanged,*<sup>219</sup> *we recommend that Ghana amend its intestate succession law to compensate for the resulting inequality between widows and widowers.* Such an amendment could take a number of forms; however, at a minimum, it should include the following provisions:

- a. Each surviving spouse should have the right, together with her children, to remain permanently in a house owned by the intestate if the surviving spouse lived there with the intestate.<sup>220</sup>
- b. If there are fewer houses than surviving spouses, each

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218. See *supra* notes 18-32 and accompanying text (discussing Ghana's obligations under international law).

219. We note that as long as there is polygyny, the statute will never apply equally to men and women but we hope to lessen the disparity by offering suggestions to address some of the difficulties that women currently face under Law 111 that men do not face.

220. This recommendation was proposed by the Attorney General's Department, Drafting Section. See Interview with Attorney General's Department, Drafting Section, Accra (June 14, 2001); AG Dep't Presentation, *supra* note 191.

house should devolve to the spouse and children who lived in it with the deceased unless another spouse can prove that she or he contributed substantially to the purchase.<sup>221</sup>

- c. A surviving spouse should have the exclusive right, with her children, to the household chattels in the house she shared with the intestate.<sup>222</sup>

These provisions could be incorporated into Law 111 by amending sections 3 and 4 as follows:

Where the intestate is survived either by more than one spouse or by one spouse and children of another spouse or of a nonmarital relationship, each spouse shall be entitled absolutely, together with her children, to the marital home occupied by her and her children and to the household chattels in that home, to the exclusion of other spouses, children, and family unless the other spouses, children, or family prove that they contributed substantially to the purchase the house or chattels.<sup>223</sup>

2. *To provide adequately for the surviving spouses and children in situations where there are multiple surviving wives and/or multiple sets of children, we recommend that the statute be amended to allow departure from the fractions set forth in Law 111 for distributing the residue of the estate if equity and good conscience would so dictate.*

Section 54(1) of the Courts Act, Act 459, provides: "In determining an issue, the Court shall apply such principles as to do substantial justice between the parties having regard to equity and good conscience."<sup>224</sup> Assuming that the statute is amended to allow each wife to inherit her marital home and chattels, we

221. This recommendation was proposed by the Attorney General's Department, Drafting Section. See Interview with Attorney General's Department, Drafting Section, Accra (June 14, 2001); AG Dep't Presentation, *supra* note 191.

222. This recommendation was proposed by the Attorney General's Department, Drafting Section. See Interview with Attorney General's Department, Drafting Section, Accra (June 14, 2001); AG Dep't Presentation, *supra* note 191.

223. If section 4 is amended as recommended here, this would remove any choice on the part of the widow and children as to which house they would inherit. Each spouse would inherit the house they lived in with the intestate. The recommended changes to Laws 111 and 112 have been incorporated into the Laws in Annex II.

224. Justice Kwadwo Owusu, Community Tribunal Chairman in Accra, informed the Crowley Team that he was relying on section 54(1) of the Courts Act to use his discretion to stray from a strict application of Law 111 in order to equitably distribute the estate of a woman in a case before him presently. See Interview with Justice Kwadwo Owusu, Chairperson of Community Tribunal, Accra (June 14, 2001) (quoting the language of the Courts Act during the interview).

recommend that, where there are multiple wives and/or sets of children, judges not be bound by the fractions set forth in Law 111 to distribute the *residue* of the estate. Rather, they should be allowed to depart from the statutory fractions in order to ensure that the distribution scheme provides adequately for all spouses and children. By exercising such discretion, judges could better ensure an equitable distribution given the particular circumstances of the intestate. For example, multiple wives need not be forced to share the designated 3/16 portion but could be provided with a greater part of the residue. Such a departure would better reflect the economic contribution of multiple spouses and avoid unjust enrichment of the parents and customary successor. In addition, judges could provide adequately for wives and children who were not living in a house owned by the intestate at the time of his death and for children born out of wedlock, as these parties might not be entitled to a share in a house and household chattels if sections 3 and 4 were amended as suggested above. In addition, judges could take into account the age and economic means of the various children of the intestate in providing for an equitable distribution of the residue among the children.<sup>225</sup>

For example, in the case before Justice Henry Kwofie discussed above, a man died leaving four wives, four concubines and a total of twenty-five children. Under the existing scheme, the four wives and all the children inherited one of the four houses in the estate.<sup>226</sup> Not surprisingly, the house had to be sold and the proceeds divided. If the statute were amended, each of the four wives would have been entitled to the home in which she lived and any household chattels. The court could

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225. Several individuals we met with in Ghana discussed, as a weakness of Law 111, its failure to differentiate between minor and adult children or to consider the financial situation of the intestate's children. See Interview with Supreme Court Justices Joyce Bamford Addo, George Acquah, Sophia Akuffo, Accra (June 11, 2001) (noting that the law fails to distinguish between adult and minor children); Interview with Angela Dwamena-Aboagye, ARK Foundation, Accra (June 11, 2001) (suggesting that the law should distinguish between minor and adult children but acknowledging that adult children would resent such a change because they may "have had put up with a lot for the wealth of the father to accumulate"); Interview with Justice Henry Kwofie, Circuit Court, Takoradi (June 7, 2001) (suggesting that children who are wealthy should not inherit under Law 111); Interview with Justice Isaac Lartey-Young, Circuit Court, Tarkwa (June 6, 2001) (suggesting that money should go to younger children because the older ones would be working and that land should go to the older children).

226. Interview with Justice Henry Kwofie, Circuit Court, Takoradi (June 7, 2001).

ensure an equitable result for the nonmarital children by allocating to them a greater share of the residue.

This recommendation would require the qualification of sections 5, 6, and 7 with the following language:

Where there are multiple surviving spouses, children of multiple spouses, and/or nonmarital children, members of the judiciary are not required to distribute the residue of the estate pursuant to the fractions set forth above if equity and good conscience would dictate otherwise.

### *B. Problems of Proof*

In addition to the unfairness created by Law 111's failure to take into account polygyny, surviving spouses routinely face a number of procedural and practical obstacles to claiming their rights under the law. In theory, because the law uses the gender-neutral term *spouse*, widows and widowers alike face these problems. In practice, however, the burden is much greater on widows. Because the law treats property acquired during marriage as belonging to the husband, widows must contend with the problems of intestate succession and estate administration in order to secure even a share of such property. Widowers, in contrast, suffer no disruption of their use and enjoyment of property when a wife dies. Thus, the problems that arise in the enforcement of Law 111 raise important issues of gender equality despite the statute's gender neutral language. This section describes the obstacles faced by widows claiming a share in the estate and offers recommendations to address the problems.

#### 1. Establishing Marital Status

Upon the death of a man in Ghana, his family will often claim that his customary law wife is not a valid wife but rather a girlfriend or a "concubine."<sup>227</sup> As such, she would not be entitled to inherit property from his estate under the Intestate Succession Law. This problem arises in part because customary law

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227. Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001); Interview with Hilary Gbedemah, Legal Officer, SNV/WILDAF Legal Awareness Programme, Ho (June 7, 2001); Interview with Mrs. Patience Diaba, SNV/WILDAF Legal Awareness Programme, Takoradi (June 8, 2001); Interview with Mr. Kwaku Frimpong, Director, Legal Aid Board, Ashanti Region, Kumasi (June 5, 2001).



marriages in general are not well-documented.<sup>228</sup> In addition, because the husband and his family initiate the customary marriage and perform the necessary customary rites, a woman may have difficulty proving the validity of the marriage when the family denies it.<sup>229</sup> According to Mrs. Hilary Gbedemah, the Legal Officer for the SNV/WiLDAF Legal Awareness Programme in Ho, this is “very rarely a legitimate claim but it is made all the time.”<sup>230</sup>

There are two contexts in which this claim is made. First, the family of the intestate may claim that the widow was not a valid customary law wife despite their knowledge that the customary marital rites were fully performed.<sup>231</sup> Second, a man and woman may have lived together as husband and wife and held themselves out to the community as such although the customary rites were not fully performed before the death of the man.<sup>232</sup> These two scenarios raise somewhat different issues and are therefore discussed separately.

#### a. Denial of Customary Law Marriage

The husband’s family will sometimes claim the widow is not a valid customary law wife despite their knowledge that the customary rites were fully performed.<sup>233</sup> As High Court Justice Mariama Owusu commented, “[i]nvariably, when a family wants

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228. See Dr. K.O. Adinkrah, *The Essentials of a Customary Marriage: A New Approach*, at 40. It was precisely this problem that Law 112 was meant to address.

229. See Interview with Hilary Gbedemah, Legal Officer, SNV/WiLDAF Legal Awareness Programme, Ho (June 7, 2001).

230. See *id.*

231. See *id.*; Interview with Mrs. Patience Diaba, SNV/WiLDAF Legal Awareness Programme, Takoradi (June 8, 2001); Interview with Mr. Kwaku Frimpong, Director, Legal Aid Board, Ashanti Region, Kumasi (June 5, 2001); Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001); see Interview with High Court Justice Mariama Owusu, Kumasi (June 7, 2001).

232. See, e.g., Interview with The Very Reverend Kofi Ampansah, Wesley Methodist Church, Kumasi (June 7, 2001); Interview with Dorothy Holbrook, Wesley Methodist Church, Kumasi (June 7, 2001).

233. Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001); Interview with Hilary Gbedemah, Legal Officer, SNV/WiLDAF Legal Awareness Programme, Ho (June 7, 2001); Interview with Mrs. Patience Diaba, SNV/WiLDAF Legal Awareness Programme, Takoradi (June 8, 2001); Interview with Mr. Kwaku Frimpong, Director, Legal Aid Board, Ashanti Region, Kumasi (June 5, 2001).

to be nasty, they will say you are not a wife, but a concubine."<sup>234</sup> This problem is especially common in agrarian areas where land often forms the residue of the estate.<sup>235</sup> The family views the wife as a "stranger" because she may be from several villages away and is therefore reluctant to grant her a fraction of the land, often contiguous to family land, for fear that she may remarry and bring onto the property someone who is antagonistic to the family's interests.<sup>236</sup> As a result, the family will simply deny that the marriage rites were performed.<sup>237</sup> The putative wife then bears the burden of establishing the validity of her customary law marriage. Because written formalities, including registration, are not routine, she may have little other than the testimony of witnesses who are often themselves interested parties.<sup>238</sup>

For example, Community Tribunal Chairman Justice Kwadwo Owusu described a case involving the estate of a sixty year-old man who had been a civil servant for almost thirty-five years.<sup>239</sup> He was survived by a thirty-five year-old widow.<sup>240</sup> They had been married five years earlier in the woman's home region, a different part of the country from the husband's home region. Although the wife produced photographs of the marriage ceremony, the man's sisters and brothers nonetheless claimed that the marriage was not valid.<sup>241</sup> According to Justice Owusu, the intestate likely has a very large amount of social security to collect and, because he has no child, the money would go to the widow. He explained that, especially in cases where a woman does not have children, the man's family will object to the widow's inheritance and may deliberately frustrate application of

234. Interview with High Court Justice Mariama Owusu, Kumasi (June 7, 2001).

235. See Interview with Hilary Gbedemah, Legal Officer, SNV/WILDAF Legal Awareness Programme, Ho (June 7, 2001).

236. See *id.*

237. See *id.*

238. Witness testimony becomes increasingly unavailable and unreliable over time. Interview with Supreme Court Justice Joyce Banford Addo, Supreme Court, Accra (June 11, 2001) (noting that it is often difficult to prove marriage after many years because many of the witnesses will have died).

239. See Interview with Justice Kwadwo Owusu, Community Tribunal Chairman, Accra (June 14, 2001).

240. This was the second marriage for the intestate.

241. The brothers and sisters are saying that because they were not parties to the marriage ceremony, it was not a valid marriage. According to Justice Owusu, however, their consent is not necessary. Only the consent of the parents is necessary and his parents are long deceased. See *id.*

the law.<sup>242</sup>

Although in Justice Owusu's case, the widow is likely to prevail based on the photographs and other evidence, the family's objections have the effect of delaying the administration of the estate. Widows lacking such proof are in an even worse position and must rely on conflicting assertions about the status of customary rites. For example, Mrs. Ellen Asiedu Akrofi Sowa, Regional Director of the Legal Aid Board for the Western Region, described a case in which, immediately upon the death of the man, his family sent drinks to the wife's family to notify them of the death.<sup>243</sup> According to Mrs. Sowa, the sending of drinks indicated that the man's family viewed the widow as a wife at the time of the intestate's death. His family has since reversed its position and is claiming that the widow was not a valid wife. The family initially tried to take the drinks back. Having failed, they now claim that they sent drinks on behalf of the man's children, not the wife. Mrs. Sowa noted, however, that if such were the case, they had no reason to attempt to recover the drinks in the first place.<sup>244</sup> This case illustrates the difficulties in factfinding that may attend the determination of marital status given the informality of customary rites.

These problems of proof would not have arisen if the couples in these cases had registered their marriages. Yet, as a practical matter, it may be difficult or impossible for most women, especially in rural areas, to take advantage of the existing registration process.<sup>245</sup> Registration requires application to the Registrar of Marriages in the District in which the marriage takes place. To register, the woman must first be aware of the availability of the procedure. She must also have the means to compile the necessary documentation, including signatures of parents or other witnesses. This may be beyond the capacity of wo-

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242. *See id.*; Interview with Mr. Kwaku Frimpong, Director, Legal Aid Board, Ashanti Region, Kumasi (June 5, 2001); Interview with Ms. Beauty Bansah, WILDAF Legal Literacy Volunteer, Ho (June 5, 2001).

243. The facts of this case were relayed to the Crowley Program Team Members by the Legal Aid Board in the Western Region. *See* Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001).

244. *See id.*

245. For example, in a meeting with the District Secretary of Tarkwa, the Secretary reported that only 30 marriages were registered in that district in 2000; a surprisingly low number. *See* Interview with District Secretary, Tarkwa (June 6, 2001).

men who lack basic literacy skills. Finally, she must have the ability to travel to the District office of the Registrar. In addition, although the statute permits either party to register the marriage, many women believe that they need their husband's permission to do so.<sup>246</sup> Many men hesitate to register marriages, believing incorrectly that doing so will limit them to one wife.<sup>247</sup> For these reasons, the existing system of registration has failed to address the problems of proof with respect to customary marriages.

#### b. Incomplete Customary Rites

As noted above, the second context in which the family often contests marital status arises when a man and woman lived together as husband and wife and held themselves out to the community as such, although the customary rites were not fully performed before the death of the man.<sup>248</sup> This may happen for several reasons. The marital rites take place in two to three stages and a couple may begin to live together and even have children before the final stage is completed.<sup>249</sup> In some cases, the man may have promised to perform the customary rites in

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246. See Mensa-Bonsu, *supra* note 164, at 114 (explaining difficulty for women in Ghanaian culture to unilaterally register marriage).

247. See Interview with Justice Henry Kwofie, Circuit Court, Takoradi (June 7, 2001) (noting that men are reluctant to register their marriages because they think that doing so will limit them to only one wife); see also Interview with Mrs. Hilary Gbedemah, Legal Officer, SNV/WILDAF Legal Awareness Program, Ho (Feb. 16, 2001) (asserting that Law 112 requiring registration of marriages hurt women because of high illiteracy rates, distance from registration centers, and societal requirement of male consent); Interview with Martha Blay & Anna Essien, Legal Literacy Volunteers, WiLDAF, Western Region (June 7, 2001).

248. See, e.g., Interview with The Very Reverend Kofi Ampansah, Wesley Methodist Church, Kumasi (June 7, 2001); Interview with Dorothy Holbrook, Wesley Methodist Church, Kumasi (June 7, 2001).

249. See Interview with Hilary Gbedemah, Legal Officer, SNV/WiLDAF Legal Awareness Programme, Ho (June 7, 2001). Customary law marriage involves two main parts. The first stage is called "knocking" where a man's family first approaches the prospective bride's family and presents a drink. This is to introduce themselves and to formally ask permission to perform the marriage rites. If the drinks are not returned within a reasonable time, usually within two weeks, the man's family will fix a date with the consent of the woman's family where the rites will be performed. The family of the woman tells the man's family what items are to be presented during this ceremony. Family members of the couple, friends, and elders in the community witness this ceremony. Usually when the woman becomes pregnant before marriage, only the "knocking ceremony" can be performed and the rest may follow after given birth. See Interview with Eric Okyere-Darko, Center for Transitional Justice, New York (Sept. 27, 2001).

the future and later simply neglected to do so. In others, the man may have chosen not to perform the rites deliberately as a way of exercising power over the woman who has become economically and emotionally tied to him.<sup>250</sup> In yet other cases, the family may have refused to perform the full rites required.<sup>251</sup>

For example, in the village of Kwanfifi, in the Ashanti Region, the delegation met with a number of women who lived with men, had children with them, and were treated as “wives” by the community, although the families had not fully performed the customary rights. Indeed, Ms. Faustina Quaye explained that, although men and women who have children together are considered married, most of the women and men in her community have not performed customary rites because the cost of performing the rites is 300,000 cedis.<sup>252</sup>

In a case village leaders in Kwanfifi described as typical, a man died leaving five “wives” and a significant amount of land.<sup>253</sup> Since his death, his family has taken the largest piece of property. The first two wives together have worked and shared a second parcel. The third and fourth wives have been working on the land, but they have not shared in the ownership of the land; the fifth wife has left for her hometown.<sup>254</sup> In this case, the families had performed full customary rites only for the first two wives. The customary successor cited this fact as the reason that he had treated the third and fourth wives differently. He did not, however, deny their status altogether. Rather, their claim to the estate was contingent on the exchange of drinks and money to validate retroactively the status of the marriage. The customary successor and the community distinguished these five “wives,” regardless of the status of the customary rites, from concubines or girlfriends who had no legitimate claim on the estate.

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250. See Interview with Hilary Gbedemah, Legal Officer, SNV/WiLDAF Legal Awareness Programme, Ho (June 7, 2001); Interview with Mrs. Betty Adunyame, Regional Director, National Council on Women and Development (“NCWD”), Kumasi (June 7, 2001); Interview with The Very Reverend Kofi Ampansah, Wesley Methodist Church, Kumasi (June 7, 2001).

251. See Interview with Mrs. Hilary Gbedemah, Legal Officer, SNV/WiLDAF Legal Awareness Programme, Ho (Feb. 16, 2001); see also *supra* note 249 and accompanying text.

252. Interview with Ms. Faustina Quaye, Kwanfifi (June 6, 2001).

253. One of the widows and the customary successor spoke to the Crowley Team about this case. See Interview with Ama Konadu and Osei Yaw, Kwanfifi (June 6, 2001).

254. See *id.*

The validity of such incompletely formalized customary marriages has been recognized by courts as well. In *Essilfie v. Quarcoo*,<sup>255</sup> Court of Appeal Justice Georgina Wood, then of the High Court, distinguished between two forms of valid customary marriage. In the first, the necessary customary rites and ceremonies have been fully performed. In the second, the

customary marital rites have not been performed [but] the parties have consented to live in the eyes of the world as man and wife and their families have consented that they do so and the parties actually live as such man and wife in the eyes of the whole world.<sup>256</sup>

In recognizing the latter as “a form of valid marriage,” Justice Wood concluded that the “ingredients essential to a customary law marriage” are satisfied when “(a) the parties agreed to live together as man and wife and they did in fact so live; and (b) they obtained the consent of their two families to the marriage.”<sup>257</sup> Moreover, the consent of the two families “need not be actual or express, it could be ‘implied from the conduct, e.g., *acknowledging the parties as man and wife* or accepting drinks from the man or his family.’”<sup>258</sup>

Applying the standard to the facts in *Quarcoo*, Justice Wood concluded that, although the customary rites had not been fully performed, the requirements for a *de facto* customary law marriage had been met: the man and woman had lived together in

255. [1992] 2 Ghana L. Rep. 180.

256. *Id.* at 184 (relying on Justice Ollennu’s opinions in *Yaotey v. Quaye*, [1961] 2 Ghana L. Rep. 573 and *Sackitey’s Caveat, Re*, [1962] 1 Ghana L. Rep. 180). Dr. K.O. Adinkrah, Professor of Law at Ghana Law School, similarly disputes whether certain customary formalities, including drinks and family consent, are legally required for a customary marriage to be valid in his article *The Essentials of a Customary Marriage: A New Approach*. See Adinkrah, *supra* note 228, at 40. He instead proposes that courts treat each determination as to whether a customary marriage exists as a matter of proof and recommends that a court consider the following factors in making this determination: (1) the length of time the couple has lived together and have held themselves out as husband and wife; (2) what their community thinks about their relationship; (3) absence or presence of issue of the relationship; (4) common ventures such as farming or trading enterprises undertaken in the belief that they are married; (5) how much they have co-mingled their money and property; (6) whether they hold themselves bound to attend and pay for funeral expenses upon death occurring in each other’s family; and (7) if they name each other as beneficiaries in individual wills or death benefits or if they submit income tax returns together. See *id.*

257. *Essilfie*, [1992] 2 Ghana L. Rep. at 188.

258. *Id.* at 185 (quoting *Yaotey v. Quaye*, [1961] 2 Ghana L. Rep. 573) (italics in original).

the same house for seven years and had two children. The woman's family visited the home of the woman and man during their cohabitation. The man had performed customary funeral rites of a son-in-law at the death of the deceased woman's father, had sent drinks to the woman's family as an admission of pregnancy, and had provided the grave and shroud for the deceased woman in his capacity as her husband.<sup>259</sup> None of these factors alone was dispositive; however, taken together, they demonstrated both the couple's agreement to live as husband and wife and their acceptance by the families and community as a married couple.<sup>260</sup>

Although the facts of *Essilfie v. Quarcoo* were somewhat unusual in that they involved a widower's attempt to prove the validity of his marriage, the principle applies equally to any putative customary law marriage. The holding of the case was affirmed by the Court of Appeal and is binding law in Ghana; however it has been applied inconsistently by lower courts.<sup>261</sup>

#### *Conclusions and Recommendations*

Before a woman can benefit from the Intestate Succession Law, she is often forced first to prove her status as a valid customary wife. This can be very difficult for a widow to do when her husband's family denies her status. Despite *Essilfie v. Quarcoo*, if customary rites were not performed, or not fully performed, a widow is often prevented from inheriting under the statute even though she lived with the man as his wife, had children with him, and was treated as his wife by his family and the community. Although this situation arises for both widows and widowers (as in *Quarcoo*), the consequences for widows are more severe given the widespread assumption that property acquired during the marriage belongs to the man. As a result, widows more often than widowers, must rely on intestate succession to establish ownership of property to which they have made an economic contribution. A systematic failure to protect the interest of spouses in intestate succession therefore violates Ghana's international obligation to ensure gender equality.

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259. *Id.* at 187-89.

260. *Id.*

261. Interview with Justices Georgina Wood, Suleiman Gbadegbe, and Dixon Kwame Afreh, Court of Appeal, Accra (June 12, 2001).

The following recommendations are intended to facilitate proof of customary law marriages by surviving spouses.

1. *To reduce problems of proof by facilitating the registration of customary law marriages, Law 112 could be amended to provide for a dual system of registration.* Under such a system, an individual would still be able to register with the Registrar of Marriages, as currently allowed under the statute. In addition, however, local registration would be permitted.

A dual scheme for registration is not unprecedented. Section 121 of the Children's Act, 1998 (Act 560), provides that the District Assembly shall be responsible for registration of births in the district but that: "[t]he District Assembly may delegate any of its functions under this section to a Unit Committee or to such other person as it may determine to be appropriate."<sup>262</sup> We recommend that Law 112 be amended similarly to allow the District Assembly in each district to delegate the marriage registration functions to an appropriate local body or local official. That local body or local official would then be responsible for forwarding the marriage registrations periodically to the Registrar of Marriages.

We recognize that local registration of customary marriages presents its own problems. For example, some suggested that local registration be delegated to chiefs or queenmothers. According to Chief Dasebre Osei Bonsu II, Omanhene of Mampong Ashanti, who supported local registration, "We [chiefs] have good secretariats and we are at the grassroots [level], so our offices are accessible to most of the womenfolk so why not permit . . . [the] secretariats to register marriages."<sup>263</sup> Others objected, noting that allowing chiefs to control the registration of marriages might unduly enlarge the powers of chiefs and encourage corruption.<sup>264</sup> The District Assembly, however,

262. The Children's Act, Act 560 (1998), § 121.

263. Interview with Chief Dasebre Osei Bonsu II, Omanhene of Mampong Ashanti, Regional House of Chiefs, Kumasi (June 8, 2001).

264. *See, e.g.*, Interview with High Court Justice Richard Apaloo, Accra (June 12, 2001) ("when we let chiefs register, we create problems." "Our chiefs have tendencies to exact fees. . . . no matter what they do . . . You know, you have to send Schnapps." "The moment you bring chiefs in you tend to enlarge the powers of chiefs. Chiefs can arrogantly refuse to conduct marriages"—either for failing to pay enough or for whatever other reason they may decide). *But see* Interview with Justice S.A. Brobbey, Court of Appeal, Accra (June 11, 2001) (supporting the idea of having local registration of marriages with chiefs and queenmothers as a "very good suggestion").



would have the power to delegate registration authority to any appropriate local body or official. For example, it could designate a local attorney, assemblyman, pastor, or the head-teacher of a local school. The District Assembly would retain supervisory control over the registration process and could correct any irregularities that might arise. Moreover, the current system of registration would be available as an alternative if local registration proved problematic in a particular case.

If this recommendation were adopted, it would require amending § 2(1) of Law 112 to provide:

Where a marriage has been contracted under customary law, either party to the marriage or both parties may apply in writing to the Registrar of Marriages (referred to in this Law as “the Registrar”) of the District in which the marriage was contracted, or in person to any such person to whom the District Assembly has delegated registration functions in that District, for the registration of the marriage in the register of marriages in this Law referred to as the “register.”

2. *Law 111 should be amended to recognize customary law marriages where the customary rites have not been performed but where certain conditions are met.*

Pursuant to *Essilfie v. Quarcoo*,<sup>265</sup> completing customary rites of marriage is not a prerequisite to recognizing a valid customary law marriage under Law 111. The absence of these rites should not prevent a surviving spouse from inheriting under the law where the “ingredients essential to a customary law marriage” exist.<sup>266</sup> Although this standard is already applicable through case law, judges have applied it inconsistently.<sup>267</sup> Accordingly, we recommend that § 18 of Law 111 be amended to include a definition of “spouse,” consistent with *Quarcoo*. For example, § 18 could be amended to provide:

“spouse” includes a person married under the Marriage Ordinance (Cap. 127), the Marriage of Mohammedans Ordinance (Cap. 129), customary law, or a person who is the surviving partner of a customary law marriage where the customary rites were not performed but where the parties lived together as husband and wife and obtained the actual or implied con-

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265. [1992] 2 Ghana L. Rep. 180.

266. *Id.* at 186-88.

267. *See* Interview with High Court Justice Georgina Wood, Accra (June 12, 2001).

sent of their two families to the marriage.<sup>268</sup>

## 2. Establishing the Nature of the Property in the Estate

In addition to proving the validity of the marriage, a widow often must establish the nature of the property in the deceased spouse's estate before she is able to benefit from Law 111. First, she must prove that the property is self-acquired property rather than family property.<sup>269</sup> Second, if she made a financial contribution to the acquisition or improvement of the property, she must also prove the extent of her contribution so that the part that is her self-acquired property will not be distributed as part of the intestate's estate.<sup>270</sup>

### a. Family Property v. Self-acquired Property

Because Law 111 excludes from its scope family property, disputes often arise with respect to the nature of the property in the estate. Family members, legitimately or not, may challenge the inclusion of property as self-acquired property of the deceased. Family members may claim, for example, that they assisted in acquiring the property and therefore that it should not be distributed under Law 111 as part of the estate.<sup>271</sup> High

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268. We are not recommending a rule that would potentially convert all concubines into customary law marriages. Such a change would meet with great resistance by many in Ghana. *See, e.g.*, Interview with Christian Council, Accra (June 14, 2001); Interview with Professor H.J.A.N. Mensa-Bonsu, Law Faculty, University of Ghana, Legon (June 14, 2001) (noting that this would undermine the institution of marriage and that families would not accept common law marriages). *But see* Interview with Angela Dwamena-Aboagye, ARK Foundation, Accra (June 11, 2001) (commenting that common law marriages should be recognized because men decide when to marry; "women cannot negotiate"); Interview with Justice Henry Kwofie, Circuit Court, Takoradi (June 7, 2001) (approving of idea of common law marriage where woman lived with the man for 10 to 15 years working as a wife); Interview with Circuit Court Justice Assan, Kumasi (June 7, 2001) (noting that without common law marriage, women suffer injustice and there is no remedy and stating that there should be a way to amend the law to accommodate those who have lived together for a long time, had children together, are still together upon man's death, and where the public recognizes them as married); Interview with High Court Justice Mariama Owusu, Kumasi (June 7, 2001) (supporting legislation on common law marriage). Rather, amending the law as suggested would simply conform the statute to existing case law.

269. Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana), § 1(2) (expressly excluding family property from the reach of the law).

270. *Id.* § 18 (defining estate as limited to the self-acquired property of the intestate).

271. Interview with High Court Justice Samuel Kwadwo Asiamah, Sekondi (June 5, 2001); Interview with High Court Justice Mariama Owusu, Kumasi (June 7, 2001); Inter-

Court Justice Mariama Owusu in Kumasi estimated that in approximately sixty percent of the cases involving intestate succession before her, the family will assert such a claim.<sup>272</sup> For example, she described a recent case in which a man died and his sister came to apply for the authority to probate the estate.<sup>273</sup> Justice Owusu granted the petition subject to notices to other parties, including the wife and children. Before the period expired, the wife and child also appeared. Although Justice Owusu had granted the sister's application, the sister did nothing for one year. The wife then applied for authority to probate the estate over the sister's objection. Faced with the possibility of losing control of the estate, the sister appeared before Justice Owusu, claiming that the property the wife listed was family property. This position contradicted her original claim that the property was self-acquired and that the man had made a will.<sup>274</sup>

Faced with such a dispute, judges will consider a range of evidence, including land registration records, if available.<sup>275</sup> They will attempt to determine whether the man had the means to acquire the property on his own.<sup>276</sup> They will also try to determine the nature and extent of family assistance, including financial contribution or physical help in developing the land.<sup>277</sup> According to High Court Justice Asiamah in Sekondi, if there was substantial family assistance, then the property is not self-acquired property but rather family property and must be excluded from the estate.<sup>278</sup> If, however, the court determines that the family assistance was only minimal, the property will be treated as the self-acquired property of the deceased and distributed according to Law 111.<sup>279</sup>

Often it is quite difficult for a spouse to contest the nature

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view with Justice Henry Kwofie, Circuit Court, Takoradi (June 7, 2001); Interview with Mrs. Patience Diaba, SNV/WILDAF Legal Awareness Program, Takoradi (June 8, 2001).

272. Interview with High Court Justice Mariama Owusu, Kumasi (June 7, 2001).

273. *Id.*

274. Justice Owusu dismissed the case and awarded costs against the sister. *See id.*

275. Interview with High Court Justice Samuel Kwadwo Asiamah, Sekondi (June 5, 2001); Interview with High Court Justice Mariama Owusu, Kumasi (June 7, 2001); Interview with Circuit Court Justice Assan, Kumasi (June 7, 2001); Interview with High Court Justice Quaye, Kumasi (June 7, 2001).

276. Interview with High Court Justice Quaye, Kumasi (June 7, 2001).

277. *See id.*

278. Interview with High Court Justice Samuel Kwadwo Asiamah, Sekondi (June 5, 2001).

279. *Id.*

and scope of the family's contribution to the disputed property. In most cases, few records exist. Moreover, because of the highly gendered roles of spouses, the widow may have very little direct knowledge about the acquisition of property or the conduct of her husband's business.<sup>280</sup> The contested property may be located in a remote area, for example, and the wife may not have even seen the property. She will therefore be unable to testify directly regarding the means of its acquisition.<sup>281</sup>

#### b. Property Acquired Through the Joint Efforts of the Married Couple

Ghanaian law makes no provision for joint ownership of property by individuals who are not part of the same lineage, even when those individuals are legally married.<sup>282</sup> As described above, husbands and wives retain any separate property they may own prior to the marriage and own separately, as individuals, any property acquired during the marriage.<sup>283</sup> Thus, if a woman contributes to the purchase of a house or household chattels, then some part of that property should be regarded as her self-acquired property and should not be distributed as part of the estate.

As a practical matter, however, women face great difficulty in establishing their ownership of property. First, there is a strong presumption that the man owns all the property of the married couple, and the woman must prove otherwise.<sup>284</sup> This can be very difficult because most women lack records of their contribution or other proof of ownership.<sup>285</sup> For example, when Mrs. Cecilia Ackah's husband died, his family seized everything in the house except for the furniture.<sup>286</sup> Although the family

280. Kuenyehia & Ofei-Aboagye, *supra* note 40, at 33 (explaining that many women make substantial contributions which are often undocumented).

281. *Id.*

282. See Akua Kuenyehia, *Distribution of Matrimonial Property on Dissolution of Marriage: A Re-Appraisal*, 18 U. GHANA L.J. 94, 108 (1990-91) (describing suggestion of a community property regime in Ghana as "radical").

283. *See id.* at 95.

284. Interview with Mr. Kwaku Frimpong, Director, Legal Aid Board, Ashanti Region, Kumasi (June 5, 2001); Rosaline Obeng-Ofori, Actionaid, Accra (June 4, 2001).

285. *See* Interview with Angela Dwamena-Aboagye, ARK Foundation, and Ms. Bernice Baiden, Commonwealth Human Rights Initiative, Accra (June 11, 2001).

286. *See* Interview with Mrs. Cecilia Ackah, Client of SNV/WILDAF Legal Awareness Programme, Takoradi (June 7, 2001).

allowed her to keep the furniture for one year, they warned her that, if anything was missing after the year, she would have to refund it. Mrs. Ackah then sought help from the SNV/WiLDAF Legal Awareness Program in Takoradi to challenge the family's action. She explained that, although she had contributed to the acquisition of the property, the family treated everything as belonging to her husband. Although she had no records of her contribution, WiLDAF encouraged her to make a list of the things she had helped to purchase. She did so, but the family disputed the claim: "They wouldn't even listen to me."<sup>287</sup>

Of course, even without proof of her contribution, Mrs. Ackah is entitled to the household chattels under Law 111. In order to establish ownership by inheritance, however, she must complete the probate process, which can be costly and time-consuming. Indeed, with WiLDAF's help, Mrs. Ackah applied for letters of administration, with the children and the customary successor as co-applicants.<sup>288</sup> Yet for over a year, the family has refused to cooperate in the administration of the estate and, in the meantime, has not returned the chattels.<sup>289</sup> Thus the family has deprived her not only of her portion of the estate but of the use and enjoyment of her own self-acquired property.

Although the problem of proving contribution is often more acute for women who lack basic literacy, even women who have the knowledge and capacity to create a record of ownership may choose to put property that they purchase in the name of the husband.<sup>290</sup> Mrs. Betty Adunyame, Regional Coordinator of the National Council on Women and Development ("NCWD"), suggested that this practice results from profound social pressure. She noted that there is an old Akan saying that, "if a wife

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287. *Id.*

288. Her husband did not have a will and they did not discuss wills. "When he was alive he always said things belonged to me and the children." *Id.* She never brought up the issue of a will because she thought that property belonged to spouse and children pursuant to Law 111. She knew of Law 111 before her husband died through radio and television programs. *See id.*

289. *See id.*

290. Interview with Mr. Kwaku Frimpong, Director, Legal Aid Board, Ashanti Region, Kumasi (June 5, 2001) ("often women register things, like cars, in their husband's names and that's a problem"); Interview with Mrs. Betty Mould-Iddrisu, Chief State Attorney, International Law Division, Ministry of Justice, Accra (June 11, 2001) ("even though women know how to keep track [of their contribution], it is difficult because the man may say 'Did you marry me or did I marry you?'").

buys a gun, it is a man who keeps it.”<sup>291</sup> Ms. Adunyame explained that if a woman insists on putting property in her own name, she is challenging the husband’s honor.<sup>292</sup> The delegation’s interviews support this explanation: many women expressed the view that it would “make things easier” at home if they put property they acquire in the man’s name.<sup>293</sup>

The significance of this social pressure should not be underestimated. It is powerful and cuts across class lines and educational levels. Indeed, several women attorneys involved in counseling women on property rights and at least one government official conceded privately that their own property was listed solely in their husbands’ names.<sup>294</sup> Despite these women’s keen awareness of the potential consequences, the social pressure and stigma associated with defying their husbands’ wishes have prevented them from protecting their own rights. Polygyny contributes to this social pressure because wives compete for resources. Even if the man has only one wife, unless he is married under the Marriage Ordinance, the possibility of his taking another wife always exists. Yet, the social pressure extends beyond the tyranny of polygyny: even women in ordinance marriages reported reluctance to insist on legal protection for their property rights.

Proving ownership is difficult for widows even when they have made an easily quantifiable financial contribution to the property. Women’s non-monetary contribution, even if proved, is virtually never sufficient to establish an ownership stake. In such cases, the family will argue that the widow was simply fulfilling her duty to labor for her husband.<sup>295</sup> As Chief Odeneho Gyapong Ababio II, President of the Western Regional House of Chiefs, explained, such claims “will fall on deaf ears. You cannot quantify such services. Such services should be considered obli-

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291. Interview with Mrs. Betty Adunyame, Regional Director, National Council on Women and Development (“NCWD”), Kumasi (June 7, 2001).

292. *Id.*

293. Interview with Mrs. Sheila Minkah-Premo, Apex Lawconsult, and Angela Dwamena-Aboagye, The Ark Foundation, Accra (Feb. 21, 2001).

294. Interview with [names withheld].

295. Interview with Justice Henry Kwofie, Circuit Court, Takoradi (June 7, 2001). As discussed above, under customary law a woman has a duty to labor for her husband and does not acquire ownership rights to the property she works with him to acquire. *See supra* notes 80-84 and accompanying text.

gatory."<sup>296</sup>

This problem arises in two contexts. First, a woman may contribute her labor to the household or a family business. Second, a woman may indirectly finance the acquisition of property by spending her own money to purchase food and other household necessities, thus allowing the man to spend his money on land or a house.<sup>297</sup> In both situations, women have great difficulty establishing a claim to ownership.

In Kpando, the Crowley Program met with Comfort Bribinti Ayeduvor, the second wife of her late husband.<sup>298</sup> Early in their customary marriage, her husband had been the proprietor of a school and a teacher. During that time he was wealthy and maintained four wives and several concubines and fathered sixteen children, including Ms. Ayeduvor's three surviving children. When the school began to face financial difficulties, the other women left him. Ms. Ayeduvor was the only wife who stayed, and the family depended upon her salary as a teacher during this time. According to Ms. Ayeduvor, her husband's family denied him any financial help.

After her husband's retirement, they lived on his pension and her salary. Based on this income, they were able to build a house in which they lived for several months before he died. On her own, Ms. Ayeduvor also purchased a piece of land next to the house. When her husband died, his family found out about the house for the first time and immediately sought to eject her from both the house and the adjoining plot of land. Ms. Ayeduvor had legal documents establishing her ownership of the adjoining property; however, the house had been listed solely in her husband's name. The family excluded her from the house during widowhood rites, in violation of Law 111. As of June 7, 2001, when we met with Ms. Ayeduvor, she had passed through widowhood rights but the house was still locked. She had hoped that the family would fulfill its promise to unlock the house by April, but, as of June, they had not. Ms. Ayeduvor was also very worried about the prospect of sharing the six room house

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296. Interview with Chief Odencho Gyapong Ababio II, President of the Western Regional House of Chiefs, Takoradi (June 7, 2001).

297. Interview with Hilary Gbedemah, Legal Officer, SNV/WiLDAF Legal Awareness Programme, Ho (June 7, 2001).

298. Interview with Ms. Comfort Bribinti Ayeduvor, Kpando (June 7, 2001).

among herself and the sixteen children.<sup>299</sup>

Ms. Mercy Dixon, who we met in Kpando in the Volta Region,<sup>300</sup> encouraged her husband to build a house for them after their marriage. Although she did not purchase the construction materials, she bought food and other household items while her husband devoted his resources to the house project. He later became ill, and she continued to support him and maintain the household. After her husband died, her mother-in-law insisted that Ms. Dixon leave the house. In Ms. Dixon's case, proving her contribution and share of ownership in the property is particularly important because she was her husband's second wife, and they did not have any children. If she is unable to prove part ownership, she will be forced to share the house equally as tenants-in-common with her husband's first wife and her four children, despite the fact that they made no financial contribution to the property.

#### *Conclusions and Recommendations*

Section 18 of the Intestate Succession Law currently defines "estate" to mean "self-acquired property which the intestate was legally competent to dispose of during his lifetime and in respect of which his interest has not been terminated by or on his death."<sup>301</sup> Determining the extent to which property should be excluded from the estate because it belongs to the family or to the surviving spouse presents difficult and unavoidable problems of proof.

Courts have interpreted the term "self-acquired" quite appropriately as excluding family property from the scope of Law 111. At the same time, women often contribute to the acquisition of property during their marriage, and the amount that they contribute should not be regarded as the "self-acquired" property of the husband. Nevertheless, as the cases above illustrate, it is often difficult for women to prove their contribution in the face of a strong, though unstated, cultural presumption in favor of the husband's ownership. As a practical matter, courts often simply assume that the husband owned the property and place the burden on the wife to establish the nature and extent

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299. *Id.*

300. Interview with Ms. Mercy Dixon, Kpando (June 7, 2001).

301. Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana), § 18.



of her contribution. As a matter of equity and logic, however, proving that property belongs to the wife should be no more difficult than proving that property belongs to the family. Thus, to the extent that courts look to the broader circumstances in determining what constitutes family property, including the nonmonetary contributions of the family, courts should also look to the nonmonetary contributions of spouses.

In interviews with the Crowley delegation, some judges expressed a willingness to consider evidence of the contribution, financial and otherwise, women have made to acquiring property, even if they cannot prove title.<sup>302</sup> As Circuit Court Justice Okraku in Accra stated:

The woman has lived with the man, has performed these services, washed these things, cooked these things, so it would not be proper to say the woman has not contributed at all. . . . If it comes to giving her part of the property, call her a joint-owner, I would go that way . . . . If she struggled with you from the beginning, it would be wicked to say she has not contributed at all.<sup>303</sup>

Circuit Court Justice Henry Kwofie in Takoradi stated that he already takes into account the non-financial work of a housewife in distributing an estate or dividing property upon divorce.<sup>304</sup> According to Justice Kwofie, most women in rural areas make significant non-monetary contributions. As an example, he described a case in which the woman had worked on a farm owned by her husband. He found that it was not fair to say all the property was the self-acquired property of the husband. To prove contribution, he considers the length of the marriage and the nature of her contribution to the economic unit of the family. If she is employed, she can give evidence of how much she earns compared with the husband's income.<sup>305</sup>

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302. See Interview with Mrs. Betty Mould-Iddrisu, Chief State Attorney, International Law Division, Accra (June 11, 2001) (noting this trend and noting that judges may rule constructively that it is joint property).

303. Interview with Justice Okraku, Circuit Court, Accra (June 12, 2001).

304. Interview with Justice Henry Kwofie, Circuit Court, Takoradi (June 7, 2001).

305. *Id.*; Interview with High Court Justice Mariama Owusu, Kumasi (June 7, 2001) (noting that some judges are taking evidence of the non-monetary contribution women make to acquiring property). The Regional Director of the Legal Aid Board for the Western Region similarly suggested that to provide security for both spouses, a law should be enacted providing that upon dissolution of a marriage, property should be presumed to be jointly acquired, even for housewives. Interview with Mrs. Ellen A.

Notwithstanding this trend among some members of the judiciary, other judges expressed discomfort with the suggestion that they should begin to take into account such contribution without legislative guidance. For example, High Court Justice Afari, in Tarkwa, commented that, in his view, "the Court of Appeal is not yet ready for the argument that women should be compensated for their contribution."<sup>306</sup> Justice S.A. Brobbey of the Court of Appeal suggested that the domestic services of a wife as contribution should be codified.<sup>307</sup>

In light of both judicial support of the recognition of women's contribution to property and judicial reluctance to act without legislative guidance, we recommend that Law 111 be amended as follows. First, § 1(2) of the statute should be amended to include language explicitly excluding a spouse's self-acquired property from the intestate's estate. Section 1(2) could be amended to read: "This Law shall not apply to any stool, skin, or family property, or the self-acquired property or share of property of the decedent's spouse." This language affords equal protection from distribution to family property and the self-acquired property of a spouse. Second, the definition of estate in § 18 should be amended to read:

"Estate" means self-acquired property which the intestate was legally competent to dispose of during his lifetime and in respect of which his interest has not been terminated by or on his death; and excluding any property or share of property acquired through substantial monetary or nonmonetary contribution of a spouse.

This statutory language clarifies that the term "self-acquired" excludes from distribution not only family property but spousal property as well and that courts should take into account both the monetary and nonmonetary contribution of the spouse.

Some may argue that excluding property from the estate based on the widow's contribution results in double-counting: the widow keeps both her self-acquired share of the property and the spouse's share under Law 111. Such a change, however,

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Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001).

306. *See* Interview with High Court Justice Afari, Tarkwa (June 6, 2001).

307. *See* Interview with Justice S.A. Brobbey, Court of Appeal, Accra (June 11, 2001).

merely equalizes the status of widows and widowers under the law. Currently, when a woman dies, her husband keeps all of his self-acquired property accumulated during the marriage and, in addition, receives the spouse's share of his wife's estate. Widows would be treated equally under the existing gender-neutral language of the statute but for the implicit presumption that all of the property accumulated during the marriage belongs to the man (or in some cases the family). The suggested amendment simply clarifies that a widow's self-acquired property, broadly defined, should be excluded from the estate at the outset.

### C. *Problems of Administration*

Ghanaian law requires a party seeking to administer an intestate's estate to obtain a grant of letters of administration.<sup>308</sup> The law establishes a hierarchy among persons with a beneficial interest in the estate who are entitled to a grant of letters of administration. The order of priority is: (1) spouse; (2) children; (3) parent of intestate; (4) customary successor.<sup>309</sup> Notwithstanding this priority list, in practice, courts often regard the lineage of the deceased as the party competent to take control of the property of the intestate.<sup>310</sup> According to Justice Owusu, Community Tribunal Chairman in Accra, courts will not grant letters of administration to a widow without an affidavit from the family supporting the application.<sup>311</sup> This deference to the lineage in the administration of the estate has created a number of problems. Because the lineage has a very limited share in the estate under Law 111,<sup>312</sup> it may attempt to delay the administra-

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308. Probate and Administration Rules, L.I. 1515 (1991), Order 2, § 6; see KOM, *supra* note 105, at 47.

309. See KOM, *supra* note 105, at 47.

310. See Interview with Charles Gyamfi Danquah, Commission on Human Rights and Administrative Justice, Kumasi (June 5, 2001); Interview with Justice Kwadwo Owusu, Community Tribunal Chairman, Accra (June 14, 2001); see also Mensa-Bonsu, *supra* note 164, at 124; Dowuona-Hammond, *supra* note 35, at 159.

311. See Interview with Justice Kwadwo Owusu, Community Tribunal Chairman, Accra (June 14, 2001).

312. Some individuals we met with in Ghana expressed the view that the share provided to the lineage under Law 111 is insufficient given the significant role the extended family often plays in the lives of its members. See Interview with Dr. K.O. Adinkrah, Professor of Law, Ghana Law School, Accra (June 13, 2001); Interview with Supreme Court Justice George Acquah, Accra (June 11, 2001) (giving example where man's education was entirely funded by his brother but all the man's property went to his wife and children under Law 111).

tion of the estate by refusing to join the widow in applying for the letters of administration.<sup>313</sup> For example, in the case of Mrs. Cecilia Ackah, discussed above, her husband's family delayed for more than a year before joining the application for the letters of administration.<sup>314</sup> Such delays impose considerable hardship on widows whose economic livelihood often depends upon property within the estate.

In other cases, the family may simply apply for letters of administration without the widow, hoping to exclude her from the process altogether. In the cases of Beatrice Avorkliyah and Bernice Segbawu, each family applied for a grant of letters of administration without the widow.<sup>315</sup> In Ms. Avorkliyah's case, the eldest son from her husband's previous marriage filed for letters of administration without her. Ms. Avorkliyah obtained legal assistance from the SNV/WiLDAF Legal Awareness Programme in Ho and filed a caveat in the Circuit Court to prevent the grant of letters of administration. Although Ms. Avorkliyah may yet be able to preserve her rights, the family's action has resulted in considerable delay. The case is still pending.<sup>316</sup> In Ms. Segbawu's case, the family of her husband secretly attempted to obtain letters of administration. Ms. Segbawu learned of their efforts, and WiLDAF filed a caveat on her behalf. The High Court Justice hearing the case ruled that Ms. Segbawu should be included in the letters along with two older sons. Since this ruling, however, the family has refused to proceed with the administration of the estate.<sup>317</sup>

The family may also list inaccurately the property within the estate in order to maximize family property. For example, Ms. Regina Papawu's husband died in 1999 following a nine year ill-

313. See Interview with Justice Kwadwo Owusu, Community Tribunal Chairman, Accra (June 14, 2001); Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region and John Bosco Nabarese, Court Registrar, Takoradi (June 8, 2001); Interview with Mrs. Patience Diaba, SNV/WiLDAF Legal Awareness Program, Takoradi (June 8, 2001); Mensa-Bonsu, *supra* note 164, at 124; Dowuona-Hammond, *supra* note 35, at 159.

314. Interview with Mrs. Cecilia Ackah, Client of SNV/WiLDAF Legal Awareness Program, Takoradi (June 7, 2001); see *supra* notes 286-89 and accompanying text.

315. Interview with Ms. Beatrice Avorkliyah, Ho (June 5, 2001); Interview with Ms. Bernice Segbawu, Ho (June 5, 2001); see also *supra* notes 214, 217 and accompanying text.

316. Interview with Ms. Beatrice Avorkliyah, Ho (June 5, 2001).

317. Interview with Ms. Bernice Segbawu, Ho (June 5, 2001).

ness.<sup>318</sup> According to Ms. Papawu, his family did not care for him or even inquire after him. Nevertheless, after he died, the family forced her to go through widowhood rites overseen by the older brother of her husband. Another of his brothers took up the administration of the estate. He prepared an application for a grant of letters of administration listing all of their property and household chattels but excluding the house in which she had lived with her husband. Ms. Papawu refused to sign the application unless the house was included. She later received a copy of the letters of administration with her name deleted. She has sought help from the WILDAF and the case is still pending.<sup>319</sup>

### *Conclusions and Recommendations*

In order to enforce their rights under Law 111, women must be able to obtain letters of administration themselves or, at a minimum, be included as applicants for the grant of letters. They must also be able to execute the letters of administration in a timely manner. Although it is appropriate for courts to require, in the first instance, that all interested parties be included in the application, no party should be allowed to interfere with or delay the process to the detriment of others.

Recognizing the types of problems described above, some courts have authorized the widow to proceed with the administration of the estate without the cooperation of the decedent's family.<sup>320</sup> This approach, however, has been far from uniform.

In order to facilitate the protection of the rights of widows under Law 111, we recommend, first, that the role of the customary successor be minimized to reflect more accurately the share of the estate the lineage receives under Law 111, which is significantly smaller than the share inherited by the widow and children of the intestate.<sup>321</sup> We further recommend that the leg-

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318. Interview with Ms. Regina Papawu, Kpando (June 7, 2001).

319. *Id.*

320. Interview with Mr. Kwaku Frimpong, Director, Legal Aid Board, Ashanti Region, Kumasi (June 5, 2001).

321. Justice Owusu recommended that the role of the customary successor in applying for letters of administration should be minimized to make Law 111 effective. *See* Interview with Justice Kwadwo Owusu, Community Tribunal Chairman, Accra (June 14, 2001). Mrs. Ellen Sweetie Asiedu Akrofi Sowa, similarly recommended that the customary successor's role should be made more of an observer role. *See* Interview with Mrs.

islature amend L.I. 1515 expressly to provide that if, after having been notified of the application, any party fails to cooperate with the widow or children in applying for or executing the letters of administration *within a fixed period of time*, the court should take appropriate measures to expedite the process including excluding that party altogether.

#### D. *Problems of Enforcement*

Even if the law of intestate succession were changed in the ways that this Report has suggested, its effect on women's equality would be limited by a lack of understanding of the law, a lack of resources required for its enforcement, and widespread resistance to its requirements. This section analyzes the scope of these problems and makes recommendations as to how they might best be addressed. We recognize, however, that increasing education and enforcement efforts requires a substantial commitment of resources for which there are competing demands. This section therefore emphasizes ways in which the government might build on existing programs to make efficient use of additional resources.

##### 1. Lack of Knowledge of the Law Governing Intestate Succession

Sixteen years after the enactment of Laws 111 and 112, many view the lack of awareness of these laws as the biggest obstacle to enforcement.<sup>322</sup> For example, Mrs. Sheila Minkah-Premo, of Apex Lawconsult, explained that "many people in Accra have not heard of the Law, and it is even worse in rural areas

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Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001).

322. See, e.g., Interview with Mrs. Betty Mould-Iddrisu, Chief State Attorney, International Law Division, Accra (June 11, 2001) (noting that the "law is not known by many of our women-folk. Our women-folk are in the main illiterate, semi-literate. . ."); Interview with Justice Okraku, Circuit Court, Accra (June 12, 2001) ("I'm not so sure whether the women in the village, in the rural area 1) whether they know about this law at all, 2) and if they know, whether they have the courage to fight for their rights"); Interview with Mrs. Hilary Gbedemah, Legal Officer, SNV/WILDAF Legal Awareness Program, Ho (Feb. 16, 2001) (noting that biggest problem with enforcement of Law 111 is lack of awareness of the law). Several articles have also commented on the general lack of awareness of Law 111 in different parts of Ghana. See Mensa-Bonsu, *supra* note 164, at 114, 126; Dankwa, *supra* note 197; Dowuona-Hammond, *supra* note 35, at 167.

and the northern region.”<sup>323</sup> Arthur Henry Adusei, a Legal Literacy Volunteer in Tarkwa, commented that the volunteers do not see many specific problems with the way the statute is being applied because most people simply do not know of the law.<sup>324</sup>

In communities in which people know of Law 111, their understanding is often imprecise. As a result, “people substitute their own notions for the provisions of the law” which differ from the actual provisions of Law 111.<sup>325</sup> For instance, the women we met in Kwanfifi in the Ashanti Region had heard of Law 111 but understood the law to provide that the intestate’s estate is divided into thirds, with the widow, the children, and the family taking equal parts but with the house and chattels going to the widow and children.<sup>326</sup> This understanding understates the widow’s and children’s share in favor of the family. In patrilineal communities, many individuals, including government officials and customary leaders, expressed the view that Law 111 simply codified the patrilineal customary law of succession. Mr. Williams Fiati, the Coordinator of Affairs of Children for the Ghana National Commission on Children in the Volta Region commented that “[i]n the Volta Region, Law 111 has no impact because it is the law here already. In Akan areas it is a positive change.”<sup>327</sup> Mr. Togbe Asamoah Keteku II, Asafofia of Ho-Bankoe, stated that they “are aware as chiefs of the Law” but “there is no real difference between custom and P.N.D.C. Law

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323. Interview with Mrs. Shiela Minkah-Premo, Apex Lawconsult, Accra (June 4, 2001).

324. Interview with Arthur Henry Adusei, WiLDAF Legal Literacy Volunteer, Tarkwa (June 6, 2001).

325. *See* Interview with Professor Takyiwah Manuh, University of Ghana, Legon (June 14, 2001). Professor Takyiwah Manuh conducted research on the application of the Law in the Ashanti Region. She gave as an example that a man may die in a village and his family will believe that they have a right to his home. But because they know of the law and because they are good people, they will allow the widow to have one room in the home. However, under the provisions of the law, she is in fact entitled to the entire house. *See id.*

326. Meeting with Community in Kwanfifi Village (June 6, 2001). Mrs. Yaa Amekudzi, the Director of the Center for the Development of People similarly noted that many people in Kumasi believe Law 111 provides for the intestate’s estate to be divided into thirds with equal shares going to the widow, the children, and the extended family but for the widow [and children] to get the house. Interview with Mrs. Y’aa Amekudzi, Director, The Centre for the Development of People (“CEDEP”), Kumasi (June 6, 2001).

327. *See* Interview with Williams Fiati, Coordinator of Affairs of Children, Volta Region, Ghana National Commission on Children, Ho (June 6, 2001).

111.”<sup>328</sup> Under customary law, however, a widow is not entitled to any share of the estate.

Despite widespread ignorance—or at best misunderstanding—of the law, the Ghanaian government has failed to establish any significant formal education programs.<sup>329</sup> When asked whether there are any government programs that educate about these laws, Mrs. Akua Ansah-Eshon, Regional Director of the National Council on Women and Development for the Western Region, commented: “I ask the National Commission on Civil Education the same question. They say they have not been mandated to explain [these] laws.”<sup>330</sup> Instead, dissemination of the law has been left mainly to non-governmental organizations, and in particular to FIDA and WiLDAF.<sup>331</sup>

Indeed, FIDA and WiLDAF have created some excellent programs to educate people on the Intestate Succession Law, Marriage Laws, Wills Act, Maintenance of Children Act, and Administration of Estates Act. In addition to its Legal Aid Center in Accra, FIDA has conducted media programs on television and radio and has sponsored a mobile legal aid clinic that travels throughout the country providing legal literacy training and le-

328. See Interview with Togbe Asamoah Keteku II, Asafofia, Ho-Bankoe, Meeting with Chiefs and Queenmothers, Ho (June 6, 2001).

329. Interview with Mrs. Betty Mould-Iddrisu, Chief State Attorney, International Law Division, Accra (June 11, 2001) (“Government hasn’t done enough. It’s never done enough. They pay lip service to it . . . . It is NGOs that do all the work . . . government has left it up to civil society.”); Interview with Mrs. Sheila Minkah-Premo, Apex Lawconsult, Accra (June 4, 2001) (noting that non-governmental organizations are doing the education on these laws); Interview with Mrs. Patience Diaba, SNV/WiLDAF Legal Awareness Program, Takoradi (June 5, 2001) (commenting that “[the Government] just passes laws and that is all” during interview with Mrs. Akua Ansah-Eshon, Regional Director, NCWD, Takoradi, (June 5, 2001)); Interview with Members of the Judiciary and Bar Association, Ho (June 6, 2001). The Government has created two governmental bodies to facilitate access to legal resources, the Legal Aid Board and the Commission on Human Rights and Administrative Justice, which will be discussed below, see *infra* notes 338-61 and accompanying text, which have had some educational programs but, as noted by the Director of the Legal Aid Board, the role of the Government regarding education has “not had a huge impact. . . . There is much publicity but we only hear it in the cities. What appears to be obvious is not obvious outside the cities.” See Interview with Felix K. Korley, Director of Legal Aid, Legal Aid Board, Accra (June 14, 2001).

330. Interview with Mrs. Akua Ansah-Eshon, Regional Director, NCWD, Takoradi (June 5, 2001).

331. Interview with Mrs. Betty Mould-Iddrisu, Chief State Attorney, International Law Division, Accra (June 11, 2001); Interview with Mrs. Sheila Minkah-Premo, Apex Lawconsult, Accra (June 4, 2001) (noting that non-governmental organizations are doing the education and have not yet hit all areas in the country).



gal aid.<sup>332</sup> WiLDAF's Legal Awareness Programs in Ho and Takoradi have also provided community education on these laws, and the Legal Officers in Ho and Takoradi provide training for legal literacy volunteers who then conduct educational sessions throughout the Western Region and the Volta Region.<sup>333</sup> WiLDAF's Legal Awareness Programme in Takoradi has also run a radio program with a call-in component to answer listeners' questions about these laws.<sup>334</sup> Most of the women we encountered who knew of Law 111 had heard about it through these programs.

Nevertheless, as important as these efforts are, NGOs lack the resources to provide such education throughout all of Ghana. In the Western Region alone, there are eleven districts and, in each district, approximately 100 towns and villages. WiLDAF's Legal Awareness Program in Takoradi has only two full-time legal officers for the entire Region and only two or three legal literacy volunteers in each district.<sup>335</sup>

## 2. Access to Legal Resources for Women

Education, though important, is only part of the solution to the problem of enforcement. Even if women understand their rights under the law, they may not be able to enforce them because they lack the necessary resources, both legal and economic.<sup>336</sup> As noted by Ms. Faustina Borkloe, a WiLDAF Legal Literacy Volunteer from Keta, "access to legal resources [is] not encouraging."<sup>337</sup> Women in rural areas typically do not have ac-

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332. See Interview with Mrs. Gloria Ofori-Boadu, Executive Director of FIDA Ghana, Accra (June 12, 2001); Interview with Mrs. Ernestina Naana Hagan, Mrs. Elizabeth Owiredu-Gyampoh, FIDA Legal Aid Centre, Accra (Feb. 13, 2001).

333. See Interview with Mrs. Patience Diaba and Mrs. Yaa Boadi, Legal Officers, SNV/WiLDAF Legal Awareness Program, Takoradi (Feb. 14, 2001); Interview with Hilary Gbedemah, Legal Officer, SNV/WiLDAF Legal Awareness Program, Ho (Feb. 16, 2001).

334. See Interview with Mrs. Patience Diaba and Mrs. Yaa Boadi, Legal Officers, SNV/WiLDAF Legal Awareness Program, Takoradi (Feb. 14, 2001). The program is on hold at the moment because funding ran out. See *id.* Many people we met with noted that radio is a particularly effective medium for educating the public.

335. See *id.*

336. Interview with Justice Okraku, Circuit Court, Accra (June 12, 2001) ("My only problem with the law is that you always need a lawyer to help you out. Many women cannot afford a lawyer to assist them.").

337. Interview with Mrs. Faustina Borkloe, WiLDAF Legal Literacy Volunteer from Keta, Ho (June 5, 2001).

cess to legal counsel or even general sources of information about their legal rights.

There are two governmental organizations that provide legal assistance for people in cases involving intestate succession: the Legal Aid Board and the Commission on Human Rights and Administrative Justice ("CHRAJ"). The Legal Aid Board was established in 1987 to provide legal assistance to people who were indigent, unemployed, or employed but earning less than minimum wage.<sup>338</sup> The Legal Aid Board handles both criminal and civil cases, including matters related to Law 111.<sup>339</sup> People who earn fewer than 5,500 cedis a day are entitled to legal assistance from the Legal Aid Board, and the Board has discretion to accept cases for people who earn more than that amount. Since 1998, the Legal Aid Board has established offices in every region in Ghana. In 1998, the Board handled 2,088 cases nationwide, with 523 cases, or roughly twenty-five percent of the total number of cases, pertaining to inheritance.<sup>340</sup>

Although the work of the Legal Aid Board is significant, a lack of resources limits its reach. Outside of Accra, only one Legal Aid Board lawyer covers each region,<sup>341</sup> and the offices are only in the regional capitals, not in the districts.<sup>342</sup> Private lawyers may register to work on Legal Aid Board cases and may accept or decline cases referred to them by the Board.<sup>343</sup> Yet, many regions have very few lawyers, some with as few as ten for

338. Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001); Interview with Mr. Kwaku Frimpong, Director, Legal Aid Board, Ashanti Region, Kumasi (June 5, 2001). The Legal Aid Board now operates under the Legal Aid Scheme Act (Act 542) of 1997 in accordance with Article 294 of the Constitution. *See* LEGAL AID BOARD, ANNUAL REPORT 1998, at 3.

339. Interview with Felix K. Korley, Director of Legal Aid, Legal Aid Board, Accra (June 14, 2001); LEGAL AID BOARD, *supra* note 338, at 3.

340. *See* LEGAL AID BOARD, *supra* note 338, at 6, 12.

341. Except in the Greater Accra Region, where there is the Director of the Legal Aid Board, a lawyer, and a person to assist both. Interview with Felix K. Korley, Director of Legal Aid, Legal Aid Board, Accra (June 14, 2001).

342. Interview with Felix K. Korley, Director of Legal Aid, Legal Aid Board, Accra (June 14, 2001); *see also* LEGAL AID BOARD, *supra* note 338, at 7 (noting further that several of the regional offices are still temporary accommodations).

343. These lawyers will be paid a fixed salary set by the Legal Aid Board. *See* Interview with Felix K. Korley, Director of Legal Aid, Legal Aid Board, Accra (June 14, 2001). However, there is a disincentive to take the cases because they will not get paid if they lose the case. *See* Interview with Mr. Kwaku Frimpong, Director, Legal Aid Board, Ashanti Region, Kumasi (June 5, 2001).

the entire region.<sup>344</sup> The Legal Aid Board lawyers are permitted to travel to the districts in their region, but they are not given resources to do so from the Legal Aid Board. They must therefore have their own means of transportation or rely on the client to pay their travel expenses.<sup>345</sup> Alternatively, the claimant must travel to the regional capital to seek assistance.<sup>346</sup> This is beyond the means of most clients who qualify for Legal Aid assistance. Logistics and cost aside, many people are simply unaware of the Legal Aid Board and therefore do not seek legal assistance from its offices.<sup>347</sup> As Mrs. Hilary Gbededmah, Legal Officer of the SNV/WiLDAF Legal Awareness Program in Ho explained, “[i]t is very hard for people to fight for their rights under this statute because of the expense of lawyers. If there is no WiLDAF clinic to help, many people will follow customary law rather than make application to Legal Aid or try to hire a lawyer at cost.”<sup>348</sup>

CHRAJ was established by the 1992 Constitution as an independent commission that has jurisdiction over complaints concerning violations of fundamental human rights, abuses of power, unfair treatment of public employees, unequal access to public services and agencies, and corruption and misappropriation of public funds.<sup>349</sup> The majority of CHRAJ’s work involves responses to oral and written complaints.<sup>350</sup> CHRAJ resolves about half of the complaints “through negotiation and compro-

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344. Interview with Felix K. Korley, Director of Legal Aid, Legal Aid Board, Accra (June 14, 2001). Of the 2,088 cases handled by the Board in 1998, 850 or 40.7% were handled in the Greater Accra Region. See LEGAL AID BOARD, *supra* note 338, at 9.

345. Interview with Felix K. Korley, Director of Legal Aid, Legal Aid Board, Accra (June 14, 2001); LEGAL AID BOARD, *supra* note 338, at 4 (“The absence of transportation and appropriate remuneration have made it difficult for the Board to provide legal personnel for state-assigned briefs and for briefs referred to the Board by the CHRAJ and FIDA in addition to the mounting number of civil cases brought directly to the Board.”).

346. Interview with Felix K. Korley, Director of Legal Aid, Legal Aid Board, Accra (June 14, 2001).

347. *Id.* (noting that if people are “not aware of [Law] 111, they wouldn’t think to come to the Legal Aid Board”).

348. Interview with Hilary Gbedemah, Legal Officer, SNV/WiLDAF Legal Awareness Program, Ho (Feb. 16, 2001).

349. See GHANA CONST. (1992) Ch. 18.; Interview with Mrs. Chris Dadzie, Chief Legal Officer, CHRAJ, Accra (Feb. 12, 2001); HUMAN RIGHTS WATCH, PROTECTORS OR PRETENDERS? GOVERNMENT HUMAN RIGHTS COMMISSIONS IN AFRICA 159 (2001). According to a recent Human Rights Watch Report, CHRAJ “has been an outspoken and independent protector of rights. It carries a high degree of public respect and confidence.” *Id.* at 163.

350. See HUMAN RIGHTS WATCH, *supra* note 349, at 158.

mise.”<sup>351</sup> The other half are adjudicated in panel hearings chaired by a lawyer who issues a recommendation.<sup>352</sup> Although the Commissioner can file an enforcement action if the parties do not comply with the recommendation within three months, this power has not been much used.<sup>353</sup>

CHRAJ has offices in all ten regions and in 89 of the 110 districts in Ghana.<sup>354</sup> Each of the regional offices has a regional director who is a lawyer, and each district office must be headed by a university graduate. Currently, CHRAJ receives an average of 4,000 to 5,000 complaints per year.<sup>355</sup> The majority of the cases are labor-related.<sup>356</sup> A quarter are related to fundamental human rights abuses and another quarter are property-related, mostly landlord-tenant disputes.<sup>357</sup> In some regions, CHRAJ handles a significant number of family-related cases, including cases involving intestate succession.<sup>358</sup> Like the Legal Aid Board, CHRAJ’s work is hampered by limited resources. CHRAJ has difficulty retaining attorneys because of low pay and poor benefits.<sup>359</sup> Moreover, with each lawyer handling 150-200 open cases, the lawyers are generally overburdened.<sup>360</sup> As a result, few CHRAJ lawyers have the training and experience to handle human rights cases effectively.<sup>361</sup>

In addition to a lack of legal resources, women may lack the financial resources required to pursue their claims with or with-

351. *Id.* at 159.

352. *Id.*

353. Interview with Mrs. Chris Dadzie, Chief Legal Officer, CHRAJ, Accra (Feb. 12, 2001); HUMAN RIGHTS WATCH, *supra* note 349, at 159.

354. Interview with Mrs. Chris Dadzie, Chief Legal Officer, CHRAJ, Accra (Feb. 12, 2001); HUMAN RIGHTS WATCH, *supra* note 349, at 158.

355. HUMAN RIGHTS WATCH, *supra* note 349, at 158.

356. *See* Interview with Mrs. Chris Dadzie, Chief Legal Officer, CHRAJ, Accra (June 15, 2001); HUMAN RIGHTS WATCH, *supra* note 349, at 158.

357. HUMAN RIGHTS WATCH, *supra* note 349, at 158.

358. In the Eastern Region, for instance, of 1,160 cases reported last year, more than 550 related to “child maintenance and custody, deprivation of child education and medical care and intestate succession.” *CHRAJ Settle More Family-related Cases in Eastern Region*, Gri Newsreel Ghana, available at <http://www.mcglobal.com/History>. Of those cases, 170 related to property and inheritance. *See id.*

359. Interview with Mrs. Chris Dadzie, Chief Legal Officer, CHRAJ, Accra (Feb. 12, 2001). For instance, there are 13 positions for lawyers in the Head Office in Accra and they generally have six working at any one time. Moreover, there is only one lawyer remaining of the original 12 lawyers hired after seven years. *See id.*

360. *Id.*

361. *See id.*

out counsel. For example, in some areas, no functioning tribunals exist so that women must travel substantial distances from their home in order to seek redress from the legal system. Yet, many women do not have money for transportation or even for food for a day of travel.<sup>362</sup> If they do find the resources to travel to court, the judges may adjourn matters, requiring women to make several trips.<sup>363</sup>

For example, in the case of Ms. Aba Akyere, a widow from Tarkwa, her husband's family accused her of killing him and refused to care for the children as required by customary law.<sup>364</sup> They took control of all of the property from his estate, including a palm oil plantation, and allocated only a small, unproductive piece of land to be shared among the several widows. Although she is illiterate, Ms. Akyere had heard of Law 111 and knew that she had been denied her rights under the law. When asked why she did not seek legal help, she explained that she cannot find enough money for school fees, much less for legal fees or travel expenses. She is not strong enough to farm anymore, and she has no one to help care for the children. In such circumstances, even a woman who knows her rights will be unable to protect her interests.

Once a case gets to court, the significant backlog of cases may mean that resolution of the case will take years, further delaying a woman's receipt of property to which she is entitled under the statute.<sup>365</sup> For example, Ms. Rita Charlotte Eshon's husband died seven years ago.<sup>366</sup> After he died, Ms. Eshon applied for a grant of letters of administration, but the family objected. After *seven* years in court, she finally obtained a judgment in her favor. In the meantime, however, the family harvested the coconuts from her husband's farm, and the farm was

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362. Interview with SNV/WiLDAF Legal Awareness Programme Legal Literacy Volunteers, Ho (June 5, 2001).

363. Interview with Mrs. Faustina Borkloe, a WiLDAF Legal Literacy Volunteer from Keta, Ho (June 5, 2001).

364. *See* Interview with Ms. Aba Akyere, Tarkwa (June 6, 2001). Her husband was from Abora Adumfa. When asked why the family beat her up she said that they claimed she monopolized her husband's time. Before his death, he moved in with her and his family and the older wives said she monopolized his time. As a result, the older wives became her enemies.

365. Interview with Maulvi A. Wahab Adam, Ameer and Missionary in Charge, Ahmadiyya Muslim Mission, Accra (June 14, 2001) ("If you go to court, you will be dead before the case is heard" because of the backlog of cases).

366. Interview with Ms. Rita Charlotte Eshon, Tarkwa (June 6, 2001).

no longer productive. The family also had been collecting rent for the house and had defied a court order to pay the rent to the Court for the benefit of Ms. Eshon. The family has now appealed the decision to the High Court further delaying the case.

Ms. Akyere and Ms. Eshon represent many of women who are unable to enforce their rights under Law 111 because of a lack of resources, both legal and financial. They lack local access to counsel and to courts, the means to travel to secure such access, or the resources necessary to mount a sustained legal battle to secure their rights.

### 3. Resistance to the Enforcement of Law 111

Even if women understand their rights under the law and have the resources to pursue their claims, they often face significant social pressure from their families and communities not to seek legal recourse and instead to resolve the cases outside of the judicial system. Supreme Court Justice Joyce Bamford Addo commented that “the majority of people do not go to court because the Chiefs are so powerful you would not dare go over their heads.”<sup>367</sup> Justice Isaac Lartey-Young noted that most cases are resolved in the traditional ways and that he will only hear a case if there are problems.<sup>368</sup> He added, “[i]f they are dealt with in the traditional courts and there is peace, I will not know.”<sup>369</sup> As Samuel Yao Nudo, an attorney in Ho, explained, “[i]f maintenance or inheritance cases are filed in court, it means there was a total breakdown of societal norms; it means that the elders, the chief, the pastor, all highly respected members of the community, have all failed to resolve the dispute.”<sup>370</sup>

Such extra-legal resolution of cases is not itself problematic. Indeed, resolution of disputes outside of court and without recourse to counsel can, in theory, reduce both the cost to the parties and the friction within the family. In many circumstances, however, traditional authorities do not resolve the cases in a manner consistent with Law 111. Such authorities may not

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367. Interview with Supreme Court Justice Joyce Bamford Addo, Supreme Court, Accra (June 11, 2001).

368. Interview with Justice Isaac Lartey-Young, Circuit Court, Tarkwa (June 6, 2001).

369. *Id.*

370. Interview with Mr. Samuel Yao Nudo, Alpha Chambers, Ho (June 6, 2001).

know about the law. If they do, they may simply refuse to enforce it to its full extent or ignore it altogether.

Resistance to the intestate succession system created by Law 111 is perhaps strongest in Muslim communities because the system differs from the distribution set forth in the Koran.<sup>371</sup> Indeed, Muslim communities in Ghana generally refuse to follow Law 111 unless directed to do so by a court of law.<sup>372</sup> Alhaj Hamza Umar, Regional Chief Imam for the Volta Region, explained: "We continue with our law. We still go with the Koran as it says."<sup>373</sup> Moreover, if a Muslim woman seeks to enforce her rights under Law 111, she may face even stronger criticism from the community than a non-Muslim woman. Alhaj Hamza Umar relayed the facts of a case in his community in which a woman attempted to enforce her rights under Law 111 in court. According to Alhaj Hamza Umar, the woman "abrogated the Koran" and can no longer be a Muslim.<sup>374</sup>

The problem of community resistance to Law 111 is compounded in some places by the attitude of law enforcement. A woman may risk ostracism by her community in order to seek help from the police only to find that the police view inheritance as a "private matter" in which they should become involved.<sup>375</sup> For example, the Assistant Superintendent of Police in Ho, Mr. F. Mahama admitted that he did not attempt to enforce the

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371. Under the Koran, a man will inherit one half of the estate of his wife, upon her death, if she does not have children. If she has children, her husband will inherit one fourth of her estate. In each case, a woman will receive only half of what a man would receive under the same circumstances. Koran, Women, 4:11-12; *see also supra* note 138 and accompanying text.

372. *See* Interview with Mrs. Betty Mould-Iddrisu, Chief State Attorney, International Law Division, Accra (June 11, 2001) (noting that for Muslims, the Koran is the law and they will not abide by Law 111 unless they are taken to court); Interview with Alhaj Hamza Umar, Regional Chief Imam for the Volta Region, Ho (June 5, 2001); Interview with Mrs. Gloria Ofori-Boadu, Executive Director of FIDA Ghana, and Mrs. Ursula Owusu-Adjei, Vice-President, FIDA Legal Aid Clinic, Accra (June 12, 2001); Interview with Maulvi A. Wahab Adam, Ameer and Missionary in Charge, Ahmadiyya Muslim Mission, Accra (June 14, 2001).

373. *See* Interview with Alhaj Hamza Umar, Regional Chief Imam for the Volta Region, Ho (June 5, 2001). In some cases, Muslim women themselves will not want to enforce the law because it is contrary to their religious beliefs. *See* Interview with Mohammed Ayariga, Executive Director, Legal Resources Center, Nima-Mamooobi (June 15, 2001).

374. *See* Interview with Alhaj Hamza Umar, Regional Chief Imam for the Volta Region, Ho (June 5, 2001).

375. Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001).

criminal provisions of Law 111 protecting widows. Specifically, he responded to the question “Do widows come to you for help when driven from home?” by stating: “If the act of driving them from husband’s home results in assault, then they go to police and we take action on that assault aspect, but not the inheritance aspect.”<sup>376</sup>

The Director of the Legal Aid Board for the Western Region accounted for the attitude of the police by speculating that male police officers “do not want to enforce [Law 111] because even they would use customary law.”<sup>377</sup> The Government has attempted to respond to this attitude of police by establishing a Women and Juvenile Unit (“WAJU”), staffed primarily by female officers.<sup>378</sup> WAJU handles cases of sexual abuse, physical abuse of women and children, including domestic violence, and it handles property related disputes when a woman is ejected from her home in violation of Law 111.<sup>379</sup> Despite the apparent success of these units, they exist only in Accra and Kumasi.<sup>380</sup>

#### *Conclusions and Recommendations*

Ghana has fully complied with neither its duty under the African Charter to ensure that its population is aware of and understands laws enacted to eliminate discrimination against women,<sup>381</sup> nor its obligation under CEDAW to take steps to change traditional practices and customs that discriminate against women.<sup>382</sup> These international legal obligations cannot be met simply by altering the statutory language of Law 111. Rather, better education and enforcement efforts are critical to ensuring women’s equality. Women and their communities must under-

376. *See* Interview with Mr. F. Mahama, Assistant Superintendent of Police, Ho (June 6, 2001).

377. Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001). As a result, the police will tell the woman seeking assistance something “flimsy” as an excuse not to enforce the law. *See id.*

378. Interview with Komfort Boateng, WAJU, Kumasi (June 5, 2001); *see* Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001) (noting that WAJU has done a good job in Accra).

379. Interview with Komfort Boateng, WAJU, Kumasi (June 5, 2001).

380. *Id.*

381. *See supra* Part I for a discussion of Ghana’s obligations under the African Charter.

382. *See supra* notes 23, 29 and accompanying text.



stand not only the rights of widows under the law but also the important purpose of the changes Law 111 made to customary law. Women must have access to tribunals or mediators to resolve inheritance disputes locally in accordance with the law. They must have access to accurate information and appropriate legal advice. Finally, in the event of conflict, women must have access to sympathetic and informed law enforcement.

Meeting these goals will require a significant commitment of governmental resources. Although we recognize that resources are limited, we urge the government to make the issue of women's property rights a priority. As Mrs. Betty Mould-Iddrisu, Chief State Attorney for the International Law Division of the Ministry of Justice, commented, "it is easier to succeed and obtain funds if the issue is an important one to the administration."<sup>383</sup> Conversely, the level of commitment of resources to the issue will be the most meaningful measure of the importance that the new Administration places on these issues.

To facilitate the goals of education and enforcement, we offer the following recommendations.

### 1. Education

Recognizing both that education is essential and that resources are limited, we recommend that the government instruct its agencies, particularly the newly-created Ministry for Women's Affairs, to collaborate with the excellent NGOs that have been successfully educating communities about these laws without significant resources.<sup>384</sup> Such collaboration would allow government agencies to support and extend the efforts of NGOs without wasteful duplication of their efforts. The National Commission on Civic Education ("NCCE") may be well-suited to coordinate such education programs.<sup>385</sup> The NCCE has offices in every district and is funded by the State. It organizes fora in various rural communities to educate people on the laws of

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383. Interview with Mrs. Betty Mould-Iddrisu, Chief State Attorney, International Law Division, Accra (June 11, 2001).

384. Governmental organizations have been charged to work with with NGOs in the past. *See, e.g.*, LEGAL AID BOARD, *supra* note 338, at 2 (charging the Legal Aid Board to "ensure cooperation with Local, International, Governmental and N.G.O.'s with similar aims and objectives to promote the human rights cause").

385. Many advocates and lawyers suggest this role for the NCCE. *See* Interview with members of the Judiciary and Bar, Ho (June 6, 2001).

Ghana by bringing experts in economic, social, political, educational, cultural, and criminal fields to these communities.<sup>386</sup> As noted above, however, the NCCE has not yet been mandated to educate on the laws governing intestate succession.<sup>387</sup> Were the government to issue such a mandate to the NCCE, the Commission might usefully employ educational approaches and materials developed by NGOs such as FIDA and WiLDAF.

## 2. Legal Resources

Notwithstanding the significant work that the Legal Aid Board and CHRAJ are doing in Ghana, as the cases above illustrate, many women have difficulty accessing legal assistance and are therefore unable to enforce their rights under Law 111. We therefore recommend that the government undertake to have its Legal Aid Board and CHRAJ lawyers travel within the various regions conducting legal aid clinics and providing mediation to facilitate out-of-court resolution of intestate cases.<sup>388</sup>

Here again, NGO efforts provide a model. Despite their limited resources, both FIDA and WiLDAF have successfully sponsored traveling clinics that provide both legal aid and legal literacy training.<sup>389</sup> The Legal Officers of the SNV/WiLDAF Legal Awareness Programmes currently travel to remote areas, spending several days handling the backlog of intestate succession cases.<sup>390</sup> Since the Government already employs lawyers

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386. Interview with Mr. Frank Adoba, Regional Director, NCCE, and Kofi Tenu, District Director, NCCE, Ho (June 6, 2001).

387. Interview with Mrs. Akua Ansah-Eshon, Regional Director, NCWD, Takoradi (June 5, 2001).

388. *See* Interview with Mrs. Patience Diaba and Mrs. Yaa Boadi, Legal Officers, SNV/WiLDAF Legal Awareness Program, Takoradi (Feb. 14, 2001); Interview with Mr. Kwaku Frimpong, Regional Director, Legal Aid Board, Ashanti Region, Kumasi (June 5, 2001); Interview with Felix K. Korley, Director of Legal Aid, Legal Aid Board, Accra (June 14, 2001); Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001).

389. *See* Interview with Mrs. Ernestina Naana Hagan, Mrs. Elizabeth Owiredu-Gyampoh, FIDA Legal Aid Centre, Accra (Feb. 13, 2001); Interview with Mrs. Patience Diaba and Mrs. Yaa Boadi, Legal Officers, SNV/WiLDAF Legal Awareness Programme, Takoradi (Feb. 14, 2001); Interview with SNV/WiLDAF Legal Awareness Programme's Legal Literacy Volunteers, Ho (June 5, 2001).

390. Interview with SNV/WiLDAF Legal Awareness Programme's Legal Literacy Volunteers, Ho (June 5, 2001) (providing as an example that Mrs. Hilary Gbedemah, Legal Officer for the SNV/WiLDAF Legal Awareness Programme in Ho, will travel to Peki or Kpandu in the Volta Region and spend several days with the community there to handle the backlog of cases). As noted by the CHRAJ attorney in Ho, Mr. Justin

trained to do this work at both the Legal Aid Board and CHRAJ, it could readily duplicate the traveling clinics model. Although such a program would not fully address the problem, it could expand significantly women's access to even minimal legal advice and promote awareness of Law 111 within remote communities.

### 3. Mediation and Local Adjudication

In addition to legal advice, women need local access to forums where their rights can be determined fairly in accordance with Law 111. In view of both limited resources and popular reluctance to turn to courts to resolve family disputes, mediation may represent the best option for providing such a forum. Indeed, both the Legal Aid Board and CHRAJ already attempt to resolve intestate succession cases using mediation.<sup>391</sup> Moreover, in the past, lawyers with quasi-judicial capacity have been appointed to assist the Registrar of Court to settle non-contested issues, such as, non-contested grants of letters of administration.<sup>392</sup> Precedents therefore exist in Ghana for the use of informal dispute resolution outside of courts. The use of mediation not only can reduce cost and delay but also may encourage compliance because of its less formal, less adversarial format. Nevertheless, in order for a system of mediation effectively to promote compliance with Law 111, the mediators must be fully trained regarding the requirements of the law and must be obliged to reach a resolution that comports with those requirements. Absent such a mandate, mediators may actually contribute to the

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Dorgu, the SNV/WILDAF Legal Officer in Ho can be more effective than the CHRAJ attorneys because she is "more mobile" and is able to travel and stay for a few days in a place where cases are pending. Interview with Justin Dorgu, Legal Officer of the Commission for Human Rights and Administrative Justice, Ho (June 5, 2001).

391. Interview with Felix K. Korley, Director of Legal Aid, Legal Aid Board, Accra (June 14, 2001) ("We try to settle the cases and not go to court. We use ADR a lot."); Interview with Mrs. Ellen A. Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (June 8, 2001) (noting that the Legal Aid Board has adopted an ADR approach to most cases which has been successful with inheritance cases; they invite the parties in, explain what the law is, and usually people will comply); Interview with Mrs. Chris Dadzie, Chief Legal Officer, CHRAJ, Accra (Feb. 12, 2001) (explaining that CHRAJ typically mediates and litigates only when its recommendations are not followed).

392. Interview with Hilary Gbedemah, Legal Officer, SNV/WILDAF Legal Awareness Programme, Ho (Feb. 16, 2001).

pressure on women to accept less than their legal share of the estate in the interest of resolving the dispute.

#### 4. Law Enforcement

Ghana's failure to ensure that members of the police department enforce the criminal provisions of Law 111, making it an offense to eject a surviving spouse from her matrimonial home or to interfere with her use of the property, violates its obligations under international law by denying women equal protection of the law. The Government has responded to this problem by creating special Women and Juvenile Units in the police departments in Accra and Kumasi to enforce the provisions of Law 111 and to handle other cases pertaining to the protection of women and children.

These units are relatively new and assessing their effectiveness is difficult. Nevertheless, the effort to concentrate even limited resources on the particular problems of women and children is an important step toward providing effective police protection for these groups. At the same time, the creation of special units risks marginalizing the needs of women and children and reducing even further the level of services provided by the general police force. We therefore recommend that the Government evaluate the success of the WAJ units and, if appropriate, expand their use throughout Ghana. At the same time, we recommend that the government undertake continuously to train its existing police force to enforce the provisions of Law 111. This training should include not only education on the requirements of the law but also the nature and scope of cultural resistance to the law and the duty of police to respond appropriately notwithstanding their own views.

#### *CONCLUSION*

Notwithstanding Ghana's commitment to gender equality, as reflected both in its domestic law and its international legal obligations, women in Ghana continue to suffer under the burden of discrimination. This burden stems in part from the limitations of laws designed to ensure women's equality, including Laws 111 and 112. This Report has described these limitations and offered suggestions as to how they might be addressed. However, a substantial part of the burden of discrimination

stems not from the laws themselves but from the government's failure adequately to educate its citizenry regarding women's rights and to combat social resistance to the recognition of those rights. These latter problems will not be remedied by amendment. Rather, they will require a commitment on the part of the government to provide both the political leadership and the resources to change traditional attitudes about the status of women. Although difficult to define and even more difficult to accomplish, this task is no less a part of Ghana's obligations under international law than its obligation to ensure women's equal treatment under law.