

# **Property issues in the dissolution of marriages: Experiences of some divorced mothers in Botswana**

**Tapologo Maundeni**

## **Introduction**

Over the last two decades rates of divorce have increased in Botswana (Murray, 1981; Ahmed and Letamo, 1989; Bhebhe and Mosha, 1996). Despite this trend, little is known about women's experiences of marital property division and the subsequent effects of this on women and children. This issue is of particular interest not only because little is known about it, but also because of the influence of social change on women and children's experiences of divorce. In traditional society (that is during the period before the introduction of the money economy to the Tswana society or before the influence of missionaries and other foreigners in the Tswana culture), divorced women and their children were absorbed into their kinship network and were provided with the necessary support, as household members were obliged to support and assist each other. Therefore, divorced women and their children's material and economic circumstances were not significantly affected by divorce. This made it less important, even unnecessary, for women and their children to seek support for themselves from their husbands or seek access to family property after divorce (Himonga, 1985; Maundeni, 2000).

In contemporary Botswana or under modern conditions, the system of support and protection for women and children that characterized the Tswana traditional society no longer exists (Maundeni, 2000). It has been transformed by changes that have been introduced such as the money economy, Christianity and colonialism, changes that have brought with them different patterns of life and values. A major change was the disintegration of the system of residence, whereby members of the same family group do not always live close together in the same household, ward or village. Some family members now work outside their own villages or even outside the country and are beyond the reach of senior family members who may want to enforce obligations relating to family support (Molokomme, 1987). Furthermore, the high cost of living in towns and limited accommodation facilities may restrict the extent to which people can help others. In his study of the social and economic structure of the Boka community in Botswana, Kooijman (1978), found that kinship cooperation has largely disappeared and people have become much more individualistic. In consequence, people are less interested in helping members of their extended family, but individuals tend to 'make their own arrangements with the aim of realizing the greatest benefit to themselves' (Kooijman, 1978: ii).

In this paper, the author examines some divorced women's accounts of how marital property was divided following divorce. These accounts were grouped into three major categories: unfair, fair, and still awaiting property division. However, for the purpose of this paper, I will focus mainly on the accounts of women who reported negative experiences of property division because unfair property division was the most common theme in relation to the issue of marital property. I discuss women's perceptions of factors that accounted for their experiences of unfair property division. The paper concludes by examining strategies that are in place and others are recommended whereby the situation can be improved for divorced women and their children.

The remaining part of the paper is divided into six sections. The first section examines what marital property is. The second one provides a brief overview of the literature, while the third section establishes a theoretical framework for the paper. The fourth section describes the methodology that was used in the study that this paper is based on. The fifth section analyses women's accounts of property division and the last section outlines existing and recommended strategies to remedy the disadvantages such women face.

### **What is marital property?**

The author's conceptualization of marital property is that it consists of the tangible and intangible assets that the couple has acquired prior to and/or during the course of their marriage. This definition includes tangible assets, such as houses, cars and furniture as well as intangible assets such as career assets, pensions and other retirement benefits. The definition of marital property that is used in this paper is not generally accepted in Botswana as traditionally marital property has been limited to tangible assets. The author's concept of marital property parallels that which has been used by Weitzman (1985) in her study of *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*.

It is important to point out that many women in the study referred to marital property as tangible assets that were acquired during the course of the marriage. Only a few women included intangible assets such as pensions, health benefits and others as marital property. The narrow perception of marital property certainly disadvantaged the women who took part in the study and this must not be underestimated. It must be recognised that because women perceived marital property in this way, much advantage accrued to the males involved in the divorce proceedings.

### **Resume of the status of women in the field**

Published literature and research to date in Botswana has not focused specifically on women's experiences of property division, but has focused on the more general issues related to marital property. These include the proprietary consequences of marriage, as well as the status of women in the country. In this section, I propose to review Botswana literature on the above issues. I will then substantiate such literature with literature from other countries that has explored how women experience marital property division following divorce.

In Botswana, potential couples can marry in community of property or out of community. Marriage in community of property entails the joint ownership of property acquired by the spouses individually or in common before and after the marriage (Dow and Kidd, 1994:28). Under this type of marriage, the husband has the marital power to manage and administer the joint estate as he deems fit. He may acquire and sell movable property without any reference to his wife. Women married in community of property have limited legal capacity and are in effect reduced to the status of minors (Dow and Kidd, 1994: 2). Research has shown that a majority of couples in Botswana marry in community of property. For example, between 1971 and 1987, 20, 447 couples opted for marriage in community of property, while only 209 opted for the marriage out of community of property (Kidd, *et al*, 1997). It must be noted that marriage out of community of property does not affect the legal capacity of either spouse except that where a woman married out of community of property is subject to marital power (Kidd, *et al*, 1997)

One of the reasons that account for the popularity of marriage in community of property is that people believe it is a sign of a high level of commitment to the marriage whereas marriage out of community of property is perceived as a lack of commitment to the marriage on the part of the couple. Another reason that accounts for the popularity of marriage in community of property is that many men feel threatened by marriage out of community of property. They feel that it undermines their male authority, control and power over the family property and the wife. Men tend to favour marriage in community of property because it gives them marital power. Furthermore, it is basically an extension of traditional gender stereotypes and beliefs, and it reinforces women's subordination.

Each of the two types of marriage highlighted above contain elements that are problematic. A major problem with marriage in community of property, for example, is that it gives men the marital power to deal with movable family property the way they deem fit and without consulting the wife, as the wife is treated as a minor under this regime. Marriage out of community of property, on the other hand, is problematic as in most cases women continue to play traditional roles. Within

such a regime, they invest their money on movable and perishable assets whereas men invest in immovable property. In consequence, on the advent of divorce, men retain property of significant value, such as land and houses, but the things women accumulate such as curtains and furniture are of less value. Another problem is that marriages out of community of property put women who are not earning incomes at a disadvantage. This is because, upon divorce, little or no value is placed on the intangible contributions they have made to the family.

Botswana society, like many societies, is patriarchal, and women are treated as minors and subordinate to men. Some of the features that characterize patriarchy as it is in Botswana include laws that deny women equality with men in such matters as their rights to own land, borrow money and enter into contracts (Commeyras and Montsi: 2000), marriage laws that give husbands the sole rights in making decisions and exercising control over the wife, children and property. In addition, there are some cultural practices that discriminate against women. For example, females, especially wives are required to mourn publicly by wearing blue or black attire (for a period of six to twelve months) following the death of their husbands. This is not required of husbands if their wives die.

Furthermore, the low status of women in Botswana is evident in relation to access and control of valuable property such as cattle. In traditional Tswana society access to the ownership and control of cattle was restricted to males. 'Cattle were passed from father to son through allotment during a man's lifetime, and through inheritance after his death' (Kidd, *et al*, 1997:53). Two important factors contributed to the gender imbalance with respect to access to the ownership of cattle. The first was the assumptions that women would eventually marry, a process that would have the effect of scattering the property belonging to the agnatic group if they owned cattle. The second was sexual division of labour, a practice that allocated the management of cattle to men. The legacy of such customary practices is still evident in contemporary Botswana as generally cattle are managed and controlled by men. As a result far more men than women in the country own cattle (Kidd, *et al*, 1997).

The above has focused on literature and research in Botswana on issues related to women and property in general. It indicates that women are generally treated as subordinate to men in various aspects of life. It is now proposed to turn to literature and published research from other countries that has focused on women's economic circumstances following divorce. Studies from various parts of the world attest to the economic hardships suffered by divorced mothers and their children (cf. Weitzman, 1985; Himonga, 1987; Braver, *et al*, 1989; Maundeni, 2000). These hardships can be attributed to a wide range of factors. These include: the overall economic vulnerability of women in general relative to men, in consequence of which women face disadvantages in the labour market regardless of marital status (Holden and Smock, 1991); the prevalence of maternal custody in many countries following divorce proceedings; the convention whereby women are usually the main financial contributors to their children's wellbeing; and the unfair division of property between males and females (Himonga, 1987; Kurz, 1996; Maundeni, 2000).

It is 'received wisdom' in Botswana that custodial mothers and their children experience economic hardships following divorce, that these hardships have adverse effects on them, and that the unfair division of property consequent to divorce is one of the factors that result in women and children experiencing economic hardships. Yet little literature or published research is available about the division of property following divorce in Botswana or on the way this affects women and children. This paper is intended to address these issues.

### **Theoretical framework**

Gender relations are central to family life, so feminist theory, which is concerned with these relationships, is important to an understanding of family issues such as divorce. There are various categories of feminist perspectives, for example, radical, socialist and liberal. However they are all concerned about establishing equality between men and women in all areas of society, without

women being seen as the weaker sex. Feminists such as Thorne (1992) assert that gender plays a significant role in the organisation of both family and the state. This school of thought contends that men dominate women in both the private and the public arenas. In the family, the gendered division of responsibilities between spouses exists in most societies, with the husband perceived as the provider and wife in the domestic role. This not only results in women's economic dependence on men, but it also increases disparities in earning capacity. Furthermore, these dynamics magnify the disparity between husbands' and wives' financial prospects at divorce (Carbone, 1994). Women also carry far greater responsibility in relation to domestic duties and children, whether or not they work outside the home. It is significant that although there has been a worldwide and large-scale increase in the participation of mothers in the labour force, there has been no corresponding increase in the contribution of fathers in the domestic sphere, and women continue to bear the overwhelming responsibility for child rearing. This division of labour within the family contributes to a large extent to the bleak financial prospects that face women who divorce.

Feminist perspectives on divorce focus on the implications of divorce for the lives of women and their children. It should be noted however, that feminists disagree over the importance and significance of children. Cultural feminists, for example, believe that one of the important differences between men and women is that women care about children more than men do, are more willing to sacrifice their own interests for those of their children, and as a result are at a disadvantage in negotiations with men. They believe that increasing and emphasising the importance society attaches to children will benefit women, and that this emphasis on the importance of children should be a central part of feminist strategy. Liberal feminists, on the other hand, have attacked the identification of women's interests with children's interests. They contend that women's interests must be considered in their own right (Carbone, 1994).

An assumption underlying this discussion is the relevance of feminist theory to divorce. In this case, feminist theory is used to argue that men's control and domination of women adversely affects women's capacity to negotiate and thereby obtain equal or fair shares of property upon divorce. Examples are offered that illustrate how women's disadvantaged position in relation to property division on divorce is a manifestation of patriarchal structures. These structures ensure that men have a monopoly of power, and thereby dominate socially, culturally, economically and politically at all levels of human interaction.

### **Investigating the impact of divorce on women**

The paper uses data elicited from in-depth interviews that were conducted in 1998 with twenty-five separated and / or divorced women in Botswana. These interviews were part of a study entitled 'Children's Experiences of Divorce in Botswana' conducted by the author and funded by the University of Botswana. Women who participated in the interviews were identified and selected through the Gaborone customary courts and the Lobatse high court records for the years 1995-1998. The names of seven women were obtained from the customary court records, while eighteen were obtained through the Lobatse high court records. Originally, the author had planned to select an equal number of women from the customary courts and the high court records. However, this approach had to be abandoned because of the inadequacy of the records of the customary courts. Some customary court records were either incomplete (in relation to particulars of mothers and children) or nonexistent.

Most mothers who participated in the study were residents of Gaborone. The rest came from villages and towns within a radius of 80km from Gaborone, namely Kanye, Ramotswa, Mochudi, Kopong and Lobatse. It was initially intended that respondents would come from Gaborone only, but problems were encountered in locating sufficient suitable participants in Gaborone, partly because some mothers whose names were obtained from court records had changed their addresses. The sample sought was not confined to women who had experiences in relation to property division following divorce, but was also to include divorced women who had children who were between

the ages of 10 and 21, whose separation or divorce cases were heard four or less years from the period of the study, and who lived in or around Gaborone. In addition to the above criteria, the author also tried to include individuals from a wide range of backgrounds—religious, educational, ethnic, socio-economic and age. The numbers of children in each of the families that participated in the study ranged from one up to six.

The researcher used the interviews that were conducted to explore the issue of property division in greater depth and detail. There was a number of reasons for this. Firstly, property division featured as a prominent experience for both children and women who participated in the pilot study that preceded the study under review. Secondly, many women and their children believed that the way property was divided had had adverse effects on them. Next, the mothers interviewed were very keen to talk about their experiences of property division. Finally, the adoption of a feminist perspective in studying children's experiences increased the author's understanding and perceptions as to how the gender inequalities that prevail in Botswana society affect women and children.

All interviews except one were audio taped. Notes were taken during that interview. To establish greater rapport with those interviewed, the researcher turned off the tape recorder at the end of each interview, and asked the women whether they felt they needed any help either for themselves or their children, and whether they wished to offer any comments or ask questions about the interview. The author (a qualified social worker) was well aware prior to conducting the interviews that interviewing people on sensitive issues such as divorce could provoke sad feelings and even depression on their part. These might even among them that may necessitate referrals for counselling treatment. As Oakley (1981) and Kelly (1990: 119) note, contrary to traditional academic views on techniques for conducting interviews, such conversations after formal interviews do not necessarily compromise the position of a researcher. In my case, they enhanced my understanding and gave me the opportunity to give something back to the women and children who participated in the study.

#### **Women's accounts of marital property division**

An analysis of the women's accounts of the issues of the division of property on divorce generated three categories of responses. The first is the women (four) who believed that property was divided fairly; second is those who believed that property was not divided fairly – 18; and the final one was those who were still awaiting the division of property division (three). Although, women's accounts fell into the three groups listed above, it should be noted that the women felt unanimously that the child support payments ordered on their behalf were unfair to both themselves and their children. They expressed intense dissatisfaction about the whole issue of child support. First they pointed out that the payments ordered were too low to meet children's needs. The payments that were ordered ranged from 50 pula to 200 pula per month per child. Second, they asserted that the payments were either paid irregularly or never paid at all. Third they complained that the enforcement procedures to ensure payment were poor. These findings are in accord with the existing literature on child support in Botswana (cf. Alexander, *et al.* 1992). The discussion below of mothers' views about property therefore focuses on other types of property besides child support.

#### **Fair property division**

Only four women perceived the division of tangible property as fair. The main reason they gave for this response was that, in the first place, there was very little property to divide. When asked about whether they felt intangible assets such as their husbands' earning capacities, insurance and pensions were divided fairly, the women said they did not consider those as part of marital property. But now that the researcher was asking about such kind of assets, they believed that the assets were not divided fairly.

### **Unfair property division**

Eighteen women held the view that marital property was divided unfairly by the courts because they were given little or no share of the property. An exploration of women's accounts of why they were given little or no share of the property revealed five major reasons. These are the fact that culturally men control and manage livestock and women end up lacking adequate information on how much livestock they had; some women's decision not to be given any share of property because they either feared violence or the property was too old when the divorce hearing took place; policies that discriminate against women; lack of or poor legal representation; and the failure of courts to take into account intangible assets. Due to constraints regarding the required length of the paper, I will discuss only the first four reasons listed above.

### **Men's control and management of cattle and other types of livestock**

Before I analyse women's accounts of how men's control of livestock resulted in them getting little share of the marital property, it is important to provide a brief overview of cattle in the country. Cattle in Botswana are a measure of wealth and social status and these are qualities associated with men (Kidd, *et al*, 1997; Maundeni, 2000). Furthermore, cattle are viewed as assets that provide real value that is convertible into capital for investment purposes, such as buying tractors, houses or vehicles (Kidd *et al*, 1997; 1). These are all perceived as male activities and in some tribes women who show interest in cattle are discouraged from doing so by the use of labels such as '*Mmapoo gaa nyalwe*' - literally translated to mean that '*a female bull is not marriageable*' (cf. *Ibid*). This labelling of females is a form of control to discourage women from developing interest in cattle. Kidd and colleagues found that the label given to women who show interest in acquiring cattle in tribes such as the Bangwato results in many women relinquishing their rights over cattle to their male family members. This trend explains why several women in the study that this paper is based on felt that livestock was not divided fairly.

Several women reported that because they lacked knowledge about the quantity of livestock, some men took advantage of that and either told court officials low numbers of livestock (especially cattle) or literally hid some or all of the livestock from customary court officials. In Botswana, customary courts officers are charged with the responsibility of dividing property of divorcing couples. The author's discussions with some customary court presidents in Gaborone in 1998 and 2001 revealed that they only visit divorcing people's cattle posts to divide property when the ex-husband and wife do not reach consensus on the quantity of livestock. They pointed out that in most cases the two parties agree on the quantity and then they (customary court officers) instruct the divorcing people to take equal share of the livestock. They however, pointed out that usually women do not have a clue of the quantity of livestock, therefore the fact that they reach consensus with their ex-husbands about the quantity does not mean that the men gave the true quantity of livestock. Taking into account information presented earlier in the paper that showed that the arena of cattle traditionally belongs to men, it is very likely that some ex-husbands may not give a true figure of the livestock they had prior to the divorce.

### **Some women's decision not to opt for any share of the property**

Six women pointed out that one of the reasons why they felt property was divided unfairly was because of their decision not to opt for any share of the property because they feared violence. Such women were among the nineteen women who had lived in violent marriages for many years and violence was a significant factor that caused them to leave marriages. They therefore genuinely believed that by expressing interest in the marital property, their ex-husbands would be more likely to continue using violence on them under the pretext that they wanted their property. This belief was evidenced by the below words of one of the women when she said:

. . . after all what I had gone through, I mean the violence, there was no way I could have expressed interest in the property . . . I knew that he was going to continue terrorizing me if I was given a share of the property. He had in the past told me that because he was the only one who was working, everything belonged to him.

The finding that men's violent actions and behaviour adversely affected some women's ability to negotiate for property is not unique to this study only. Several authors from other countries have also found it (cf. Kurz, 1996). This shows how men's control and domination of women can have serious consequences for women and children's material well being.

Fear of violence was not the only reason that women gave for their lack of interest in property, the other reason they gave was the poor condition of property and lack of interest in getting property that was either old or had been used by other women. Most of the women in the study left marital homes because they feared violence, therefore they did not collect any substantial marital property when running away. Usually it takes several years before the divorce case is heard. In addition, most men stayed with other women after the wives had left the home. These two factors contributed to the poor condition of property that discouraged divorced women from having interest in it.

#### **Discriminatory laws against women**

Several women lamented that one of the reasons that led the courts to give them little share of the marital property was discriminatory laws against women in Botswana. For example, according to common law, husbands whose marriages are in community of property are the sole administrators of the property, they have marital powers and can deal with the joint estate the way they want without their wives' knowledge and consent. In other words they are not obliged to seek their wives' consent. One of the women in the study sadly reported that her ex-husband sold the family car without her knowledge immediately after she ran away from the home in fear of violence.

#### **Poor legal representation**

A few women held the view that one of the reasons that accounted for their negative experiences of marital property division was because of poor legal representation. They lamented that unlike their husbands who (because they were better off financially) were able to hire more capable and expensive lawyers, they were not able to do so. In other words they did not have the legal representation necessary to secure an adequate hearing, and this put pressure on them to accept an adverse settlement. This trend should be understood in the context that women are over-represented in low paying jobs. Women's experiences of poor legal representation was evidenced in the below words of some of them

My ex-husband, he has a lot of money, so he used one of the expensive lawyers. I think you have heard about that lawyer. He never loses any cases... I did not choose the lawyer to represent me, but the legal clinic<sup>1</sup> assigned me that lawyer. He did not do a good job at all. Let me give you an example why I say he did not do a good job at all. He asked me how much my husband was earning. I told him, I don't know, then he said why did I say I wanted him to pay child support if I did not know how much he was earning. .

#### **In place and recommended strategies for way forward**

The paper has shown that a majority of women who participated in the study believed that the courts divided marital property unfairly. Both women and children believed that the unfair division of property had adverse effects on them. These included emotional, financial and school problems (see Maundeni, 2000, for a detailed discussion of women and children's accounts of how economic



hardships following divorce affected them).

Several structures are in place to address problems faced by women at an individual, group, community and societal level. These include just to mention a few: NGOs such as Women and the Law in Southern Africa (WILSA); Emang Basadi; Women Against Rape (WAR) as well as government departments such as the Women's Affairs Department (WAD). These structures have engaged in a wide range of efforts to address issues that were discriminatory to women. For example, in 1997, the government—through WAD initiated a consultancy that reviewed all laws affecting the status of women in the country. Since then, several discriminatory laws have been amended or repealed or new laws enacted including the Penal Code Amendment Act of 1998 with important changes in the definition of, and sentencing for rape. Another strategy that has been used to address issues affecting women is that in 1997, women's NGOs petitioned the police in relation to the way they handled domestic violence cases. The police responded by setting a task-force to look into abuse cases that women presented to the police in recent years as well as to develop ways of better helping battered women. Furthermore, the women's advocacy groups have embarked on and are continuing to embark on gender sensitization and training programmes initiated as part of a broad strategy of capacity building, advocacy and social mobilization. The above initiatives show that existing structures that focus on women's issues in Botswana have a lot of potential to bring about improvements in women's lives. As such, they could be used to spearhead some of the recommendations that are discussed in this paper.

Feminists emphasize the need for a more equitable allocation of resources and burdens. They emphasize the need to re-examine the allocation of resources following divorce. Women's reports of unfair property division and its effects on them and their children have several implications (both short-term and long-term) for policy, practice and research. One of the short-term implications is that women must be encouraged to play an active role in livestock, especially cattle. They must be given skills to be resilient and to resist cultural stereotypes that discourage them from showing interest in cattle. Efforts to encourage women to play an active role in cattle could be done by among others, women's advocacy non-governmental organizations as well as government department that are responsible for women's issues such as the women's affairs department. Furthermore, lawyers and judges need to be made aware of the importance of gender sensitivity in their work. For example, in cases where women get custody, they should be given the marital home.

Another long-term implication is that policies that discriminate against women are changed. The government of Botswana is already taking measures to address this concern. For example, in 1998, it commissioned a study that looked into all laws affecting the status of women in Botswana. However, it seems like progress in implementing the recommendations of the consultancy is quite slow as very few of them have been implemented. Women's advocacy groups therefore need to put pressure on the government to implement other recommendations as soon as possible.

Both in the short-term and long-term, research (both qualitative and quantitative) and documentation is needed. This is essential if policy makers and practitioners are to have access to data, which will help them obtain an improved understanding of the experiences of women in relation to marital property, as well as improvements (both in practice and in policy) that need to be made. Such research could be funded by various agencies (both government and non-governmental) and should not only focus on areas surrounding Gaborone, but should reach out to people in remote areas.

One of the reasons that some women gave for their negative experiences of property division is that of poor or no legal representation. Although the legal clinic exists at the University of Botswana to offer legal support for low income people, its ability to help a large number of people is limited because it is based only in Gaborone and a large number of people don't have access to it. It is therefore recommended that services of the legal clinic are expanded to other areas of the country.



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<sup>1</sup> The legal clinic is a legal agency attached to the University of Botswana that among other things helps poor people with legal services.

